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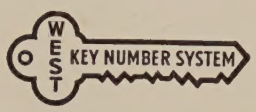
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COVERING CASES REPORTED IN

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33 P.2d – 34 P.2d

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SECOND SERIES

In re THORNTON'S ESTATE.

GARRY v. CRESWELL et al.

S. F. 14262.

Supreme Court of California.

May 17, 1934.

Rehearing Denied June 14, 1934.

1. Constitutional law ⇐96, 207(1), 277(1).

Statute declaring all other property than separate property, acquired by husband, wife, or both after marriage, including personalty previously or subsequently acquired while domiciled outside state, community property, *held* unconstitutional as disturbing husband's vested rights, abridging citizens' privileges and immunities, and taking property without due process (Civ. Code, §§ 162–164; Const. U. S. Amend. 14, § 1; Const. Cal. art. 1, § 13).

2. Constitutional law ⇐96.

Any interference by statute with husband's right of ownership or dominion over spouses' previously acquired common or separate property disturbs vested right of husband.

3. Husband and wife ⇐246.

Separate property, acquired by either husband or wife in common law state, cannot be converted into common property merely by bringing it into community property state and establishing domicile therein.

4. Husband and wife ⇐246.

Husband's change of domicile from common-law state to California, accompanied by importation of personalty acquired by spouses while domiciled in former state, is not implied consent to submit to requirements of California statute declaring personalty acquired by spouses while domiciled elsewhere community property (Civ. Code, §§ 162–164; Const. U. S. Amend. 14, § 1; Const. Cal. art. 1, § 13).

5. Husband and wife ⇐247.

Statute declaring personalty acquired by spouses while domiciled outside state community property *held* not valid as statute of succession (Civ. Code, §§ 162–164).

LANGDON, J., dissenting.

In Bank.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

In the matter of the estate of William M. Thornton, deceased. From an order denying the petition of Joseph A. Garry, as executor of the will of Helen H. Thornton, deceased, for distribution of half of the estate to petitioner, contested by Lucy Creswell and others, petitioner appeals.

Affirmed.

For prior opinion, see 19 P.(2d) 778.

Rehearing denied; LANGDON, J., dissents.

Jos. A. Garry, of San Francisco, for appellant.

Chase, Barnes & Chase, of Los Angeles, Marcel E. Cerf, Henry Robinson, and Herbert A. Leland, all of San Francisco, and J. L. Royle, of Fresno, amici curiæ.

Carey Van Fleet, Treadwell, Van Fleet & Laughlin, and Pillsbury, Madison & Sutro, all of San Francisco (Maurice D. L. Fuller, Frank D. Madison, and Marshall P. Madison, all of San Francisco, of counsel), for respondents.

John Perry Wood, John F. McCarthy, and Norman T. Mason, all of Los Angeles, amici curiæ.

PRESTON, Justice.

Appeal from order denying petition for distribution of one-half of the estate of William M. Thornton, deceased, to his widow, Helen H. Thornton, also now deceased.

[1] The basic question is that of the constitutionality of so much of section 164 of the Civil Code as provides that all other property (than separate property as defined by sections 162 and 163 of said Code) "acquired after

marriage by either husband or wife, or both, including * * * personal property wherever situated, heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state is community property. * * *"

The findings of the court in this cause, which have ample support in the record, show the facts material to this discussion to be as follows: The property involved was acquired by said husband and wife during the years 1885 to 1899 and 1906 to 1919, while they were domiciled in Montana and, under the laws of that state, it was the husband's separate property, subject only to the wife's dower rights. The husband returned to California in 1919, bringing said property with him, and was here domiciled until his death on February 25, 1929. His widow petitioned for distribution of one-half of his estate to her upon the theory that said property was converted into community property when it was brought into this state. The court below, however, upheld the testamentary attempt of the husband to dispose of all of said estate as his sole and separate property. The widow thereupon prosecuted this appeal from the order denying her petition for distribution and the executor of her will has now been substituted as petitioner and appellant in her stead.

Further reflection upon the question presented convinces us that under the compulsion of well-understood constitutional provisions, as well as settled pronouncements of this court, no alternative remains but to declare the above-quoted provision unconstitutional and void.

[2] Since the statute of 1891 (Stats. 1891, p. 425, section 172, Civ. Code), enlarging the right of the wife in the community property, it has been consistently and repeatedly held that any interference with right of ownership or dominion over the common property is a disturbance of a vested right of the husband. Spreckels v. Spreckels, 116 Cal. 339, 48 P. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170. Each step taken in recognition of the wife's increasing claims upon said property has been met by express holdings of this court that such statutes are inapplicable to existing community property and could only apply to subsequent acquisitions of the marital union. Spreckels v. Spreckels, 172 Cal. 775, 158 P. 537; Roberts v. Wehmeyer, 191 Cal. 601, 218 P. 22; Stewart v. Stewart, 199 Cal. 318, 249 P. 197; McKay v. Lauriston, 204 Cal. 557, 269 P. 519.

[3] If this be true as to the common property, how much plainer must the application of the same principle be to the separate property of either spouse. We then must consider whether separate property acquired by either spouse in a common law state can be converted to common property by the mere act of bringing it into a community property state and establishing a domicile therein. Again this court has repeatedly spoken with a negative answer over a period of more than fifty years. Kraemer v. Kraemer, 52 Cal. 302; Estate of Burrows, 136 Cal. 113, 68 P. 488; In re Estate of Niccolls, 164 Cal. 368, 129 P. 278; Estate of Boselly, 178 Cal. 715, 175 P. 4.

This was the unclouded holding until 1917 (St. 1917, p. 827), when section 164 of the Civil Code was amended to provide substantially as above quoted. The question then arises as to the competency of the state to pass such a statute in view of certain clear, related, and co-ordinate inhibitions of section 1 of the Fourteenth Amendment to the Constitution of the United States and the due process provision of article 1, § 13, of the state Constitution. In the following cases this question was partially determined by holding that the provision was without application to property brought into the state prior to passage of the enactment: In re Estate of Frees, 187 Cal. 150, 201 P. 112; In re Estate of Arms, 186 Cal. 554, 199 P. 1053.

Still confident of its power to enact such a statute, the Legislature in 1923 (St. 1923, p. 746) supplemented and clarified the amendment by the use of appropriate words to make its provisions apply to such property whether brought into the state before or after passage of the act. Power to legislate as to property reaching a California domicile before passage of the act was again held wanting. In re Estate of Drishaus, 199 Cal. 369, 249 P. 515.

As to property brought into the state subsequent to the amendments of 1917 and 1923, we have certain appellate court decisions which have assumed that the principles of the Frees and Drishaus Cases (In re Estate of Frees, supra; In re Estate of Drishaus, supra) control and the statute was in those cases held inoperative as to separate property of the spouse brought into the state subsequent to passage of the act. Scott v. Remley, 119 Cal. App. 384, 6 P.(2d) 536; Melvin v. Carl, 118 Cal. App. 249, 4 P.(2d) 954; In re Estate of Bruggemeyer, 115 Cal. App. 525, 2 P.(2d) 534. This holding was also announced in Brookman v. Durkee, 46 Wash. 578, 90 P. 914, 12 L. R. A. (N. S.) 921, 123 Am. St. Rep. 944, 13 Ann. Cas. 839, and Douglas v. Douglas, 22 Idaho, 336, 125 P. 796.

So long as we are bound by the holding that to limit the right of one spouse by increasing the right of the other in property acquired by their united labors is the disturbance of a vested right, we entertain no doubt of the application of at least two provisions of the Fourteenth Amendment to the Constitution of the United States. If the right of a husband, a citizen of California, as to his separate property, is a vested one and may not be impaired or taken by California law, then to disturb in the same manner the same property right of a citizen of another state, who chances to transfer his domicile to this state, bringing his property with him, is clearly to abridge the privileges and immunities of the citizen. Again, to take the property of A and transfer it to B because of his citizenship and domicile, is also to take his property without due process of law. This is true regardless of the place of acquisition or the state of his residence.

[4] The doctrine that a change of domicile to this state, accompanied by an importation of the personalty is an implied consent to a submission to requirements of this statute, cannot be sustained, for to do so would be to give effect to a restriction prohibited by the Constitution. Frost v. Railroad Commission, 197 Cal. 230, 240 P. 26; Hartford Acc. & Ind. Co. v. Delta & Pine Land Co., 54 S. Ct. 634, 78 L. Ed. ——, decided by Supreme Court of the United States, April 9, 1934.

[5] Neither can we hurdle these barriers by holding the amendments in question to be part of our succession laws and hence valid as a statute of succession. For we are met with plain holdings of our own court that such is not the effect of said statute. In re Estate of Frees, supra; In re Estate of Drishaus, supra.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.

LANGDON, Justice.

I dissent.

I am in full agreement, of course, with the proposition that absolutely owned personal property brought into this state by the husband cannot be taken from him, nor can his ownership or control over it be diminished or impaired by our statute. To make such deprivation or impairment of a vested property right a condition of entrance into this state is undoubtedly unconstitutional, as the majority opinion points out. This question has been fully considered in the law reviews, and the principles and cases will be found fully discussed therein. See 20 Cal. L. Rev. 201; 5 So. Cal. L. Rev. 309; 21 Cal. L. Rev. 221. But the conclusion that the section under consideration is unconstitutional in so far as it attempts to diminish the husband's property rights during his lifetime does not solve the problem of the instant case. William Thornton is dead and has no property rights. No claim of rights, under sections 172 and 172a was made by his wife before his death. The parties before the court all have claims arising after death, and the only rights conceivably involved are those of succession and testamentary disposition.

This is made clearer by an examination of the relevant statutes. Section 164 defines community property; sections 162 and 163 define separate property; section 201 of the Probate Code provides that upon the death of either husband or wife, "one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent." Now, to say that the widow here claims under section 164, and that she must fail because that section is unconstitutional, is unsound. Section 164 is not a statute of succession and the widow cannot claim rights under that section alone. Section 164 declares none of the interests of the spouses in community property, and hence it affects no rights. It is a definition, nothing more. To declare it void by itself is meaningless. It is only invalid when taken together with some other statutory provision for the incidents of community property as defined in section 164, a violation of a constitutional right appears. This would be the situation were section 164 to be taken to enlarge the wife's rights under sections 172 and 172a. So here, the widow claims under section 201 of the Probate Code, and the constitutionality of that section, as broadened by the definition of section 164, is the only question on this appeal. The issue is whether the state of California may require that upon the death of a decedent, certain property owned by him and brought into this state shall be subject to the same rules of testamentary disposition and succession as community property acquired in this state. There can be no doubt as to the answer. It is a rule of almost universal acceptance that the rights of testamentary disposition and of succession are wholly subject to statutory control, and may be enlarged, limited, or abolished without infringing upon the constitutional guaranty of due process of law. See Spreckels v. Spreck-

els, 116 Cal. 339, 48 P. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170; In re Estate of Phillips, 203 Cal. 106, 263 P. 1017; In re Estate of Watkinson, 191 Cal. 591, 217 P. 1073; Magoun v. Illinois T. & S. Bank, 170 U. S. 283, 18 S. Ct. 594, 42 L. Ed. 1037.

The only objection urged to this reasoning is the failure of this court to apply it in the Frees and Drishaus Cases. These decisions state that section 164 is not a statute of succession, and the statement is strictly correct. However, neither is it a statute giving the wife rights in the husband's property during his lifetime. It is, as already shown, a statute of definition. That its effect on the statutes governing rights during the husband's lifetime (sections 172, 172a), and on those governing rights after death (Probate Code, § 201), is not the same, is, of course, clear. Hence, section 164 may, in its application to the other statutes, be considered as a separate and distinct law in each instance, and the legislative power may be upheld where properly exercised, and denied where constitutional objections are present. This view is possible, reasonable, and in accordance with the legislative purpose. We should disregard the prior expressions in cases where the point was not fully presented, and give the statute a construction which will give it effect to the extent that it is constitutional.



138 Cal.App. 682

OTIS v. WINTER INV. CO.

Civ. 8138.

District Court of Appeal, Second District, Division 2, California.

May 25, 1934.

Hearing Denied by Supreme Court July 23, 1934.

1. Brokers ⇐86(2).

Evidence in action for share of commissions collected by defendant for obtaining loan to plaintiff's client *held* not to show plaintiff's abandonment of transaction, revocation of his agency, or his authorization of defendant to act without him.

2. Brokers ⇐9.

Ordinarily, agent's powers continue until he definitely and finally fails in attempt to accomplish purpose of agency.

3. Brokers ⇐84(1).

To overcome assumption of continuance of powers of broker, enlisting services of corporation to obtain loan for his client, latter's repudiation of either broker, termination of corporation's agency for individual broker, its right to deny liability to him for share of joint commission, or original broker's intent to abandon transaction in co-agent's favor must be shown.

4. Appeal and error ⇐1071(1).

Trial court's fact findings, placed among and denominated as conclusions of law, *held* not prejudicially erroneous; statutory provisions for separate statement of such findings and conclusions being merely directory.

Appeal from Superior Court, Los Angeles County; Erwin W. Owen, Judge.

Action by E. G. Otis against the Winter Investment Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Lucien Gray, of Los Angeles, for appellant.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (E. Avery Crary, of Los Angeles, of counsel), for respondent.

CRAIG, Justice.

In an action for commissions of a broker alleged to have been collected by defendant after the parties had been brought together, judgment was rendered in favor of plaintiff, from which the defendant appeals.

It is contended that the findings of fact are not supported by the evidence, and that certain thereof were erroneously placed among and denominated as conclusions of law. It appeared that in the spring of 1928 the plaintiff was interested in obtaining a loan for a client, the Pacific National Building Company, in whose bank he had for some time been a depositor; that he negotiated with and enlisted the services of defendant in an effort to obtain the same from the New York Life Insurance Company. Following numerous and frequent conferences, a complete understanding and agreement was concluded as to the principal amount, the rate of interest, amortization schedules, etc. The plaintiff was assured that he would be paid and would receive upon consummation of the loan one-third of the amount of commission collected by said company, or the same proportion as that allowed to its agents. After inspections and appraisals of the property, the prospective lender declined to make a

loan of the nature then required to remove a large bond issue existing thereon. During a period of about two years the borrower's efforts to refinance the obligation by other means were not consummated, but said bond issue was during such interim materially reduced. During all of said time the plaintiff was in frequent touch with the borrower or its officers, and made numerous inquiries almost weekly as to whether a loan could be effected or anything new had developed, to which he received a negative reply. However, it appeared that in the month of May, 1930, the defendant had received advice from the insurance company that a loan based upon the then existing conditions might be effected, had so communicated to the borrower, received its application therefor, and had consummated the same. Although the plaintiff visited the offices of the Pacific National Bank at least three times a week and inquired about the matter, he was not informed until afterwards of the completion of the transaction. A demand for a settlement and accounting was then refused.

[1-4] Although their evidence was in some respects conflicting, witnesses called by the plaintiff under section 2055 of the Code of Civil Procedure confirmed generally all that the plaintiff testified to, under the allegations of his complaint. Authorities denying compensation to brokers who had failed to bring borrowers and lenders together are not helpful in determining the question presented. It was admitted by officers of defendant corporation that they knew nothing of the need or desire for financing on the part of the Pacific National Building Company until mentioned by the plaintiff. The suggestion that there had been an abandonment of the transaction by the broker is not warranted by the record before us. Nor is there evidence of an intention to revoke the agency of respondent or of his authorization of appellant to act without him. In fact, as observed, he constantly requested information as to their success in behalf of said specific loan. "Ordinarily, so long as the purpose of the agency has not been fulfilled, as originally contemplated, the agent's powers continue, unless he has definitely and finally failed in his attempt to accomplish that purpose." Smith v. Davis, 67 Colo. 128, 186 P. 519, 520; 2 Cor. Jur. (Agency) § 147. It nowhere appears that such assumption was overcome by evidence of a repudiation by the principal, the Pacific National Building Company, of either of its brokers, or the termination of appellant's agency for respondent or its right to deny liability for his share of the joint commission received by it from the principal. This would be unwarranted without such showing or evidence of the respondent's intention to abandon the transaction in favor of his coagent. No authority cited by the appellant relating to the relationship between principal and agent aids its contention, in effect, that the consummation by one of two agents or brokers, jointly interested, may deprive the other of agreed compensation for initiation of the transaction. The statutory provisions regarding a separate statement of findings of fact and conclusions of law has repeatedly been held merely directory. Faure v. Drollinger, 60 Cal. App. 594, 213 P. 724. It must therefore be held that said findings are not prejudicially erroneous, as contended.

The judgment is affirmed.

I concur: DESMOND, J.

STEPHENS, Presiding Justice.

I concur. The intention of the parties is the difficult question in this case, and this intention could best be determined by the judge who tried the case.



138 Cal.App. 714

PEOPLE v. THORN.

Cr. 2394.

District Court of Appeal, Second District, Division 2, California.

May 28, 1934.

Hearing Denied by Supreme Court June 26, 1934.

1. Forgery ⇐12(4).

Test whether shipper's receipts used in obtaining money from finance company could be basis of forgery charges was not whether, if genuine, receipts would create legal liability, but whether upon their face receipts would have effect to defraud those who might act upon them as genuine.

2. Forgery ⇐44(2, 3).

Evidence sustained conviction of forging and uttering shipper's receipts for purpose of obtaining money from finance company.

3. Corporations ⇐324.

In prosecution for fraud in keeping corporate books, counts showing that accused was officer of corporation, and that, with intent to defraud corporation, accused made

and concurred in making false entries, knowing them to be false, in journal ledger, which was corporation's book of accounts under accused's control, and which counts described entries, *held* good as against demurrer (Pen. Code, §§ 563, 950).

4. Corporations ⇐324.

In prosecution for fraud in keeping corporate books, it was not necessary to set out how entries could have resulted in defrauding corporation or its stockholders, since that was matter to be shown by evidence (Pen. Code, §§ 563, 950).

5. Corporations ⇐324.

Evidence sustained conviction of fraud in keeping corporate books (Pen. Code, § 563).

6. Insurance ⇐31.

Counts charging that accused fraudulently caused to be presented false claims for insurance in certain sums upon fire policy issued to accused and corporation of which accused was president, which policy was then in force, *held* not demurrable on ground that counts did not state in what manner claims were fraudulent or that counts did not describe claims with reasonable certainty (Pen. Code, § 549).

7. Insurance ⇐31.

In prosecution for presenting false claims of insurance, accused could not claim variance because information charged presentation of claim different from claim presented by insured, under evidence showing that accused could have been prosecuted for presenting other claims and could have been compelled to defend four charges instead (Pen. Code, § 549).

8. Insurance ⇐31.

In prosecution for presenting false claims of insurance, accused was not prejudiced because prosecution relied in one count on claim for loss and damage to machinery and equipment, rather than on similar claim relied upon in another count (Pen. Code, § 549).

9. Criminal law ⇐112(5).

Venue of prosecution for presenting false claims of insurance *held* properly laid in Los Angeles county, notwithstanding claims were received by insurer in San Francisco, where claims were prepared and deposited in mail in Los Angeles (Pen. Code, §§ 549, 781).

10. Insurance ⇐31.

In prosecution for presenting false claims of insurance, there was no material variance because claims for loss were shown to have been based on four policies instead of one as charged in information, since gist of offense is presentation of false claim, and material fact to be alleged and proved is that party presenting, or on whose behalf claim was presented, was protected by policy (Pen. Code, § 549).

11. Insurance ⇐31.

In prosecution for presenting false claims of fire insurance, that information alleged that company and accused were protected, and evidence showed that party other than accused was protected, did not constitute prejudicial variance, where accused owned all of company's common stock and part of preferred stock (Pen. Code, § 549).

12. Indictment and Information ⇐171.

In determining whether variance is material, question is whether indictment fully informs defendant of criminal act with which he is charged that, taking into consideration proof which is introduced against him, he is not misled in making his defense, or placed in danger of being twice put in jeopardy for same offense.

13. Insurance ⇐31.

In prosecution for presenting false claims of insurance accused *held* not prejudiced because information charged presentation of claim upon one policy, and evidence showed that there were three policies, and that more insurance was outstanding in three policies than amount of loss claimed, which exceeded any one policy (Pen. Code, § 549).

14. Criminal law ⇐618.

Where information charged offenses of forgery, fraud in keeping corporate books, and presenting false claims of insurance, refusing to grant motion for separate trials as to each group of offenses *held* not abuse of discretion (Pen. Code, § 954).

15. Indictment and Information ⇐130.

Offenses of forgery, fraud in keeping corporate books, and presenting false claims of insurance *held* properly joined, since words "same class of crimes or offenses" within statute providing that two or more different offenses of same class of crimes or offenses may be joined mean offenses possessing common characteristics or attributes (Pen. Code, § 954).

[Ed. Note.—For other definitions of "Same Class," see Words & Phrases.]

16. Indictment and Information ⇐121(2).

In prosecution for forgery, fraud in keeping corporate books, and presenting false claims of insurance, motion for bill of particulars *held* properly denied.

17. Corporations ⇐324.
Forgery ⇐42.
Insurance ⇐31.

In prosecution against corporation president for forgery, fraud in keeping corporate books, and presenting false claims of insur-

ance, evidence as to agreement between corporation secretary and broker as to raising invoice price of materials, and as to purchase of machinery by accused and increasing cost thereof to corporation, *held* properly admitted, where transactions were closely related and were pursuant to common design to defraud corporation (Pen. Code, §§ 549, 563).

18. Criminal law ⇐742(2).

In prosecution against corporation president for forgery, fraud in keeping corporate books, and presenting false claims of insurance, whether corporation bookkeeper, and broker from whom materials were bought by accused, were accomplices, *held* for jury (Pen. Code, §§ 549, 563).

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

John C. Thorn was convicted of forgery, of fraud in keeping corporate books, and of presenting false claims of insurance, and he appeals.

Affirmed.

Halverson & Halverson, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, John Barnes, and A. H. Van Cott, all of Los Angeles, for the People.

ARCHBALD, Justice pro tem.

An information was filed against defendant by the district attorney of Los Angeles county containing seven counts charging forgery, nine charging fraud in keeping the books of a corporation, and two charging the presenting of false claims of insurance. Count XIV was dismissed, and the jury returned verdicts of guilty on counts III and V (forgery), counts VIII, IX, X, XI, XII, XIII, XV, XVI (fraud in keeping corporate books), and counts XVII and XVIII (presenting false claims of insurance), and of not guilty on the remaining counts. From the judgments entered on said verdicts of guilty and from the orders denying his motions for a new trial, defendant has appealed.

The trial lasted eleven weeks, and the record before us consists of the reporter's transcript of 5,356 pages and the clerk's transcript of 384 pages. The exhibits introduced are listed on 32 pages of the clerk's transcript. Under the circumstances, even a very incomplete statement of the facts must suffice, for a complete statement would take more space here than can be given.

Defendant came to Los Angeles from Canada and organized California Thorn Cordage, Inc., in 1924, which company engaged in the business of manufacturing rope and other materials from hemp, sisal, etc. For several years prior thereto he had operated a similar enterprise in Canada and had acquired an expert knowledge not only of the operation of such a plant, but also of the price of raw materials used. Defendant was president of the corporation so organized and Frank C. Langdon its secretary from the beginning, except for a short time when defendant acted as vice president. Defendant purchased or supervised the purchase of hemp from importers of such commodity from the beginning until the fall of 1928. From then on Langdon gave the buying orders, but defendant would tell him what to buy. When this change occurred, the orders were placed through Clifford L. Ach, who was induced by Langdon to act as a broker for the company and who by arrangement with Langdon added 1 cent per pound to the price he paid the importers, for which price, plus his commission of 2½ per cent., he billed the cordage company. The company paid or charged such bills, and Ach, after deducting his commission, would pay the overcharge of 1 cent per pound to Langdon or his wife. The sum of $18,212.10 was thus obtained, and the evidence shows that practically all of it was turned over to defendant by the Langdons. When the company was short of money in the early part of 1930, the amounts of the importers' invoices were paid either to the importers direct or to Mr. Ach, and the latter was still credited with the full amount billed, including the additional one cent.

The jury could infer from the evidence that the arrangement above mentioned was not only known to defendant but was really initiated by him, although Mr. Ach had not talked to him until the plan had been in operation from three to six months, at which time defendant expressed his appreciation of the additional charge of one cent per pound, as it allowed the company to secure more from the finance company when they borrowed with the merchandise and hemp as collateral. The price of hemp varied from 4 to 10 cents per pound, depending upon quality and the market. Defendant had access to the market reports, and testified that, in order to operate successfully as president, he kept his eye on the cash price of merchandise he was acquiring. It will be seen that the increase of 1 cent per pound

raised the price to the company from 10 to 25 per cent. above the market. Most of the money so abstracted was loaned back to the company, resulting in a corresponding credit to defendant on the books.

During this time the company was advised by the Milton Daily Company of Chicago that it had some secondhand cordage machinery for sale, and defendant agreed to purchase the same. Two schedules of accounts were sent by defendant to a finance company, with a letter stating that he needed $1,265 with which to purchase machinery. With the money thus obtained, a cashier's check was procured and sent to the Daily Company and the amount was charged to defendant on the books of the cordage company. Defendant also arranged to purchase some repair parts for $1,343.14. The jury might have inferred from the evidence that the price of the machinery was approximately $5,060 and that the balance of $3,795 was sent to the Daily Company in a draft purchased by defendant himself with a company check and charged to the account of defendant built up by loans made to the company of the money which he had taken from it by the added charge on hemp purchases. About one week after the first machinery payment was made, defendant reported at a special meeting of the board of directors of the cordage company that he had inspected some cordage machinery that was for sale in the East, and told his plans for financing its purchase. The minutes do not show that he disclosed the agreed price or the fact that one-fourth of it had been paid by him. The invoice for the parts was also paid by a cashier's check bought by defendant with a company check and charged to him in the same account. Apparently the books of the cordage company do not disclose any other than the three payments mentioned to cover the purchase of machinery and parts, and the evidence discloses that the bank account of the Milton Daily Company shows the deposit of such three payments and does not show the deposit of $2,485 which defendant claimed to have paid F. E. Daily in cash in Chicago and some $3,800 he claims to have paid by a draft of which he could find no record, although "I have been trying to find out about that." It appears that F. E. Daily died some time before defendant so testified. That $5,060 was the actual cost of the machinery in question is strongly indicated by two letters written by defendant and introduced in evidence by the prosecution. The first was one sent to the finance company from which was obtained the first payment of $1,265. It is dated April 22, 1930, inclosing schedules of accounts on which such sum was furnished. In it defendant tells the finance company that he wants to get some money to pay on machinery and asks it to have a cashier's check in his favor for $1,265 issued and charged to the schedules inclosed; that he had promised to mail the draft for $1,265 "to-day." The second was a letter sent to the Daily Company early in June of 1930, in which he refers to "the twenty-five per cent of the amount of the machinery [sent] last month." The evidence does not disclose any other sum sent to Daily Company up to that time. If $1,265 is 25 per cent. the full price would appear to be $5,060, and the difference equals the other payment shown of $3,795. On July 18, 1930, after the payments had been made for the machinery and parts, another meeting of the board of directors of the cordage company was held, at which defendant stated that he had arranged for the purchase of said machinery and that he thought it "should be leased or purchased on a monthly basis." After some discussion, defendant and the secretary, Langdon, were authorized to contract for the company for the lease or purchase of such equipment.

In July, 1930, defendant met a man by the name of Harold O. Pressman, who had been connected with a finance company for some time, and there was some discussion about financing the purchase of certain machinery. Pressman was "never told the exact amount," but in round numbers he was given the amount of "about $10,000.00." Two or three weeks thereafter he was given a contract to sign. There was no conversation at that time, and he did not read it. Defendant and his attorney were present with him, in the attorney's office.

Pressman testified that he had no money to finance it with. He was shown a contract, the last pages of which contained his signature, but he could not identify any part of it except his signature. It is interesting to note that all of the pages except the one containing his signature were water marked "Lawyer's Bond," and that one is on "Graylock Bond" paper. The last page is a carbon copy, and the others are all originals; and, instead of reciting a consideration for the machinery of "about $10,000.00," it names one of $25,555.35. The machinery described is the same as that purchased by defendant as aforesaid, with the addition of ten machines for which he negotiated with the Daily Company, but which were not purchased. Such witness, when shown the inventory of the repair parts, stated that he did not know any-

thing about it. Pressman signed the contract on August 4, 1930, as seller, and defendant and Langdon executed it for the corporation. The contract is dated August 4, 1930, and acknowledges receipt of $5,555.55 upon its execution, the balance to be paid in thirty-six monthly installments of $555.55 each, beginning December 31, 1930. A bill of sale appears to have been made by defendant in favor of Pressman of the machinery that was actually purchased and paid for through the Daily Company. Pressman testified that both the contract and bill of sale were left in the attorney's office, and that he "never took them out."

The evidence shows that on August 21, 1930, defendant in his own handwriting drew an order for certain rope to be shipped to Pressman, amounting, after deducting a purported cash discount, to $2,502.71. An invoice covering such fictitious order was then made, and, pursuant to defendant's order, the account receivable of H. O. Pressman was charged therewith on August 26, 1930. Apparently no rope was shipped to Pressman or any one else. On August 26th a $5,000 check on the company's bank was executed by defendant and Langdon and credited to the bank account on the books of the company. It was charged to the Pressman account. The check was indorsed with Pressman's name by some one other than Pressman, and was deposited in the bank account of the company with $2.71 in cash on September 30, 1930. On the same day defendant instructed the auditor to credit the Pressman account with $5,000 for repair parts and also to credit the latter with $2,502.71 to cover the charge for the fictitious invoice charged therein, and the balance of the deposit of $5,002.71, i. e., $2,500, was credited to defendant's account. December 9, 1930, defendant instructed the auditor to make out a check in favor of Pressman for $5,555.55, saying that he wanted to make a down payment on the Pressman contract. This check was charged to the Pressman conditional sales account on December 9th, and appears as a credit to the bank on which it was drawn the same day. On December 29th it was redeposited in the bank with a check for $96.62 issued in favor of defendant and appears as a charge in an account of his as shown later herein, making a total deposit of $5,652.17, which amount was charged to the Pressman account, off-setting the fictitious invoice of the same amount. At the time, the auditor had not seen the contract nor had it been credited to the Pressman conditional sales account, but the amount thereof, $25,555.35, was credited to such account and charged to the account of "new machinery" on December 23, 1930, by order of defendant, at which time, on the latter's written instructions, initialed by Langdon, the auditor charged the Pressman account with the sum of $2,100.35, which the instructions said was a discount allowed by Pressman if he was paid in advance, immediately, twelve monthly installments on the contract of $555.50 each, or $6,666.60. On December 27th, a check for $6,666.60 was issued in favor of Pressman and charged on his conditional sales account. This check was returned to the bank as a deposit December 30th; the account of defendant being credited therewith. The auditor was told by defendant that he wanted the difference between the amount of the Pressman contract and the actual amount he had paid for the machinery "to show as a revenue to sales," and defendant made a fictitious order for rope on which another fictitious invoice in the sum of $5,652.17 was charged to the Pressman account receivable on December 12, 1930, and in the same way another fictitious charge of $2,929.66 for rope was made to said account on December 31, 1930. The fictitious sale of rope amounting to $2,929.66, charged in the Pressman account, was balanced by a check for $1,602.09 signed by defendant and Langdon and charged to the personal account of defendant, and by a credit memorandum issued on the instruction of defendant in the sum of $1,327.57, which was in turn charged to defendant. There is evidence which tends to show that Pressman knew nothing about any of such transactions except the fact that he signed *a* contract; that he did not indorse any of such checks; that no rope was shipped under said invoices to Pressman or any one else; and that he had no money to finance any contract.

May 26, 1931, a fire occurred in the plant of the company. In September defendant was examined under oath in regard to the loss and stated that the machines "were purchased by us from a private individual" named Pressman, "who in turn bought these machines and sold them to us." He said he was not sure of the exact place where Pressman bought them, but that some were from the Indiana state prison; that they were bought by the company on a conditional sales contract; that the company owed "about I think $10,000.00"; and that the whole machinery came to about $22,000 or $23,000. The balance of the H. O. Pressman conditional sales contract account on December 27, 1930, after the charge of said two large checks, was a credit of $11,232.85. The bookkeeper of the cordage company testified that on December

31, 1931, defendant gave him a memorandum in writing with instructions to enter same on the books of the company, which was done. The memorandum reads as follows:

Detail of amount of contract.

Amount of contract	$25,555.35
Less allowance for advance payment	2,100.35
	$23,455.00
Less machinery for delivery to Houston, Texas	5,832.35
	$17,622.65
Less revenue to sales, Col. Thorn's time spent on purchase	5,652.17
	$11,970.48
Less additional revenue to sales, Col. Thorn's time spent on supervision and installation	1,602.09
	$10,368.39

—Actual cost of machinery to company.

The same witness testified that the credit balance of $11,232.85 in the Pressman account "was wiped out by two entries * * * dated December 31, 1931," one being the charge of $5,832.35 for machinery not delivered to Houston, and the other a charge of $5,400.50 which was reflected in a credit of like amount to the account of defendant.

With this general background of facts, which there is ample evidence to support, we shall take up appellant's contentions.

The condition of the corporation's finances seemed to make it necessary to obtain money from finance companies by the use of warehouse receipts covering fiber in storage and sales of accounts receivable due for merchandise sold. The facts hereinbefore stated show the device adopted for raising the price of the fiber from 10 to 25 per cent., depending on cost, in order to obtain more money on the material stored. In the sale of accounts receivable for such purpose, the accounts to be sold were listed on a sheet containing an assignment form printed at the bottom, which would be executed by the cordage company, and invoices covering the accounts listed were attached, as well as a memorandum copy of bill of lading and shipper's receipt issued by the carrier showing that the goods were shipped. Such a schedule of accounts was prepared by the defendant himself on July 17, 1930, and included an account purporting to be that of the Chas. R. McCormick Company, Port Ludlow, amounting to $469.95. The assignment represented that the schedule set forth "undisputed accounts *now owing* and that proper entries have been made on the books disclosing the absolute sale thereof" to the finance company. This account was supported by an invoice of the cordage company purporting to show a sale to said purchaser of 40 reels of twine of such value, marked "Shipped to Port Ludlow," and what purported to be a memorandum copy of a bill of lading of the Bayside Steamship Company acknowledging receipt of 40 bales of yarn, consigned to Chas. R. McCormick Lumber Company, Port Ludlow, to be shipped by steamer San Diego. This particular form of memorandum and receipt does not contain any place for signature of carrier, except at the bottom under a "Release" clause waiving loss or damage in carriage in excess of stated value. This clause was signed in the shipper's blank "L" —for Langdon—and in the blank by the word "Carrier" the name "Lester" appears. These documents were presented to the Commercial Capital Corporation, and the agreed amount of money was paid by such finance concern to the cordage company. The president of the finance company testified in effect that this proof was required to show that the goods were out of the possession of the cordage company. Count III charges that defendant forged and uttered such shipper's receipt knowing the same to be forged, and the count sets it out in hæc verba. Count V is as to a similar transaction, involving, however, a different schedule, date, invoice, purchaser and shipper's receipt.

Both schedules above mentioned are in the handwriting of defendant, and the invoices and shipping receipts involved are in the handwriting of Langdon. The evidence seems to support the conclusion that it was quite a common occurrence to use such "dummies" in making the schedules so used. The witness Sawyer, bookkeeper of the cordage company, testified that in August of 1930 the defendant asked him for suggestions for the betterment of conditions in the plant, and that in compliance therewith he gave defendant some written suggestions, among which was the following: "Eliminate putting false and consigned accounts on schedule. At least to the extent it has been done in the past. Give the finance companies all that is coming to them." The numbers on the fictitious invoices are the same as those on bona fide invoices for merchandise actually shipped to other customers. Langdon, secretary of the company, testified for the defense that he made up the invoices and shippers' receipts involved in counts III and V, and that he had an order for the goods, although they had not

been made up. He did not make it clear, however, why the supporting papers carried the statement that the merchandise had already been shipped, as well as the numbers of bona fide invoices apparently theretofore shipped, and the books of the cordage company did not show any such order, sale, or shipment. In addition to that already mentioned, there is evidence from which the jury might have concluded that Langdon did nothing but the ordinary detail of his work without consulting defendant or without being directed by him so to do, and that the finance company would not have purchased the account if it had not believed from the proof given that it was a bona fide transaction, notwithstanding the testimony of Langdon that the president thereof said it would be all right to put in anything if the real invoices covered the amount advanced or were as much as 70 per cent. of the amount of the schedule.

Appellant urges that the instruments set forth do not show that they have any legal effect and, not constituting a bill of lading and the information not setting forth facts showing how the finance company could have been damaged, that demurrers interposed by him should have been sustained.

[1, 2] The instruments are not bills of lading, and, from the testimony of Langdon, it appears that they were like the memoranda which the carrier furnished the shipper, and they apparently served the purpose for which they were intended by defendant, in increasing the amount he could get from the finance company when he did not have bona fide accounts to sell. The true test of whether the receipts in question can be the basis of forgery charges is not whether, if genuine, they would create legal liability, but whether upon their face they will have the effect to defraud those who may act upon them as genuine. People v. Munroe, 100 Cal. 664, 667, 35 P. 326, 24 L. R. A. 33, 38 Am. St. Rep. 323. This, we think, they do; and also that the evidence justifies the verdicts thereon.

Do counts VIII to XIII, inclusive, and XV and XVI, each sufficiently state a cause of action?

Count VIII charges that defendant, with intent to defraud the cordage company, the stockholders and creditors thereof, made and concurred in the making of a false entry in the accounts receivable ledger of the company, by causing a credit of $1,602.09 to be made in the account receivable under the name of H. O. Pressman. As we have already seen, this account was started by charging fictitious invoices of merchandise therein. Pressman knew nothing about the account, bought no rope, and none was manufactured for or shipped to him. These charges were reflected in a credit to the account of "Sales." On December 31, 1930, there was still a charge balance under the name Pressman of $2,929.66. On January 26, 1931, defendant and Langdon signed a check on the company's bank account in the sum of $1,602.09, which the former had instructed the bookkeeper to issue. After indorsing such check, defendant told the bookkeeper to deposit it in the bank and show it in the cash receipts record, and to credit it to the Pressman account receivable. This check was charged to the defendant's account in which the fictitious Pressman check was credited on its redeposit, and which gave defendant a fictitious credit in the same sum. Counts IX and X charge as false entries the recording of the checks for $5,555.55 and $6,666.60, respectively, which were charged to the Pressman conditional sales account as hereinbefore shown. Count XI charges the recording of the sum of $25,555.35 in the journal of the company as a charge to the "New Machinery Account" and as a credit to said Pressman conditional sales account. Count XII charges the entry of said sum in the general ledger of the company. Count XIII charges as a false entry that of the credit to the Pressman conditional sales account of the sum of $2,100.35; count XV the false entry of $5,400.50 as a charge in the Pressman conditional sales account and a credit to defendant, and count XVI the entry of the sum of $5,832.35 as a charge in said Pressman account and as a credit to the machinery account.

It is urged that said counts should show in what manner the entries are false or fraudulent, particularly as all save two are credits to the company, and do not show how any of them could defraud the company or its stockholders, and that the demurrer should have been sustained.

Section 563 of the Penal Code so far as material here reads: "Every * * * officer * * * of any corporation * * * who, with intent to defraud, * * * makes, or concurs in making, any false entries * * * in any book of accounts, * * * is punishable," etc. Each count shows that appellant was an officer of the corporation, viz. its president and general manager, and alleges that with intent to defraud the company, its stockholders and creditors, he did "make and concur in making, a false entry in the journal ledger, said journal ledger being then and there a book of accounts of the said California Thorn Cordage Company, a corpora-

tion, said entry being as follows, to-wit": Then follows a description of the entry claimed to be false, followed by the allegation that said books were then and there the books of and in the possession of said corporation, and under the direction and control of defendant, and that "he, the said John C. Thorn, then and there well knew said entry so made, as aforesaid, to be false and untrue."

[3, 4] In our opinion each count states the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of ordinary understanding to know what is intended. Section 950, Pen. Code. And specifying, as each count does, the particular entry of which complaint is made, we think they are good as against the demurrer. People v. Palmer, 53 Cal. 615. It is not necessary to set out how such entries could have resulted in defrauding the corporation or its stockholders, as that is a matter to be shown by the evidence. People v. Leonard, 103 Cal. 200, 37 P. 222; People v. Ah Woo, 28 Cal. 206, 211. Does the evidence tend to show such result? In our opinion it does.

[5] It will be seen that the entries charged as false involve in the main five accounts; i. e., the Pressman contract account, the Pressman account receivable, the new machinery account, the sales account and an account of defendant which opens with the above-mentioned charge of $96.62, which with the charge of $1,602.09 hereinbefore mentioned, the credit caused by the redeposit of said check for $6,666.60, and the credit balance of $5,400.50 in the Pressman contract account, made a credit balance in favor of defendant of $10,368.39, which by a striking coincidence is the same as the amount shown as the "actual cost of machinery" on such Pressman contract account as the same was shown by the entries made therein December 31, 1931. Of course, the bank account through which the issued and redeposited checks washed, balancing each other, is incidentally involved.

The evidence tends to show that both of the Pressman accounts have no foundation in actual transactions and that the new machinery account was fictitiously increased from the real cost of $5,060 to $25,555.35, which amount was later reduced to $10,368.39 (still an increase of more than 100 per cent.) by other entries of similar nature. The net result of such entries was to increase the showing of the sales account, increase the cost of the new machinery to the company, and increase the credit balance in favor of appellant very substantially. In view of that, we cannot say that the implied finding of the jury as to the falseness of such entries and the fraudulent intent with which they were made does not have substantial support in the evidence; and in our opinion such support is strengthened rather than weakened by a defense exhibit introduced, marked "X3."

We have shown how the Pressman conditional sales account was made to show that the actual cost of the machinery mentioned was $10,368.39. By a strange coincidence that seems to be the credit balance in the account on the books in appellant's name, after transferring the credit balance of $5,400.50 to it from the Pressman contract account. We have also referred to appellant's letter to the Daily Company referring to the payment of one-fourth of the price of the machinery. The exhibit above mentioned is dated at "Chicago, LaSalle Hotel, April 8, 1930," and purports to be a receipt for the sum of $2,485, as follows: "1.04 for telegraphic expense," balance to apply as follows: "$1,327.10 on machinery as per list balance to be paid as follows: $1,265.00 to make 25% of payment of $10,368.39 on or before April 20th, 1930, balance as soon as shipment ready. $1,156.86" on repair parts, "as per list to be furnished, total purchase price $2,500.00, balance $1,343.14 to be paid as soon as shipment is ready." There is a signature purporting to be that of "F. E. Daily" to such paper. It is to be noted that such exhibit tends to show not only that the $2,485 payment in cash was made, as claimed by defendant, but also indicates that part of it, applied to the only first payment shown by the evidence of $1,265, makes one-fourth of the total which corresponds to the corrected balance of cost of machinery, and that the balance, after deducting the $1.04, added to the only payment the evidence shows was made on the parts, viz. $1,343.14, makes the total price of such parts $2,500, which is the amount to which the first charge of $5,000 therefor was reduced—apparently about the time the change was made in the price of the machinery and after the fire had occurred and defendant had been examined. It also supports the credit balance of $10,368.39 referred to. The $2,500, new cost of parts, had been transferred to the credit of defendant's "deferred liability account." Thorn testified that he found such exhibit in his desk at the factory ten days after the trial commenced. There is evidence showing that several persons had searched the same desk at different times theretofore but that there was no such document there. A handwriting expert testified that the signature was traced from the genu-

ine signature of F. E. Daily, and, in view of the fact that the Daily bank account did not show any such deposit or any deposit comparable in amount, with the exception of the deposits of $1,265, $3,795, and $1,343.14, accounted for, the jury evidently drew the conclusion that such receipt was a forgery. The jurors then could easily have inferred from the evidence that no such payment in cash was made, and that the receipt was made by defendant to furnish proof to support the statement the books were made to show by other fictitious entries as the "actual cost" of such machinery and parts and to harmonize the cash payments actually made with his story of such cost.

[6] Count XVII charges that defendant on or about the 3d day of August, 1931, did "willfully, unlawfully, knowingly, fraudulently and feloniously present and cause to be presented a false and fraudulent claim for insurance to the Sussex Fire Insurance Company of Newark, New Jersey, in the sum of thirty-eight thousand four hundred and eight dollars," upon a policy of insurance for the payment of loss by fire "issued to said defendant John C. Thorn and the California Thorn Cordage Company, a corporation," by said insurance company, "and then and there existing and in force." Count XVIII is identically the same, except the amount of the claim is stated to be $53,081.55, and it covers loss to machinery and equipment. Appellant urges that such counts do not state sufficient facts to constitute a public offense, in that they do not state how or in what manner or particular either of the alleged false claims is false or fraudulent, and do not set forth the claims or describe them with reasonable certainty.

In the case of People v. Lauman, 187 Cal. 214, 201 P. 459, the demurrer to the indictment was not only general, but also because it did not conform substantially to the provisions of sections 950, 951, and 952 of the Penal Code, as here, and it was there urged, as here, that the indictment was fatally defective in alleging merely that defendant presented "a false and fraudulent claim of loss by fire." In that case the proofs of loss alleged to have been presented were set out verbatim. Such is not true of the claims charged to have been presented here. That, however, was a matter going to the description of the alleged false document and did not aid the allegation to which objection was made. The court said of such allegation, at page 218 of 187 Cal., 201 P. 459, 460, "It is incomprehensible to us how a person of common understanding could fail to be informed by the indictment that respondent [defendant] was charged with anything different than presenting to the Springfield company a false claim of loss suffered by fire;" and also (page 222 of 187 Cal., 201 P. 459, 462) that "it must be held that the indictment substantially alleged facts sufficient to constitute a public offense under section 549 of the Penal Code, and that respondent was not prejudiced by the defects of pleading complained of." There was no allegation in the indictment there that the companies whose existence was alleged issued the policies, nor that the proofs of loss were presented on contracts of insurance for the payment of a loss; and such seem to be the defects held not prejudicial in the last language quoted. Both counts involved here alleged such presentation and the further fact that the claim was "upon a contract and policy of insurance and indemnity for the payment of loss by fire issued to said defendant John C. Thorn and the California Thorn Cordage Company, a corporation, by said Sussex Fire Insurance Company." While the claim of loss presented is not set out verbatim, it does give the date of presentation, the amount of the claim, and the name of the company issuing the policy or contract of insurance; and, while it does not expressly allege that the fire occurred, damaging property covered by the policy, or describe the policy, we fail to see how any one could fail to know that it charged the presentation of a claim for loss and damage done by fire to property covered by a policy of insurance issued by the Sussex Fire Insurance Company, and that it was a claim against such company under such policy for such loss. In our opinion, under the authority cited, there was no error in overruling the demurrer on both grounds.

[7, 8] Appellant does not seriously urge that there is not sufficient evidence that the claims alleged were false, but he does urge that the evidence does not show the presentation of a claim for $38,408, as alleged in count XVII, and that the evidence shows that the claims were not presented in Los Angeles county.

The evidence shows that the claims under count XVII involved loss and damage by the fire heretofore referred to, to hemp and manufactured merchandise, both of which involved purchases made through the witness Ach and billed to the company at an increased cost of 1 cent per pound. Certain proofs of loss to such hemp, etc., were filed by the company, proving a loss which aggre-

gated $37,677.61. Appellant urges a variance. We fail to see how he could claim prejudice when the evidence shows, as it does, the presentation of a claim for loss in the exact amount alleged, because plaintiff did not include in the information, in lieu of the claim charged, four other claims, attached to four proofs of loss, and compel him to defend four charges instead. Nor in our opinion was he prejudiced because in count XVIII plaintiff relies on the claim for loss and damage to machinery and equipment that appears in the proof of loss supporting such claim, rather than on a similar claim that appears to have been sent with that relied on in count XVII.

Section 549 of the Penal Code, upon which the two counts under discussion here were based, reads, so far as material, as follows: "Every person who presents *or causes to be presented* any *false or fraudulent claim*, or any *proof in support of any such claim*, upon any contract or policy of insurance or indemnity whatsoever for the payment of any loss, * * * is punishable," etc. (Italics ours.) It is to be noted that the offense may be either by presenting a false claim or proof in support thereof.

[9] Appellant urges that the claims for loss and damage were *presented* in San Francisco and not in Los Angeles. That they were sent by registered mail from Los Angeles to the company's office in San Francisco is not questioned. Section 781 of the Penal Code provides: "When a public offense is committed in part in one county and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either." The claim as well as the proofs of loss were prepared in Los Angeles for the sole purpose of presentation to the insurance company; they were deposited in the mail in that county addressed to the office of the company in San Francisco. Those acts were a part of the process of presentation. The consummation of the act may have occurred when the claim was delivered at the office of the insurance company in San Francisco, but its inception was in Los Angeles; and in our opinion it cannot be said that the acts occurring in Los Angeles county, or the effect of such acts, did not form a very effective and substantial part of the completion or consummation of the offense charged. The venue, therefore, could have been laid in either county.

[10-12] Nor in our opinion is there any material variance shown from the fact that the claim for loss to cordage material is shown to have been based on four policies instead of one, or that any loss on such policies is payable to California Thorn Cordage Company and Commercial Capital Corporation instead of to John C. Thorn and California Thorn Cordage Company, as alleged. The gist of the offense charged is *the presentation* of the *false claim*. To be sure, there has to be a contract or contracts of insurance upon which the claim is based to complete the offense, and the information so alleges. The material fact to be alleged and proved to complete the offense is that the party making and presenting, or on whose behalf the claim was made and presented, was protected by the policy. The evidence shows that as to the California Thorn Cordage Company, and it also shows that appellant was the owner of all of the common stock of such corporation as well as some of the preferred. That the information alleged that defendant was also protected and the evidence shows that the Commercial Capital Company was named in the policies instead of defendant is in our opinion immaterial and does not constitute a prejudicial variance, as long as the cordage company, on whose behalf the claim was made, is alleged and proved to be covered by them. A far different situation would exist if the policies themselves were the instruments charged to have been falsified, assuming that such an offense was named in section 549 of the Penal Code. People v. Reed, 70 Cal. 529, 11 P. 676; People v. Cummings, 117 Cal. 497, 49 P. 576. Unlike such cases, however, where the variance occurred between the allegation and proof of the instrument directly involved, the variance here is in the allegation and proof as to an instrument indirectly involved, and in a particular which is but a part of the description thereof, rather than an essential part of the description of the offense itself. "In determining whether a variance is material, the question to be decided is, does the indictment so far fully and correctly inform the defendant of the criminal act with which he is charged that, taking into consideration the proof which is introduced against him, he is not misled in making his defense, or placed in danger of being twice put in jeopardy for the same offense." Underhill on Crim. Ev. (3d Ed.), § 80. Applying such test to the allegations and proof involved here, we conclude that appellant could not possibly have been misled in making his defense and that there is no possible danger of his being twice put in jeopardy on a charge of falsifying the claim alleged.

[13] In our opinion the same reasoning applies to the fact that the loss on the cordage materials had to be apportioned to three different policies. The evidence shows that the cordage company had three policies of insurance covering its merchandise and stock in trade, one for $25,000, one for $20,000, and a third for approximately $15,000. The claim of loss alleged sets forth the total loss claimed on such property. Notwithstanding the fact that more insurance was outstanding in the three policies than the amount of loss claimed, and that the loss claimed was in excess of any one policy, it would still be a claim upon a contract and policy of insurance, as alleged, and that is all that is required to complete the offense if the claim is in fact false, as the jury impliedly found.

Because of the above conclusions, we see no error in the denial of defendant's motion to dismiss as to counts XVII and XVIII, nor in the refusal to instruct the jury to return a verdict for him as to count XVII. The same is true as to defendant's motion to dismiss as to counts III and X.

[14] It is urged that there is a misjoinder of offenses in the information and that the court erred in overruling appellant's demurrer and objections to such information on that ground, as well as in refusing to grant his motion for separate trials as to each group of offenses charged. If the offenses charged were properly joined, it was discretionary with the trial judge, "in the interest of justice," to order them tried separately. Section 954, Pen. Code. Assuming that they were properly joined, we see no abuse of discretion in denying such motion. Were the counts properly joined?

[15] As we have seen, the three groups of crimes joined are forgery, fraud in keeping accounts in corporate books, and presenting false claims of insurance. The Legislature, it seems to us, meant by the use of the words, "the same class of crimes or offenses," in such section, offenses possessing common characteristics or attributes, and it would seem that the different offenses set out in the information here do have many attributes in common. Fraud is involved in them all, and the purpose of each is to obtain property or credit by false writings. The inference drawn by the jury was that they were so used. The offenses charged were closely related in the plan and scheme of their commission, and the joinder saved useless repetition of evidence, time and expense, both to the state and to the defendant. We think the different offenses were properly joined.

[16] We know of no statutory authority for a bill of particulars in a criminal case, and under our system of pleading in such cases there seems to be no place for it. No error, then, was committed in denying a motion therefor.

[17] For reasons hereinbefore mentioned, we see no error in admitting the evidence as to the agreement made between Langdon and the witness Ach as to raising the invoice price of fiber billed the company 1 cent per pound, in admitting evidence as to the purchase of the machinery and parts by defendant and the method of increasing the cost thereof to the company, nor in overruling the objection of defendant to the introduction of evidence of the false entries as to rope invoiced to H. O. Pressman. All of such transactions were so closely related that the jury might well have inferred that they were all pursuant to a common plan and design that had for its purpose the benefit of appellant and the defrauding of the party alleged. Even though not alleged as separate offenses, the proof of them, as similar offenses, threw light on the intent with which the similar acts charged were committed.

[18] We think the court properly refused, in view of the evidence, to instruct the jury as a matter of law that the bookkeeper Sawyer and the broker Ach were accomplices, and properly left such question to the jury to determine as one of fact.

Objections are urged by appellant to the giving of many instructions as well as the refusal to give many requested by him. We have examined the instructions given as well as those refused, and in our opinion no error appears.

The judgment and order are affirmed.

We concur: STEPHENS, P. J.; DESMOND, J.

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MORALES v. L. W. BLINN LUMBER CO. et al.

Civ. 9407.

District Court of Appeal, Second District, Division 2, California.

May 31, 1934.

Hearing Denied by Supreme Court July 30, 1934.

1. Automobiles ⇐245(2).

Truck driver's negligence in shoving railroad gondola car along spur track with truck, thereby pinning workman between gondola and another truck, *held* for jury.

2. Automobiles ⇐245(90).

Whether workman, pinned between railroad gondola car and truck when another truck shoved gondola along spur track, proximately contributed to his injury by his own negligence, *held* for jury.

3. Negligence ⇐136(14).

Generally, question whether person exercised ordinary care must be left to jury for determination from all circumstances surrounding him at time.

CRAIG, Acting P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Demetrio Morales against the L. W. Blinn Lumber Company and another. Judgment for defendants, and plaintiff appeals.

Reversed.

Frankley & Spray, of Los Angeles (W. H. Abrams, of Los Angeles, and Elmer Guy, of Santa Ana, of counsel), for appellant.

George L. Greer, of Los Angeles, for respondents.

DESMOND, Justice.

Under instructions of the trial court, the jury in this case rendered a verdict in favor of defendants L. W. Blinn Lumber Company and R. R. Hughes. This action was taken at the close of plaintiff's case, upon defendants' motion and without any evidence being submitted by them. Plaintiff appeals.

Appellant, employed by one Kransler, was working on a lot abutting upon the east side of Santa Fe avenue in the city of Los Angeles. Kransler had leased a portion of this lot for use as a junk yard. Through Santa Fe avenue runs a railroad track in a northerly and southerly direction, with a spur leading to the east through the lot above mentioned and immediately adjacent to the junk yard. A driveway within the lot crosses this spur track in a southerly direction. Directly blocking this roadway on the day in question was a gondola freight car, that is, a car without a top and with solid sides rising approximately five feet from the flat body of the car. Kransler, assisted by his son and the appellant, proposed to haul this gondola to the east along the spur track so that the driveway would not be blockaded. To accomplish this, they drove a White truck into a position on the spur track directly east of the gondola, and appellant, under instructions of his employer, then undertook to attach the two by means of a chain. In the performance of that work he bent or crouched down at the east end of the freight car. While this operation was going on, the motor of the truck was left running. In the meantime defendant Hughes, driver of a truck belonging to respondent company, entered the yard, driving easterly along the spur track to a point west of the gondola, where he stopped. Shortly thereafter he drove forward and shoved the gondola ahead by means of his truck, thereby pinning appellant between the easterly end of the gondola and the White truck, inflicting injuries for which this action was brought.

Although Hughes testified that he saw two men on the top of the gondola, that he heard the motor of the White truck, and that he knew the truck was in front of the gondola, he not only failed to leave his seat in the machine which he operated and go forward to inspect conditions at the east end of the gondola, but there is no evidence that he called out to the Kransler crew or gave them any warning that he intended to shove the car toward the east. At the time the Kranslers, father and son, and appellant began the job of pulling the gondola easterly on the spur track, the Blinn Lumber Company's truck was not in the yard; and appellant testified that at no time did he see that machine or know that it was in the yard until after the accident.

[1-3] The complaint, of course, is predicated upon the negligence of the defendants, and the answer sets up contributory negligence on the part of appellant. Under the facts above recited, we believe the determination of the questions, "Were defendants negligent?" and "Did the plaintiff proximately contribute to his injury by his own negligence?" should have been committed to the jury. As to the latter of these two questions the comment of the court in O'Connor v. United Railroads, 168 Cal. 43, at page 48, 141 P. 809, 811, is perti-

nent: "As a general rule, whether a person has exercised ordinary care or not is to be left to the jury, to be determined by them from all the circumstances surrounding him at the time," As to the former, see 19 California Jurisprudence, 591 et seq.

Judgment reversed.

I concur: ARCHBALD, Justice pro tem.

CRAIG, Acting Presiding Justice.

I dissent. Where a new trial is granted for alleged insufficiency of evidence, unless it clearly appears that there was an abuse of discretion, it is the rule that on appeal the order will not be disturbed. Sawyer v. McRoskey, 32 Cal. App. 489, 163 P. 336; Puget Sound Lumber Co. v. Krug, 89 Cal. 237, 26 P. 902; Schramm v. Southern Pacific Co., 87 Cal. 425, 25 P. 481. "To withhold a case from the jury is no greater interference than to set aside their verdict." Bohn v. Pacific Electric R. R. Co., 5 Cal. App. 622, 91 P. 115, 116; Lynch v. Pacific Electric R. R. Co., 32 Cal. App. 689, 164 P. 20.

The trial court instructed the jury to return a verdict for the defendants, which it did. The motion for an instructed verdict was based upon two grounds, lack of evidence to sustain the allegation of negligence on the part of defendants and contributory negligence. The court's ruling was general, and for the purposes of this proceeding must be assumed to have been on both grounds. Adverting to the first, the question presents itself: Was the trial court justified in believing that the defendant Hughes, situated as he was, acted as an ordinarily reasonable and prudent man would have acted?

Viewed from Hughes' place in the picture, the record before us shows it to be as follows: There was a gondola freight car directly blocking a roadway which crosses a spur track and passes over a lot used to store junk and other materials; Hughes, driving a truck, entered the lot on the roadway and approached the gondola from the rear; he saw two men on top of the gondola; a person called "Scotty" came out, went away and came back, putting a four by four timber across the rear end of the gondola; whereupon Hughes ran his truck against it, and when the car moved, followed up, shoving the gondola about ten feet away; "Scotty" was standing on the side and called out to stop, which Hughes did; he did not see the truck ahead of the gondola or hear the motor running until he had moved forward and the accident had occurred. An important factor which should not be overlooked is that the record discloses that diagrams were drawn and witnesses marked thereon, indicating positions and objects in such a manner that the trial judge might properly determine their importance and bearing on the issues; and this the appellate court cannot do. To my mind the trial court may well have concluded that Hughes' conduct was not negligent and that the circumstances were not such as to have required of a reasonable and prudent man that he should alight from his truck and go forward to inspect the ground in front of the gondola to discover whether or not some one might be there; and it is not suggested that he could be regarded as negligent in any other way than in the possible omission of taking such a precaution.

There is no evidence indicating that Hughes' acts were willful or wanton. The law of comparative negligence is not recognized by the courts of this state. Schooley v. Fresno Traction Co., 56 Cal. App. 705, 206 P. 481, and cases there cited. It is the duty of an ordinarily prudent man, before placing himself in a position of danger, to look in the direction from which such danger may be anticipated. This duty of watchfulness is a continuing one. Moss v. Boynton Co., 44 Cal. App. 474, 186 P. 631.

In viewing the situation with the purpose of determining how the events occurred from the plaintiff's standpoint, and as to whether or not he was guilty of contributory negligence, we see this: The gondola was standing in the driveway; Kranslers, father and son, and Morales went about to remove it; the White truck was placed in front of it; Morales bent down in front of the gondola to attach a chain; it is true that he was doing this under directions of his employer, but this fact is of no importance as between Morales and defendants; beside him and engaged in the same work were the two Kranslers, all in between the gondola and the White truck; this truck was standing with no one on it and its motor was running; the gondola started to move forward; Robert Kransler saw it move, got out of the way, pulled his father out, and, while so doing, shouted to Morales, who apparently did not realize what was happening and did not move. According to Robert Kransler, the gondola moved very slowly—barely moved at all. The White truck and the gondola were about six or eight feet apart when the latter started to move. Morales was caught between the two and injured. He states that he did not know of the approach of the truck driven by Hughes, and neither he nor the men with him used any care or cau-

tion. He knew the gondola car was in the way of traffic on the driveway, and he at no time looked to see if any other truck was approaching.

Clearly the trial court cannot be said to have abused its discretion in construing this evidence as showing contributory negligence on the part of plaintiff.



138 Cal.App. 599

PEOPLE v. PARKINSON et al.

Cr. 1355.

District Court of Appeal, Third District, California.

May 22, 1934.

1. Burglary ⇐37.

Where fact of commission of burglary has been established, testimony showing that defendant was in possession of burglarious tools shortly after commission of alleged burglary, *held* admissible.

2. Burglary ⇐43.

Evidence showing possession of burglarious tools shortly after commission of alleged burglary may not, standing alone, be sufficient to sustain conviction; only slight additional testimony being required.

3. Burglary ⇐41(1).

In prosecution under information charging burglary of office, evidence *held* sufficient to support conviction of burglary in second degree.

4. Criminal law ⇐911, 1156(1).

Motion for new trial is addressed to sound legal discretion of trial court, and its action will not be disturbed on appeal except where there is manifest a clear and unmistakable abuse of discretion.

5. Criminal law ⇐938(1).

Trial court, on application for new trial on ground of newly discovered evidence, is vested with enlarged discretion, in view of disfavor with which such applfcations are regarded.

6. Criminal law ⇐938(1).

Discretion of trial court on motion for new trial on ground of newly discovered evidence is to be exercised in determining diligence shown, truth of matters stated, and materiality and probability of their effect if believed to be true.

7. Criminal law ⇐945(2).

In prosecution for burglary of office, refusing new trial on ground of newly discovered evidence showing alleged accomplice of defendant who possessed key to office door also possessed key which would unlock office door, *held* not abuse of discretion.

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

C. G. Parkinson and others were charged with burglary, named defendant was convicted of burglary in the second degree, and he appeals.

Judgment and order denying motion for a new trial, affirmed.

S. Luke Howe and O. F. Meldon, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Jess Hession, Deputy Atty. Gen., for the People.

PLUMMER, Justice.

On the 21st day of November, 1933, an information was filed in the superior court of the county of Sacramento, charging the appellant, together with Frank Crawshaw and F. E. Collins, with the crime of burglary, alleged to have been committed in the city and county of Sacramento, on or about the 11th day of October, 1933, in that the said defendants did enter the office of the Rainier Distributing Company, located in a building situate at 1808 Twenty-second street, in the city and county of Sacramento. To this information the defendants Crawshaw and Collins, during the course of the trial subsequently had thereon, entered pleas of guilty. The appellant was found guilty of burglary in the second degree, and from the judgment pronounced upon the verdict rendered against him, and from the order of the court denying his motion for a new trial, this appeal is prosecuted.

Two questions are submitted for our consideration: (1) That the evidence is insufficient to support the verdict; and (2) that the court erred in denying the appellant's motion for a new trial.

The record shows that the Rainier Distributing Company had an office at 1808 Twenty-second street, and in the office there was a safe belonging to the company. On the evening of October 10, 1933, the managers of the company left the office at about 7:30

o'clock in the evening; that the safe in the office which we have mentioned contained some $800 in currency and checks, and also other papers not necessary to be mentioned here. The office had one door leading out into another portion of the building. When the managers left the office of the company, they locked the safe, and also the door which we have mentioned. When one of the managers returned to the office on the morning of October 11th, he found the safe open; the dial that controlled the combination was knocked off; papers were on the floor; money and checks were gone. At about 1 o'clock on the morning of October 11th, two police officers, one named Catlett and the other Kenealy, were patrolling the district in the vicinity of 1808 Twenty-second street, and saw two men who were about one-half a block from the Rainier Distributing Company's office. The officers stopped the two men; made inquiries as to how they happened to be there, and where they were going; to which the men replied that they had just got off of a freight train and were on their way to the lower end of town. It so happened that they were traveling in a direction other than that toward the lower end of town. Thereupon, the officers proceeded to search the defendants Crawshaw and Collins. In this search they found considerable money in the pockets of one of the defendants, and money in the cap of another of the defendants. They also found a number of checks; also, a flash-light was found in the pocket of one of the defendants, and two 12-gauge shotgun shells, loaded with No. 2 shots. The defendants Crawshaw and Collins were then sent to the police station at approximately 1:30 o'clock; thereafter, at approximately 3 o'clock, a telephone call was received at the police station, inquiring about Crawshaw and Collins. The person making the inquiry represented himself as Luke Howe. The officers proceeded to check the telephone call, found the number of the place from which the call had been sent in, and thereupon proceeded to Sixth and I streets, and there arrested the defendant Parkinson and a man by the name of Richie. When questioned at first about the telephone call, Parkinson said that it was a joke. After taking Parkinson and Richie to the police station, the officers went back to Sixth and I streets, arriving there shortly after 3 o'clock, and found a yellow roadster registered in the name of Parkinson. In this car the police officers found the following articles: Sawed-off shotgun, No. 12 gauge; a 30-30 rifle, loaded; a sledge-hammer; a bar; 7 punches; chisel; rope; and a pair of gloves similar to the ones found on the persons of both Crawshaw and Collins.

In making the entrance to the Rainier Distributing Company office it appears that the skylight was opened and a rope was lowered therefrom. This rope was left hanging where it had been used in making the entrance to the building. Near the safe where the dial to the combination was broken off, was found a piece of a chisel. The piece of the chisel found near the safe fitted into the place where the chisel found in the appellant's car had been broken, showing that the chisel found in Parkinson's car had been used in breaking the combination of the Rainier Distributing Company's safe. At the police station there was taken from the person of the appellant, a key described by some of the witnesses as a skeleton or pass-key, and by other witnesses, as a common key which was shown by experiments to lock and unlock the door to the office of the Rainier Distributing Company.

The record shows that in addition to the property which we have described as taken from the persons of Crawshaw and Collins, there was taken from the person of Collins a key, a knife, and a cheap watch. Experiments made after the close of the trial in this action showed that this key would also unlock and lock the door to the Rainier Distributing Company's office. The articles which we have mentioned as found in the car belonging to the appellant were contained in a gunny sack.

There is also testimony in the record to the effect that the arresting officers repeatedly asked the appellant about his phone call, and how he knew the two men were arrested, and that the appellant refused to answer; that he simply kept his mouth shut and said nothing; and that he did not tell them that he was phoning for somebody else. Also, at the time that the appellant and Richie were being locked up, the appellant was overheard to say to Richie, "Don't talk; keep your mouth shut."

In addition to what we have stated as taken from the persons of Crawshaw and Collins, it appears that two loaded shotgun shells No. 12 gauge were taken from the clothing of one of them.

On behalf of the appellant testimony was introduced to the effect that on the evening of October 10, 1933, he went to a place kept by Mr. and Mrs. Wirts at Eighteenth and X streets, had dinner there, and remained until about 12 o'clock, when the appellant and Mr. and Mrs. Wirts drove to the north part of the city and stopped at what is called in the rec-

ord "Richie's Place"; that they were drinking at the Wirts' place, and when they went over to Richie's place they also had several drinks; that they all left the Richie place around about 20 or 30 minutes after 2 a. m.; that they drove from the Richie place down to Sixth and I streets, and stopped at a speakeasy called the "Green Lantern"; that the appellant and Richie went up there and had a few drinks, the appellant then testifying that he was called out and asked for the loan of his car. The appellant had testified that his car was left parked in the north part of the city near the subway, from early in the evening until the time that he and Mr. Richie left Richie's place and drove down to the Green Lantern. Just how the appellant's car happened to be parked at Richie's place in the north part of the city, and the appellant had in the evening gone over to a place located in the southern part of the city, is not explained in the record.

The appellant testified that at the Green Lantern he was called out by a man by the name of Bill Crumb, and asked for the loan of his car, which was then parked in front of the Green Lantern on Sixth and I streets, as just stated; that he had known him in and out of town for five or six years, but had not seen him for considerable time before being called out from the Green Lantern, as just stated. The testimony of the appellant shows further that the appellant had had no conversation with the so-called person named Bill Crumb; that there had been no appointment, and how Bill Crumb happened to come to the Green Lantern is left entirely unexplained.

While the record shows that the witnesses Richie and Mrs. Wirts were at the Green Lantern at the time when the appellant claims to have loaned the car to Bill Crumb, neither one of these witnesses saw the person called "Bill Crumb." The appellant likewise testified, not that he did not own the articles found in his car, as claimed in the briefs, but that he first learned that these things were in his car when he was told by Mr. Foote, the next morning after his arrest. The testimony of the appellant with regard to meeting Bill Crumb is as follows:

"Q. And did you have an appointment to meet him at the Green Lantern? A. I did not.

"Q. And he came up there and asked for you? A. Yes.

"Q. And you were there, were you? A. Yes, I was there.

"Q. You were there, you and Richie? A. Yes, sir.

"Q. What were you doing in the Green Lantern at that time in the morning? A. Drinking."

Richie's testimony, after testifying that he went from his place to the Green Lantern, is as follows:

"Q. Was Mr. Parkinson with you there at all the time from the time you arrived until the officers—A. Right with me?

"Q. Yes, at the Green Lantern. Was he there in the building? A. He was there in the building, yes.

"Q. The only time he was away was when he stepped in to the telephone—the room with the telephone? A. I don't know where he went.

"Q. But he went into the room? A. Yes.

"Q. Do you know about what time it was you went to the Green Lantern? A. A little after 2 o'clock."

Upon cross-examination it appears that this witness had formerly testified as follows, about the appellant going to Richie's place:

"Q. What time did Tuffy come out? ('Tuffy' was the name given to Parkinson.) A. One or one thirty.

"Q. In his roadster? A. Yes."

Mrs. Wirts testified, as we have stated, that Parkinson, Mr. Wirts, and herself drove from the Wirts' place in the southern part of the city over to Richie's place in a car belonging to a friend. Who the friend was does not appear in the record. Mrs. Wirts testified that she and Wirts also drove down to the Green Lantern; that they did not have any appointment to meet Parkinson and Richie at the Green Lantern; that they were at the Green Lantern around 2:30 a. m.; that she did not know the exact time that they went into the Green Lantern. Questioned as to whether she saw Parkinson at the Green Lantern, the record shows the following:

"Q. Did you see Tuffy there? (Referring to the appellant.) A. No.

"Q. Was his car out in front? A. Yes.

"Q. Did you see his car in front of the Green Lantern when you went in? A. When we went into the Green Lantern.

"Q. How long did you stay in the Green Lantern? A. Oh, about half an hour, I think.

"Q. And when you saw his car in front of the Green Lantern, did you look for him, inquire for him in the Green Lantern? A. No.

"Q. When you came out was the car there? A. No."

Upon the trial of the case the police officer Catlett testified as follows:

"Q. Now, did you stop these men and talk with them? (Referring to Crawshaw and Collins.) A. We did.

"Q. What time was it? A. Approximately ten minutes to one.

"Q. In the morning? A. In the morning.

"Q. Did you search them? A. I did; I searched Collins first.

"Q. Now, did you find any keys in the possession of either Crawshaw or Collins? A. No, sir.

"Q. No keys on either one? A. No, sir."

The police officer Kenealy testified as follows:

"Q. Now, in order to shorten this case I might just ask you if you heard Mr. Catlett testifying? A. I did.

"Q. To the arrest of the two defendants and the attendant circumstances? A. I did.

"Q. Would your testimony be the same? A. Practically the same."

As we have stated, the record shows that when the defendant Collins was arrested there was taken from his person a key which would lock and unlock the office door of the Rainier Distributing Company. The copies of receipts presented upon motion for new trial show that the officers had taken receipts for the identical property referred to herein, and show that they had taken from the person of Collins a key which would fit the office door of the Rainier Distributing Company just as above stated. This fact appears to have escaped the recollection of the officers upon testifying in this case. In his address to the jury, counsel for the people, referring to the fact that a key found upon the person of Parkinson would lock and unlock the office door of the Rainier Distributing Company, used the following language: "Well, who was the third man that was with Crawshaw and Collins? Who was the man that used the gloves that were found in Parkinson's car by the driver's seat? Now, if Crumb had gone down to get the tools, wouldn't the tools and gloves have all been together? And how would the key get into Parkinson's possession? And that is the thing, the key to the whole situation in this case: The key was just a little too much. That is one of the things that you can't explain, and they could argue until Doomsday, and how could they explain it? And I want you to pay particular attention to that, because it is not only the door key, but it is the key to this whole case, the thing that ties up the defendant Parkinson in the case so completely that there is absolutely and positively no doubt; and that is this, as I said, and I say again,—and you will pardon me for repeating it, but it is that important that I feel that I ought to repeat it again,—and that is that that door was closed there and Parkinson had the key that turned the lock on the door, that not only locked it but unlocked it, and Crawshaw and Collins did not have a key, and how did Crawshaw and Collins get in there? They got in there with the key Parkinson had, and if Parkinson didn't use the key to open the door that led in there, how did the key get back into Parkinson's pocket? And if Crumb had borrowed the car to go get the tools, how did the key—why was the key found in Parkinson's pocket? Now, if you can answer that, turn him loose. If you can answer that, find him not guilty. If I was defending that man before this court, and that evidence came in, I couldn't answer it."

The discovery, after the trial of the Parkinson case, that a key taken from the person of Collins would answer the same purpose as the key found upon the person of the appellant, is the real basis for the motion for new trial herein.

[1-3] Excluding reference to the key found upon the person of the appellant, the first question to be answered is: Is the testimony shown by the record sufficient to support the verdict? In addition to what we have said, the testimony shows that the appellant and Crawshaw and Collins were acquainted with each other, but were not shown to have been together on the evening of the burglary. In principle, the testimony as to the possession of burglarious tools we think comes within the doctrine relating to the possession of stolen property shortly after the commission of an offense. That testimony as to the possession of such instruments may be admitted in evidence after the fact of a burglary having been committed, seems to be very clearly established by the authorities cited in the footnotes to sections 131 and 132, 9 C. J., on pages 1073, 1074, and 1075.

In the instant case the record presents more than the mere possession of tools suitable for the accomplishment of a burglary. In addition to the loaded rifle, the shotgun, the sledge-hammer, and numerous punches, the record shows that there was found in the automobile belonging to the appellant a certain chisel from the point of which a portion had been broken. The broken portion of the chisel was found near the safe that had been burglarized. This broken portion is shown by the record to exactly fit the broken place in the chisel. The explanation given by the

appellant as to his possession of the different articles found in the gunnysack in the rear of his automobile is not such as to carry any weight whatever. "The phantom" Mr. Crumb was never seen by any of the other persons at the Green Lantern on the morning of October 11, 1933, nor had the so-called Mr. Crumb been seen by the appellant, according to his own testimony, for several days preceding his visit to the Green Lantern. The appellant, according to his own testimony, had no appointment to meet Mr. Crumb at the Green Lantern in the early hours of the morning of October 11th. Nothing in the record shows that the so-called Mr. Crumb knew that the appellant was at the Green Lantern; nothing in the record shows that the appellant and the so-called "Bill Crumb" had ever met each other, or were accustomed to meet each other at the Green Lantern; the record shows no effort on the part of the appellant to have the so-called "Bill Crumb" apprehended or subpœnaed to testify in this case.

The testimony of Mrs. Wirts is that she and Mr. Wirts and the appellant drove from the Wirts place in the southern part of the city to the Richie place in a car belonging to a friend. The name of the friend does not appear in the record. The witness Richie contradicts this portion of the appellant's alibi, and states that the appellant drove to his place in his own yellow roadster. The appellant testified that his roadster was parked in front of the Richie place early in the evening at about the same time that the testimony shows the appellant reached the home of the Wirts in the southern part of the city. The witness Mrs. Wirts testified that when she and Mr. Wirts went to the Green Lantern after leaving the Richie place, she did not see the appellant there; that she did see the car in front of the Green Lantern, upon going to the place, and after remaining there some thirty minutes, left, and when she left the Green Lantern observed that the yellow roadster was gone. Somewhere in the neighborhood of 3 o'clock on the morning of October 11th the appellant telephoned, using an assumed name, to ascertain if Crawshaw and Collins had been arrested. No information had been given out by the police department as to the arrest of Crawshaw and Collins. No telephone messages had gone out from the police department, and no other calls or inquiries as to Crawshaw and Collins had been made. When questioned as to the telephone message, the appellant replied to one inquiry that it was only a joke. As to other repeated inquiries as to how he obtained the information which caused him to telephone to the police office, the appellant made no reply whatever. The fact that the appellant, before any information had been given out by the police department of the arrest of Crawshaw and Collins, sent in the telephone call, establishes beyond controversy that he knew what was taking place. The mute evidence of the chisel with the broken end being found in the possession of the appellant, to which the broken end thereof found near the safe fitted exactly, is as conclusive a circumstance as can well be conceived of supporting the conclusion that the chisel found in the possession of the appellant was the chisel used in breaking the combination of the burglarized safe. The explanation given by the appellant of his possession of the chisel as well as of the other articles, as we have said, is not such as to command either the belief or conviction of any one either as to its reasonableness or as to its truth. In fact, we think the jury would be justified, and could only be justified in coming to the conclusion that the appellant's story in relation to the appearance of Bill Crumb asking for the loan of the automobile at such an unusual hour, without any information as to the whereabouts of the appellant at the time in question, was and is a transparent fabrication and establishes beyond a reasonable doubt that the appellant was not only the possessor of the chisel in question, but also was one of the parties who participated in its use in opening the safe belonging to the Rainier Distributing Company. Likewise, the inference to be drawn from the telephone message following shortly after the arrest of Crawshaw and Collins, may properly be drawn that the appellant was in the neighborhood where the burglary was committed and witnessed the apprehension of Crawshaw and Collins by the officers, as we have above related.

While the evidence of the possession of stolen goods, and we may add, of burglarious tools, shortly after the commission of an offense may not, standing alone, be sufficient to sustain a verdict, it requires only slight additional testimony. In the case of People v. Lang, 142 Cal. 482, 76 P. 232, 233, the evidence is summarized in the third paragraph of the opinion as follows, and held to be sufficient, to wit: "There is evidence, which, if true (and we must presume it to be for the purposes of this case), shows that on the morning of August 6th the defendant took the overcoat to a loan office at 22 Mason street, and pawned it for $4; that he signed a fictitious name on the books at the loan office, to wit, 'G. Reed, 1101 Eddy Street;'

that the overcoat is the property of Orr; that it was found at the loan office by Detectives Dinan and Wren; that the name, 'G. Reed, 1101 Eddy Street,' written in the books of the loan office, is the handwriting of defendant; and that defendant, when arrested, denied that he pawned the overcoat." The opinion then goes on to state: "The authorities hold that where goods have been feloniously taken by means of a burglary, and they are immediately or soon thereafter found in the possession of a person who gives a false account, or refuses to give any account, of the manner in which he came into the possession, proof of such possession and guilty conduct is presumptive evidence not only that he stole the goods, but that he made use of the means by which access to them was obtained." The jury in the instant case were amply justified in coming to the conclusion that the appellant gave a false account of the loan of his automobile to the person we have called "phantom Bill Crumb." Likewise, the record shows that he refused to give any account of how or why he was caused to telephone to ask if Crawshaw and Collins had been arrested.

In the case of People v. Wing, 23 Cal. App. 50, 137 P. 47, the facts and the holding of the court are set forth in the opinion as follows: "A certain business concern was burglarized in San Francisco on the night of July 8, 1912. In September of the same year a detective of the police department, while investigating another charge against the defendant, found in his possession the articles stolen on the night of July 8th. Defendant admitted that he received these goods on July 18th, but at the trial claimed that he had purchased them from a man named Dewey. The articles admitted in evidence against the defendant were amply identified as those which were stolen on July 8th from the said concern, and, as defendant came into possession of them ten days later, the fact of his being in possession of recently stolen property was clearly before the jury. Dewey, the man from whom defendant claimed to have purchased this property, was not satisfactorily identified, nor was he called as a witness by the defendant. Moreover, a witness for the people testified that the defendant had told him that he had bought the goods in Fresno a year before, and defendant was also contradicted in his testimony that on the night of the commission of the crime he was in the city of Stockton." This testimony was held to be sufficient to support the verdict of conviction. The person of Bill Crumb in this case fits in very closely with the person called Dewey in the case from which we have just quoted. Neither person is satisfactorily accounted for. The jury in both cases were authorized to conclude that the alleged persons were only fictitious.

In the case of People v. Warner, 25 Cal. App. 751, 145 P. 545, this court had occasion to pass upon a conviction based upon the possession of stolen property, supported by other circumstances, to sustain a conviction. It was there held that the possession of a certain coin which had been worn smooth, found in the possession of the defendant, identified as being the property of the one from whom it had been stolen, together with the incriminating actions of the defendant, constituted sufficient proof upon which to base a verdict of guilty.

In the case of People v. Morrell, 28 Cal. App. 729, 153 P. 977, it was held that proof of the possession of stolen property shortly after a burglary had been committed, accompanied by a false account, or a refusal to give an account of the manner in which possession was obtained, constituted sufficient proof to support a verdict.

That proof of the possession of burglarious tools is admissible in testimony is supported by the case of People v. Winters, 29 Cal. 658.

The foregoing summary of what the record shows in this case we think amply supports the conclusion that the verdict of the jury was and is fully supported.

[4-7] It remains to be determined whether the trial court abused its discretion in refusing to grant the appellant's motion for a new trial. The lapse of the memory of the two officers who searched Crawshaw and Collins, relative to their not finding a key on the person of either of said defendants, is not explained in any affidavits contained in the record. That the key found in the possession of the appellant was such as would lock and unlock the door of the office in which the burglarized safe was contained, must be admitted as a circumstance of considerable importance. There is nothing in the affidavits, however, to the effect that this particular key was not used. The affidavit of Collins as to the possession of the key heretofore referred to herein, and which, upon trial being made, was found sufficient to lock and unlock the same door, contains no statement as to whether the key possessed by him was or was not used. All that appears in the record is that Collins pleaded guilty as be-

ing one of the persons who participated in the burglary. There is no statement in his affidavit concerning the use of the broken chisel, nor is there anything in the affidavits which explain how the implements referred to herein were found in the appellant's automobile. For all that appears in the affidavits it may be that the key possessed by the appellant was actually used in opening the office door of the Rainier Distributing Company. The argument of counsel for the people in stressing the importance of the key is a circumstance which should have, and probably did appeal strongly to the jury, and must have been a circumstance taken into consideration by the judge of the trial court when passing upon the appellant's motion for a new trial.

Again, there is another factor which must be considered, and which doubtless was considered by the trial court in passing upon the appellant's motion, to wit: The diligence or lack of diligence in discovering the different articles taken from the persons of the three defendants. The record shows that all the articles which we have mentioned were taken from the persons of the defendants on the 11th day of October, 1933. These different articles were in the possession either of the property officers of the police department of the city of Sacramento, or in the possession of the jailor of the county of Sacramento, from the time that they were taken from the persons of the defendants until the time of the trial. Access thereto might have been had by counsel for the appellant at any reasonable time. The fact that the appellant had a key, of course, was known to him. The fact that one of the other defendants had a key could have been readily discovered by an examination of the record showing the property taken from him. The affidavit of Collins is to the effect that he made known the possession of the key to counsel for the appellant immediately after the trial. The fact that the two officers who searched Crawshaw and Collins testified that they did not find any keys upon the person of either of them does not excuse the failure to examine the records to which we have referred, which were open to inspection from the 11th day of October, 1933, until the date of trial on January 17, 1934.

The law in relation to granting a new trial, and the binding effect of the discretion of the trial court is fully set forth in 8 California Jurisprudence 442, § 463, as follows: "A motion for new trial is addressed to the sound legal discretion of the trial court, and its action will not be disturbed upon appeal except in an instance manifesting a clear and unmistakable abuse of such discretion. This rule is peculiarly applicable to an application based upon the ground of newly discovered evidence, as to which an enlarged discretion is committed to the trial court, because of the disfavor with which such applications have always been regarded. This discretion is to be exercised in determining the diligence shown, the truth of the matters stated, and the materiality and probability of the effect of them if believed to be true. The question as to whether the evidence produced on the motion is such as to render a different result probable is one peculiarly addressed to the discretion of the trial judge." This statement of the law is so fully supported by the cases cited in the foot-notes, that no further reference need be made thereto. We may, however, quote the following from the case of Nave v. Graham, 37 Cal. App. 332, 174 P. 76, 77: "An adverse ruling on such a motion and on such grounds (newly discovered evidence) will not be disturbed on appeal, in the absence of a plain showing of abuse of the power of the court. The question as to whether diligence had been used, which might have enabled the moving party to have furnished the evidence at the trial, and whether a different result would be probable had such evidence been produced, were matters which the court had discretion to determine either way under the statements made in the affidavits." (Citing authorities.) The trial court possessed the power to determine whether there would have been a different result had the fact of the possession of the key by Collins, which key would also unlock and lock the office door of the Rainier Distributing Company), been placed, or not been placed before the jury. The trial court also had before it the determination of the question whether there would have been a different result if a new trial were granted.

In view of the conclusion which we have reached that the evidence is sufficient to support a verdict of guilty, without any reference to the key possessed by the appellant, it follows that we cannot hold the trial judge guilty of an abuse of discretion in denying his motion for a new trial on the ground of newly discovered evidence. Nor can it be held that the record shows a miscarriage of justice.

The judgment and order are affirmed.

We concur: R. L. THOMPSON, J.; PULLEN, P. J.

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BLAND v. SMITH et al.

Civ. 5083.

District Court of Appeal, Third District, California.

May 31, 1934.

1. Fraud ⇐58(4).

In action for fraud, evidence *held* to sustain finding that vendor did not rely on any representations made by defendant representing purchaser.

Evidence showed that vendor was herself a real estate dealer; that she had in her employ regular real estate agent to whom she referred purchaser; and that her regular agent had on property in question his sign as "exclusive agent."

2. Principal and agent ⇐23(5).

In action for fraud, brought by vendor against purchaser's agents, evidence *held* to support finding that none of defendants were acting as agent of plaintiff.

3. Appeal and error ⇐1010(1).

Trial court's finding, supported by evidence, cannot be disturbed.

Appeal from Superior Court, Los Angeles County; Edward Henderson, Judge.

Action for fraud by Mia Candida Bland against Jess Smith and others. From an adverse judgment, plaintiff appeals.

Affirmed.

Victor R. Hansen, of Los Angeles, for appellant.

Gibson, Dunn & Crutcher and H. F. Prince, all of Los Angeles (Robert F. Schwarz, of Los Angeles, of counsel), for respondents.

Mr. Justice pro tem WEYAND delivered the opinion of the court.

The statement of facts contained in respondents' brief herein fairly represents the real facts of this case.

They are as follows, to wit:

"Prior to October 10, 1928, appellant, an experienced real estate operator, owned the real property at Westwood and Santa Monica boulevard involved in this action. The defendant Jess Smith was a salesman with the Janss Investment Company. Prior to the 10th day of October, 1928, Jess Smith attempted to talk to the plaintiff, but only over the telephone (and not more than twice), in regard to this real estate, and he claims he told her that he could sell the property for her for $40,000, and that she referred him to Alonzo B. Moore, an agent who had handled all of her transactions except those which she managed personally. Jess Smith claims the plaintiff refused to have anything to do with him and hung up the receiver. Plaintiff paid a commission to Moore when this property was finally sold, but did not pay compensation of any kind to any of the defendants. Plaintiff knew that Jess Smith was representing a buyer. A sign on the property in question designated Moore as the exclusive agent. Smith located Moore, to whom he made offers to buy the property. Moore relayed these offers to the plaintiff. Finally, through Moore's persuasion, plaintiff sold the property. Title was taken in the name of C. P. Wasmer, an officer of the Janss Finance Corporation, and an employee of the Janss Investment Company. The purchase price was paid by the Janss Finance Corporation by checks issued in the name of C. P. Wasmer, the first check for $1,000 paid out of escrow being made to 'Alonzo Moore, Agent,' as payee. Subsequently, C. P. Wasmer deeded the property to the Janss Finance Corporation, which deeded it to Dr. Foster K. Collins and Pearl Collins, his wife, whom Jess Smith had represented. Plaintiff received from the defendants C. P. Wasmer and Janss Finance Corporation the sum of $40,000 cash as the purchase price. Dr. Collins and his wife, in taking the property, paid the Janss Finance Corporation $4,209.86 in cash, took an assignment of a condemnation award which was not yet due to make the balance of $12,500, refinanced other property to the extent of $15,000, and agreed to the payment of the balance of a price of $55,000 over a period of years."

Respondents' brief likewise presents a fair statement of the findings of the trial court, in the following words: "The trial court found, in substance, that the property was of the market value of $40,000; that the plaintiff had not employed any of the defendants as her agents in the transaction; that neither Jess Smith personally or as the agent of Janss Finance Corporation, and/or the Janss Finance Corporation itself, violated any trust imposed in them by the plaintiff, or realized any secret profit from the deal; that no false or fraudulent representations were made; that the plaintiff had not relied upon any of the representations made to her; and that the plaintiff had not been damaged either in the sum of $50,000 or any other amount."

The points attempted to be made by appellant in support of her claims for a reversal of the judgment are that the evidence is insufficient to justify the findings of fact and the judgment.

The one important question is: Was Jess Smith, Janss Investment Company, or Janss Finance Corporation the agent or agents of plaintiff and appellant?

A secondary question arises: Did the plaintiff rely upon any statement or statements made by Jess Smith?

As we view the evidence, both these questions must be answered in the negative.

[1] Taking up the secondary question, first, we cannot believe that plaintiff relied upon any statements made by Jess Smith. The plaintiff was herself a real estate dealer, holding a license as such. She had been so engaged for a number of years. She had in her employ a regular real estate agent, to whom she referred Jess Smith as to all matters relating to this transaction. Plaintiff's regular agent, one Alonzo B. Moore, had upon the property his sign as "exclusive agent." Moore did discuss a sale of the property with Jess Smith, and Moore advised Mrs. Bland to sell for $40,000. Mrs. Bland, after consulting with her agent Moore, agreed to and did sell her property for that sum, and she paid to Moore the usual commission of $2,000. The payment of a preliminary deposit in the sum of $1,000 was by a check payable to Moore "as agent" and this deposit check was indorsed by plaintiff. The plaintiff never paid nor offered to pay Jess Smith any commission. Taking these facts into consideration, we believe the trial court was amply sustained in his findings to the effect that the plaintiff did not rely on any representations made by Jess Smith or any of the other defendants.

[2] The important question herein was whether Jess Smith was the agent of plaintiff. The rule governing any and all transactions where agency is involved is that "no man can serve two masters." The plaintiff was asked the following questions to which she answered as indicated: "Q. Mrs. Bland, at the time Mr. Smith had his first conversation with you over the telephone did you understand then that he was also representing the purchaser of the property, the buyer of the property? A. Yes. Q. And that the buyer was paying the entire commission to Mr. Smith? A. Yes."

Plaintiff knew Smith was representing another person, and she already had a regular agent of her own. According to the testimony of defendant Smith, Mrs. Bland said she "did not want anything to do with me (Smith) or the Janss Investment Company." Smith further testifies that all further dealings were had with Moore as agent for plaintiff. As before indicated, Mrs. Bland sold her property on the recommendations of Moore, and she paid Moore the usual 5 per cent. commission. She paid no commission to Smith.

Under such a statement of facts, the lower court was justified in finding that none of the defendants were acting as agents of the plaintiff.

[3] I see no necessity to cite authorities or quote at length from the many cases cited, as the question is, at most, one of fact, and the trial court having decided that neither Smith nor any one of the defendants was the agent of plaintiff, that finding cannot now be disturbed.

The judgment of the trial court is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.



138 Cal.App. 528

RUFFINO et al. v. QUEEN INS. CO. OF AMERICA.*

Civ. 5046.

District Court of Appeal, Third District, California.

May 15, 1934. As Modified June 13, 1934.

1. Insurance ⇐629(1).

Complaint *held* to state cause of action on standard fire policy as against contentions that plaintiffs' estoppel to assert waiver of their failure to supply proof of loss and incumbrance of insured property by chattel mortgage, rendering policy void, affirmatively appeared.

The complaint alleged that property owner and mortgagee were jointly insured; that insurer, through its agent, had full knowledge of mortgage and insured property with such understanding, and that written rider so stating was signed by agent and attached to policy; and also alleged facts amounting to waiver of provision as to proof of loss.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For modifying opinion, see 33 P.(2d) 883.

2. Insurance ⇐665(8).

Evidence *held* to show that insurer's local agent had authority to attach to fire policy signed rider consenting to chattel mortgage on insured property, and that such rider was duly signed and attached.

3. Insurance ⇐150.

Rider, signed by insurer's authorized agent and attached to fire policy in manner consistent with language thereof, becomes part of it and will be construed in connection with other provisions thereof.

4. Insurance ⇐665(8).

Evidence *held* to support court's finding that provision of fire policy for forfeiture thereof for failure to file proof of loss within sixty days after fire was waived by conduct of insurer and its agents.

There was evidence that insurer's local agent was informed of fire immediately after it occurred and promptly notified insurer thereof; that insurer immediately sent adjuster, who inspected property, instructed insureds to segregate undamaged from damaged property, and said they would hear from insurer later; that local agent, frequently interviewed by insureds thereafter, told them that he would take care of everything, and that there were no papers to be signed to show amount of loss; and that insurer first notified insureds that it denied liability after time for presenting sworn proof of claim.

5. Insurance ⇐612(2).

Insurer's denial of liability under fire policy because of insured's failure to file proof of loss within time required as result of insurer's conduct and declarations amounting to waiver of such requirement waived necessity of insured presenting sworn proof before commencing action on policy.

6. Insurance ⇐612(1).

Liability of insurer is not waived by breach of provision of standard form of policy by insured which is declared to be a prerequisite of maintenance of suit upon the contract, where that breach is caused by fault of insurer or its agents.

7. Insurance ⇐146(4).

Fire insurance policy in statutory form is deemed contract, and must be construed as such (Gen. Laws 1931, Act 3735; Civ. Code, § 2586).

8. Insurance ⇐612(2).

Requirement of fire policy in statutory form that sworn proof of loss be furnished insurer within sixty days as prerequisite to action on policy may be waived by subsequent declarations and conduct of insurer or its authorized agent (Gen. Laws 1931, Act 3735; Civ. Code, § 2586).

9. Insurance ⇐371.

Waiver or equitable estoppel, affecting standard form of fire insurance policy, may be proved by oral evidence (Gen. Laws 1931, Act 3735; Civ. Code, § 2586).

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by Peter Ruffino and another against the Queen Insurance Company of America. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Miller, Van Ness & Leo J. McEnerney, of San Francisco, for appellant.

Griffin & Boone, of Modesto, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendant has appealed from a judgment of $2,714.80 which was rendered against it by the court sitting without a jury, in a suit upon an insurance policy for loss by fire of certain personal property.

Through its Stanislaus county agent, J. F. Campbell, the defendant insurance company, on September 26, 1930, on receipt of $67.50 which was paid as premium therefor, issued to the plaintiffs jointly, as their interests appeared, a standard statutory form of fire insurance policy for $4,500, for the period of one year, on certain personal property owned by the plaintiff Ruffino, subject to a chattel mortgage of $1,000 held by the plaintiff Smith. The agent was informed and knew of the existence of the chattel mortgage, and, at the request of plaintiffs, attached to the policy a rider in the following language: "It is understood and agreed that this policy is to insure Peter Ruffino and Paul Smith as their interests may appear. [Signed] J. F. Campbell, Agent." The policy provides in part that "no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except by writing endorsed hereon or added hereto." It is further provided the policy shall become void "if the interest of the insured be other than unconditional and sole ownership," and that "unless otherwise provided by agreement in writing endorsed hereon or added hereto this company shall not be liable for loss or damage to any property insured hereunder while encumbered by a chattel mortgage"; that "within sixty days after the commencement of the fire the insured shall render to the company at its main office in California named herein preliminary proof of loss con-

sisting of a written statement signed and sworn to by him, setting forth, (a) his knowledge and belief as to the origin of the fire; (b) the interest of the insured and of all others in the property; (c) the cash value of the different articles or properties and the amount of loss thereon." On November 25, 1930, the personal property was destroyed by fire to the extent of the undisputed value represented by the amount of the judgment. Fraud was not charged either in procuring the policy or on account of the origin of the fire. The respondents failed to file proof of loss as provided by the policy, but the local agent of the insurance company was promptly informed of the loss by fire, and he agreed to and did notify the company thereof in writing, in response to which an adjuster was sent to Modesto, who personally investigated the claim of loss and instructed the plaintiffs to segregate the undamaged property from that which was damaged, and told the plaintiffs they would hear from the company later regarding the claim. The plaintiffs promptly segregated the property as requested, but heard nothing further from the company regarding the matter until after the time had expired for filing the proof of loss. A few days after the fire occurred, Mr. Campbell, the defendant's agent, in the presence of both plaintiffs, and in response to an inquiry as to whether anything further was necessary to be done on their part to collect the insurance, replied, "No, that he had taken care of everything that was necessary." The plaintiff Smith testified that he afterwards saw the agent prior to the expiration of the time for filing proof of loss and was assured by him that his loss would be paid in full as his interest appeared. Mr. Smith then asked him "if there was any necessary papers to be signed to show evidence of the amount of the loss," to which he replied, "No, there was not, that he had taken care of everything * * * in communication with the San Francisco office." After more than ninety days had elapsed from the time of the fire, the company for the first time denied its liability, asserting that the policy was void for failure on the part of the plaintiffs to comply with its provisions. Suit was then commenced. The cause was tried by the court sitting without a jury. Findings were adopted favorable to the plaintiffs in accordance with the facts above recited. Judgment was rendered accordingly for the sum of $2,253.70, and interest amounting to $461.10, aggregating the sum of $2,714.80. From this judgment the defendant has appealed.

[1] The appellant contends that the complaint fails to state facts sufficient to constitute a cause of action, for the reasons that it affirmatively appears the insurance policy which is involved in this action is the standard statutory form prescribed by law, which provides that no officer or agent of the company shall have power to waive any provision or condition therein contained except by written consent, and that the plaintiffs are estopped from asserting that their failure to supply sworn proof of loss, or knowledge of the origin of the fire, was waived by the conduct of the agent or otherwise. It is further asserted that the incumbrance of the property by a chattel mortgage renders the policy void. For these reasons it is claimed the demurrer should have been sustained, and that the motion for judgment on the pleadings should have been granted.

The demurrer and motion for judgment on the pleadings were properly overruled. The complaint clearly alleges that the owner of the property and the mortgagee were jointly insured as their respective interests appear; that the company, through its agent, had full knowledge of the existence and nature of the mortgage and insured the property with that understanding; that a written rider was signed by the agent and attached to the policy in the following language: "It is understood and agreed that this policy is to insure Peter Ruffino and Paul Smith as their interests may appear." The complaint further alleges facts which amount to a waiver on the part of the company of the provision of the policy requiring the insured to furnish sworn proof of loss within sixty days of the time the fire occurred. The rules of law regarding the construction of the terms and conditions of a fire insurance policy are the same as they were prior to the adoption of a statutory form thereof by the Legislature of California.

[2] The evidence abundantly shows that the defendant's local agent, Mr. Campbell, had authority from his company to attach a signed rider to the policy consenting in its behalf to the chattel mortgage of the plaintiff Smith, and that that document was duly signed and attached to the policy in consonance with the authorization conferred by the language of the contract of insurance. Mr. Campbell was called by the plaintiffs as a witness, under the provisions of section 2055 of the Code of Civil Procedure, and testified to those facts. He said that he had instructions from the company to sign and attach riders to insurance policies authorizing the execution of chattel mortgages on insured property, and that he did so in this instance. He also notified the company at its home office in San

Francisco that he had attached the rider to this policy authorizing the chattel mortgage. No objection to the rider was ever made by the company. The agent authorized his stenographer to sign his name to the rider, and she did so. The rider was therefore signed and attached in writing in the manner and form authorized by the policy. By inference, the policy of the insurance company authorized the incumbrance of insured property in this manner by specifically providing therein that: "Unless otherwise provided by agreement in writing endorsed hereon or added hereto this company shall not be liable for loss or damage to any property insured hereunder while encumbered by a chattel mortgage."

The authorization of the company to incumber the insured property by chattel mortgage is clearly inferred by the language of the rider that "it is understood and agreed that this policy is to insure Peter Ruffino and Paul Smith as their interests may appear." Home Ins. Co. of N. Y. v. Scott (C. C. A.) 46 F. (2d) 10, 12; Atlas Reduction Co. v. New Zealand Ins. Co. (C. C. A.) 138 F. 497, 9 L. R. A. (N. S.) 433. In the case first cited it is said: "These riders were in the form and were attached in the manner provided for in the policies, and it is to be presumed, nothing to the contrary appearing, that the agent attaching them acted with full authority. The purpose in attaching them was to grant authority to encumber the property. The language used was that of the insurance companies and was sufficiently comprehensive for the purpose for which it was intended."

[3] A rider signed by the authorized agent of the company containing stipulations with respect to the contract of insurance which is attached to the policy in a manner not inconsistent with the language therein contained becomes a part of the original policy and will be construed in connection with the other provisions of the policy. 2 Cooley's Briefs on Insurance (2d Ed.) p. 1011; 14 R. C. L., p. 933, § 107; Burch v. Hartford Fire Ins. Co., 85 Cal. App. 542, 551, 259 P. 1108.

[4] The insured failed to present to the company sworn proof of loss within sixty days from the time the fire occurred, or at all, as required by the provisions of the policy. But there is ample evidence to support the finding of the court that this clause was waived by the conduct of the insurance company and its agents. Mr. Campbell, the local agent, was informed by the plaintiffs of the fire immediately after it occurred. He promptly notified the company thereof by communication with its main office at San Francisco, and an adjuster was sent at once to Modesto to investigate the circumstances and appraise the loss. The adjuster inspected the property and instructed the plaintiffs to segregate the undamaged property from that which was destroyed or damaged, saying they would hear from the company later. The adjuster failed to return. The insured frequently thereafter interviewed the local agent, Campbell, inquiring about the delay and asking him if there was anything further they were required to do to obtain a settlement of the claim. Campbell told them: "They are all right, you don't need to worry. * * * I have done everything that I know of, 'phoned them, wrote them letters.' * * * Q. Now, in any of these conversations did Mr. Campbell ever tell you he would take care of everything for you? A. Yes sir. * * * He said he was taking care of everything." Mr. Smith testified that plaintiffs had a conversation with Campbell soon after the fire occurred in which they inquired regarding the delay on the part of the company in settling the claim, and asking him when the payment would be made. He said, "I asked him at that time if there was any necessary papers to be signed to show evidence of the amount of the loss, and he said no, there was not, that he had taken care of everything." Having failed to further inform the insured regarding the payment of the claim, after the sixty-day period for presenting sworn proof of the claim had expired, the plaintiffs wrote the company, and for the first time received a letter in reply in which the company denied its liability, saying that an investigation was being made by the fire underwriters regarding the origin of the fire, and that the insured had forfeited all claim to insurance compensation by failure to file the sworn proof of loss as required by the policy.

The foregoing conduct of the company and its agents naturally had the effect of deceiving the insured with respect to the necessity of filing sworn proof of loss, and undoubtedly led them to believe the company would attend to that matter and to all other preliminaries necessary to entitle them to compensation. This conduct of the company and its agents amounted to a waiver of the clause of the policy providing for a forfeiture of the contract for failure to file sworn proof of loss within sixty days from the date of the fire. It estops the company from asserting the defense of forfeiture of the policy on that account. Francis v. Iowa Nat. Fire Ins. Co., 112 Cal. App. 565, 297 P. 122; 26 C. J., p. 393, § 507; 7 Cooley's Briefs on Insurance (2d Ed.) p.

5990, § 13 (b); 14 R. C. L. p. 1155, § 335; 5 Joyce on Insurance, p. 5566, § 3355. In 7 Cooley's Briefs on Insurance, supra, it is said in that regard: "Any acts by or conduct of the company which directly prevent the insured from complying with the conditions of his policy as to notice and proofs of loss or which induce him to believe that strict compliance will not be required will operate as a waiver of any default resulting from such acts or conduct."

It is said in 14 Ruling Case Law, page 1156, in that regard: "It is also held that a provision limiting the power of any officer, agent, or other representative of the company, in the waiver of any provision or condition in the policy, does not supersede the law making the principal liable for the negligent, wrongful, or fraudulent act of its agent, or the law of equitable estoppel, and therefore that limitation may itself be waived by the company through its agent, acting within the apparent scope of his authority."

[5, 6] The necessity of first ascertaining the amount of loss and presenting the insurer with sworn proof thereof as a prerequisite to the maintenance of this action was also waived. The policy provides in that regard: "No suit or action on this policy for the recovery of any claim shall be sustained, until after full compliance by the insured with all of the foregoing requirements, nor unless begun within fifteen months next after the commencement of the fire." The fire occurred November 25, 1930. In reply to a letter from the plaintiffs inquiring about its failure to pay the claim, the insurance company wrote them on February 6, 1931, in part as follows:

"As more than sixty days have elapsed since the fire occurred and no proofs of loss having been received by the company, it would appear that Peter Ruffino has forfeited any rights which he may have had under the policy on account of the fire which occurred on or about November 25th, 1930.

"Very truly yours,

"O. J. Rea, General Adjuster."

This suit was then commenced October 21, 1931. The proof of loss was not furnished, as previously stated, because the plaintiffs were led to believe by the statements and conduct of defendant's agents that it was unnecessary to do so. The liability of the insurer is not waived by a breach of a provision of the standard form of policy on the part of the insured which is declared to be a prerequisite to the maintenance of a suit upon the contract, when that breach is caused by the fault of the insurance company or its agents. 26 C. J. p. 406, § 522; Enfantino v. United States Fire Ins. Co., 116 Cal. App. 729, 3 P.(2d) 331; Bank of Anderson v. Home Ins. Co. of New York, 14 Cal. App. 208, 219, 111 P. 507. The insurer may not predicate an absolute denial of liability upon failure of the insured to file sworn proof of loss, which failure is caused by conduct or declarations which amount to a waiver thereof by the insurer.

[7-9] Finally, it is contended that, since the adoption of a standard form of fire insurance policy by the Legislature of California (St. 1909, p. 404, 2 Deering's Gen. Laws of 1931, p. 1878, Act 3735), the instrument is binding on the parties and must be construed as a statute and not as a contract, and that a breach of the terms thereof is not subject to waiver or equitable estoppel except as therein provided. In other words, it is urged that, since the adoption of the statutory standard form of fire insurance policy in California, which provides that no officer, agent, or other representative of an insurance company shall have power to waive any of the provisions or conditions of a policy except by a writing indorsed thereon or added thereto, oral evidence of waiver or equitable estoppel is incompetent by means of which to excuse a breach of the terms thereof. In support of that contention, reputable authorities from other jurisdictions have been cited, with which we are not in accord. It would be an arduous and idle task to attempt to review these cases, since they are in direct conflict with numerous authorities from other states which do conform with our view of the law in that regard.

It is true that the question as to whether the adoption of the standard statutory form of insurance has abrogated the status of the policy as a contract has not been directly presented to the courts of California for determination. Nevertheless, numerous cases have been decided in this state since the adoption of the standard form, which recognize the fact that the policy is still deemed to be a contract. 32 C. J., p. 1147, § 257; American Building Maintenance Co. v. Indemnity Ins. Co., 214 Cal. 608, 615, 7 P.(2d) 305; Boyer v. United States F. & G. Co., 206 Cal. 273, 274 P. 57; Bassi v. Springfield Fire, etc., Ins. Co., 57 Cal. App. 707, 712, 208 P. 154; Mauck v. N. W. Nat. Ins. Co., 102 Cal. App. 510, 283 P. 338; Wong v. Stuyvesant Ins. Co., 100 Cal. App. 109, 279 P. 1050; Kavanaugh v. Franklin Fire Ins. Co., 185 Cal. 307, 197 P. 99.

Section 2586 of the Civil Code recognizes an insurance policy as a contract. It provides: "The written instrument, in which a contract

of insurance is set forth, is called a policy of insurance." The fact that a fire policy is a standard form prescribed by statute does not alter its status as a contract. It must, nevertheless, be construed as such. 2 Cooley's Briefs on Insurance (2d Ed.) p. 968; 1 Joyce on Insurance (2d Ed.) p. 546, § 206a; 32 C. J. p. 1093, § 177; Gazzam v. German Union Fire Ins. Co., 155 N. C. 330, 71 S. E. 434, 437, Ann. Cas. 1912C, 362. 2 Cooley's Briefs on Insurance, supra, says in that regard: "The fact that a fire policy is a standard form prescribed by statute does not alter its status as a contract, which must be construed by the rules of construction usually applied to insurance contracts."

This text is supported by numerous authorities from many jurisdictions. In 1 Joyce on Insurance, supra, it is said: "Although a standard form of policy is prescribed by statute, nevertheless upon its acceptance by the parties it becomes a voluntary contract between them which derives its force and efficacy from their consent. It constitutes their contract, and must be construed by the same rules as similar contracts voluntarily entered into."

In 32 C. J., supra, it is said: "A policy in the standard form prescribed by statute is to be treated, not as a legislative enactment, but as a voluntary contract."

The case of Gazzam v. German Union Fire Insurance Company, supra, quotes with approval from Quinlan v. Providence Washington Insurance Company, 133 N. Y. 365, 31 N. E. 31, 28 Am. St. Rep. 645, in that regard, as follows: "Now, as heretofore, it is competent for the parties to a contract of insurance, by agreement in writing or by parol, to modify the contract after the policy has been issued, or to waive conditions or forfeitures."

The Gazzam Case further quotes with approval from Vance on Insurance, at page 430 thereof, as follows: "While many of the unfair features of the earlier policies have been eliminated from the modern standard policy, the courts still apply to this instrument the same rule of construction as the considerations just mentioned led them to apply to the old forms."

In enacting the California standard form of fire insurance policy and making it a misdemeanor to execute a contract of insurance without compliance therewith, it was evidently the intention of the Legislature to protect the insured against highly technical and involved provisions which were inserted in lengthy and intricate policies by the skilled representatives of insurance corporations, which became traps for the unwary and frequently resulted in unjust forfeitures. It is said in that regard in the case of Heim v. American Alliance Ins. Co., 147 Minn. 283, 180 N. W. 225, 226, 1022: "The statute is founded on public policy. It was enacted to do away with the evils arising from the insertion in policies of insurance of conditions ingeniously worded, which restricted the liability of the insurer and gave the insured less protection than he might naturally suppose he was getting under his contract."

Regarding the purpose of the Legislatures in adopting a statutory form of policy, the Gazzam Case, supra, quotes from Armstrong v. Western Manufacturers' Mut. Ins. Co., 95 Mich. 139, 54 N. W. 637, as follows: "In construing this statute, we must consider the purpose which the Legislature had in view. * * * The object was to protect policy holders, and to provide a policy fair to the insured and the insurer, and avoid litigation. It was undoubtedly well known to the Legislature that policy holders do not usually examine and scrutinize their policies with the same care that they do other contracts which they make, involving their ordinary business transactions. The statute imposes a penalty upon an insurance company for issuing such a policy. * * * [Not in accordance with the standard form.] The law, so construed [as a statute rather than a contract], instead of operating to protect the insured, would afford the surest means to oppress and defraud them, and thus defeat the very object the Legislature had in view."

We are therefore of the opinion the statutory form of fire insurance policy which was adopted by the Legislature of California is deemed to be a contract, and that it is to be construed as such. It follows, in spite of the fact that the policy in the present case was the statutory form thereof, requiring sworn proof of loss, and a declaration of the origin of the fire to be furnished the company within sixty days of the date of the fire, and as a prerequisite to the commencement of an action on the policy, those provisions may be waived by subsequent declarations or conduct of the company or its authorized agents, and that the doctrine of equitable estoppel still applies to an alleged cancellation of the con-

tract for breach thereof. Waiver and equitable estoppel affecting a standard form of insurance policy may be proved by oral evidence exactly as it was established prior to the adoption of the standard form of policy.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



RUCKSTELL CORPORATION, Limited, v. GREAT LAKES AIRCRAFT CORPORATION.*

Civ. 8301.

District Court of Appeal, Second District, Division 2, California.

May 28, 1934.

Rehearing Denied June 26, 1934.

Principal and agent ⇨41.

Evidence in action against manufacturer for damages *held* insufficient to establish existence of direct contract with manufacturer for distribution of manufacturer's products.

Appeal from Superior Court, Los Angeles County; Allan B. Campbell, Judge.

Action by the Ruckstell Corporation, Limited, against the Great Lakes Aircraft Corporation. Judgment for plaintiff, and defendant appeals.

Reversed.

O'Melveny, Tuller & Myers, Homer I. Mitchell, and Albert Parker, all of Los Angeles, for appellant.

Kaye & Johnstone, of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

From a judgment in favor of plaintiff entered on the verdict of a jury, defendant has appealed.

Plaintiff's last amended complaint claims damages by reason of the breach by defendant of an alleged contract with plaintiff under which the latter alleged it was acting as distributor in southern California and Arizona of airplanes manufactured by defendant. A part of the damages allowed by the jury for such alleged breach was the sums of money laid out in preparing to perform and in performing such contract, less the income received from such performance and the value of materials on hand at the time performance was prevented.

Many points are urged by appellant, but most of them are based on the contention that the evidence does not support the finding of the jury by special verdict that a contract was entered into between plaintiff's assignor and defendant, as alleged in the complaint, on July 18, 1929, or in fact at any time, and that in consequence there was no such contract to breach. It is not questioned that there were some sums due plaintiff from defendant for labor done, supplies furnished, and money advanced at plaintiff's request, but such amounts do not aggregate the large judgment given, $26,570.87, which can only be justified by the existence of the contract alleged.

The evidence shows without dispute that on April 19, 1929, J. G. (Tex) Rankin was appointed distributor for defendant corporation's products in California, Washington, Oregon, and Idaho, and that he had contracted to buy from defendant one hundred airplanes of different models, it being provided in such contract that if within ninety days from date of the agreement he increased such contract by agreeing to purchase one hundred additional planes, the following states would be added to his territory, viz., Montana west of the Rocky Mountain continental divide, Nevada, Utah, and Arizona. The contract also provided that it could be canceled by either party with or without cause by mailing the other written notice of its intention so to do, and that such cancellation should operate as a cancellation of all orders for planes or parts not actually shipped; and, further, that the relation created between the parties by the contract was that of "vendor and vendee and not principal and agent, and neither the distributor nor any of its associate dealers, subdealers or employees shall be deemed the representatives of the company for any purpose whatever." It was further provided that before closing an agreement with any associate or subdealer a copy of the proposed agreement should be submitted to defendant corporation. This contract was canceled by defendant "about the first of October, 1929."

On or about July 18, 1929, G. E. Ruckstell, who was well and favorably known as the manufacturer and distributor of an improved axle for Ford cars, met Rankin, who interested him in selling planes made by defendant.

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 34 P.2d 495.

Ruckstell testified that Rankin said "that if I would make the arrangement to properly establish such an account such as a suitable hangar and location and have the proper personnel that was necessary for the conduct of such a business, and that if I would agree to take five planes per month until sixty total were taken, delivery to be made one carload at the time, each carload to include five airplanes per month, and if I would endeavor to establish dealers throughout the territory, and provided after talking with the Great Lakes Company * * * and it had their approval, *he* would appoint me distributor for Southern California and Arizona. * * * He said they had the approved type certificate and that * * * there should be no difficulty in licensing of these planes, * * * and as far as he knew they was satisfactory, and that if it was not that the factory would take care of any difficulty that would come with that product, or replace anything that was defective. * * * I said that providing these things we were to get would be actually carried forth, it would be agreeable to me to make such an agreement on that territory. * * * Mr. Rankin said he would like to put into writing these various things that we had talked of. I also stated that I would like to have it in writing. So * * * he said upon his return to Portland that he would send me a written arrangement or understanding of what we had entered into, and I was to do likewise. And that is generally what took place there. * * * I told him I had formed this corporation with my name to directly connect whatever little business acquaintance I had in this territory with my business, and that I would do all the necessary things to properly conduct such an account." Mr. Ruckstell further testified that he had talked with Rankin prior to July 18th and that on one occasion "Mr. Rankin said that *he* would like to make me a dealer or distributor for the Great Lakes Aircraft Company. * * * I told Mr. Rankin that I did not want to be just a local dealer or a small dealer. If I went into the agreement it would have to be for a larger territory. Mr. Rankin said he would release Southern California and Arizona."

Miss Eleanor Straka, secretary of plaintiff corporation and prior thereto "secretary to Mr. Ruckstell, personally, for seven years," who was present at the conversation between Ruckstell and Rankin, testified that "Mr. Rankin said in substance that in consideration of the organization of the corporation by Mr. Ruckstell and the embodying of Mr. Ruckstell's name and the renting of the necessary hangars and the employing of personnel and all the facilities for handling a business of the kind that was in contemplation, and the purchase or rather I should say the agreement to take sixty airplanes, four of which were then in Los Angeles, *Mr. Rankin was to see to it* that Mr. Ruckstell was given the exclusive distribution of Great Lakes airplanes by the Great Lakes Company," and that as a step to accomplish it he would communicate with Mr. Van Sicklen, vice president of the Great Lakes Corporation. "Mr. Rankin said Mr. Ruckstell at that time would receive five per cent of the commission to be paid." A telegram sent in furtherance of such understanding reads in part: "Have closed Southern California and Arizona with Ruckstell subject to minor changes regarding exclusive territory," and requested the diversion of a car of planes from Portland to G. E. Ruckstell, that draft be sent to Bank of Italy, Olive street branch, Los Angeles, and that the next car be sent to Portland. It also asked where Rankin could communicate with Van Sicklen the next morning at six.

Mr. Ruckstell further testified that Rankin told him that he (Rankin) had an agreement with defendant corporation giving him the exclusive right to sell their planes on the Pacific Coast, *and that he wanted Ruckstell to sell planes in the southern part of his territory* under an arrangement "whereby I would take a part of the commissions and he would take a part. *He said that he would make me a subdistributor in the southern part of his territory. As such subdistributor I would get fifteen per cent of the twenty per cent commissions, and would give him or see that he got five per cent.* I said I would agree to buy sixty airplanes. He told me he had agreed with the Great Lakes Aircraft Company to buy some planes; that sixty of these *he wanted to turn over to me.*" At that time Rankin had five planes with the Pacific Finance Company of Los Angeles, which company held them for payment of a balance due on the purchase price. Four of these were turned over by Rankin to Ruckstell, who paid the finance company's balance and repaid Rankin's company for the amount it had paid on the purchase price, Ruckstell taking his 15 per cent. commission and Rankin getting 5 per cent. Mr. Ruckstell then reiterated: "I told Rankin that *if he would give me a subdistributorship*, giving me the exclusive right to sell in Southern California, I would go out and try to sell airplanes, that I would pay him five per cent, that I would organize the corporation, that I would carry parts and put in the proper persons to take care of service and

do a certain amount of demonstrating and advertising—all things that are expected of anybody handling an account of that character. Mr. Rankin said if I would organize the corporation and put in this personnel, and buy sixty airplanes, that he would get me the territory—*that he would make me the exclusive dealer in this territory that we had discussed.*"

Fourteen planes were purchased by plaintiff or its assignor, Mr. Ruckstell, and the evidence shows that the commission was divided as stated, except on the last five. As to the commission on these, Mr. Rankin testified, apparently without contradiction, that plaintiff or its assignor, Ruckstell, owed his company $845 for parts shipped and charged to Rankin Airplane Sales Company, as well as commissions on the last five of the fourteen planes, for all of which bills had been sent; that in the meantime he, Rankin, came to Los Angeles, and inasmuch as Ruckstell still had the "ships" he, Rankin, "really felt I should not charge him any commission on it, and so I said if you will pay us the $845.00 we will forget about the commission, which he did."

While Mr. Van Sicklen, with whom Mr. Rankin talked from Los Angeles after his conversation with Mr. Ruckstell above referred to, and who was vice president and general sales manager at the time but who was discharged shortly thereafter, was not a good witness, it is perfectly clear from his evidence that the only understanding he had from such conversation was that Rankin, "acting as distributor for the territory of the Pacific Coast, had given Ruckstell, subject to my approval, a dealership or subdistributorship that was to include Southern California and Arizona," and that he did not understand "that the Great Lakes Aircraft Corporation was entering into any contract with G. E. Ruckstell or Ruckstell Corporation Limited."

In addition to the testimony already quoted, there is a letter on the letterhead of plaintiff corporation, signed by its director Burkhardt and dated September 12, 1929, relative to the difficulty of licensing the fourteen planes mentioned, addressed to Rankin Airplanes Sales Company, 409 Corbett Bldg., Portland, Or., stating in substance that defendant had reported the first four ships sold to Rankin Flying Service, and inasmuch as "Tex" Rankin gave G. E. Ruckstell a bill of sale for them, the department of commerce and labor had returned their applications for licenses with request for "bills of sale from Great Lakes to Rankin Flying Service and from Rankin Flying Service to Tex Rankin, to complete the line of ownership," and that the same were required as to the second car of five planes, but that as to "the last carload, your bill of sale is O. K. and we need only that of Great Lakes to you for completion." W. D. Sheffey, who had charge of the bookkeeping of plaintiff corporation, testified that the books of that company showed the "purchase of the fourteen Great Lakes airplanes from Rankin." The evidence shows without conflict that during September of 1929 plaintiff was dissatisfied with the arrangement made with Rankin and was trying to get him to release his claim on the territory in which it was selling, and a telegram from G. E. Ruckstell to C. F. Van Sicklen, Great Lakes Aircraft Corporation, dated the 18th of that month says in part: "If agreeable with you Rankin will relinquish California, Nevada, Utah and Arizona, for which I will pay him thousand dollars giving me these states direct with you," to which Van Sicklen replied, in part: "Hold deal with Rankin until I arrive." This was followed by a wire from Ruckstell as follows: "Consummation deal with Rankin can await your arrival here but must know your attitude regarding direct distributorship which I cannot close without additional discount and territory and which delay may forfeit. * * * If you are forwarding proper bills of sale to Rankin on all ships and Rankin in turn forwards us proper bills of sale on all ships licenses will be issued. Certified invoices are not acceptable." To this defendant answered by wire to plaintiff: "Our attitude regarding your acting as direct distributor is favorable. Want to discuss with you personally general details covering territory dealers number of ships and schedule also discounts. * * *"

Following this exchange of telegrams Van Sicklen came to Los Angeles and an agreement dated October 2, 1929, was signed by plaintiff and Van Sicklen for defendant subject, however, to approval at the office of defendant, which agreement, except for the territory named, was very similar to that theretofore given Rankin, including the provision for cancellation by either party, and which appointed plaintiff distributor for California, Nevada, Arizona, Utah, and the Hawaiian Islands. Plaintiff deposited the sum of $1,750 upon the execution of this agreement. Defendant's approval of such contract was not given, as a new plan of distribution was contemplated, and plaintiff, treating the failure to approve as a cancellation, through G. E. Ruckstell wired defendant as follows: "We hereby accept cancellation your contract. As our order for show planes was subject to contract this cancels our order for these planes

so do not ship them. * * * Please return our deposit money. * * *"

We do not believe, under the evidence in this case, that any other conclusion can be drawn than that the alleged oral contract of July 18, 1929, was simply an arrangement between Rankin, the Pacific Coast distributor of defendant corporation, and plaintiff's assignor, by which plaintiff, under Rankin, acquired the exclusive right to sell planes manufactured by defendant in part of Rankin's territory, plus the state of Arizona, which was not alloted Rankin by contract but which defendant was apparently satisfied to let him have; that there was no direct contract of agency between defendant and plaintiff or its assignor; and that when Rankin's contract was cancelled, any right plaintiff had fell with it. Nor in our opinion does the use of the word "distributor" by defendant, in speaking of plaintiff at various times, mean anything more than that it had the exclusive right of sale which resulted from its arrangement with Rankin and under the Rankin contract; and we fail to see any conflict with the direct and positive evidence which shows that no direct contract existed with defendant.

Judgment reversed.

We concur: STEPHENS, P. J.; CRAIG, J.

138 Cal.App. 668

RASKIN v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 9716.

District Court of Appeal, Second District, Division 2, California.

May 24, 1934.

1. Contempt ⇐3, 60(1).

"Contempt" is disobedience of court by acting in opposition to its authority, justice, or dignity, and is criminal offense that must be supported in same manner as other criminal charges, and subject to same presumptions.

[Ed. Note.—For other definitions of "Contempt," see Words & Phrases.]

2. Contempt ⇐30.

Power to punish for contempt is inherent in the court because of necessity for preserving order and enforcing its decrees and mandates, and does not depend upon express statutory sanctions.

3. Evidence ⇐21.

Court takes judicial notice that it is a general custom in the state for attorneys at law to employ other attorneys at law to assist in legal work and to appear in court without employed attorney being made attorney of record in that case.

4. Contempt ⇐10.

Attorney who was employed by another attorney and attorney of record to appear in court under instructions of employing attorney to argue motion in pending case *held* not guilty of contempt because of failure to be made an attorney of record in the case in which he appeared (Code Civ. Proc. § 1209, subdivs. 3, 6, 9).

Application by Edward M. Raskin to the Superior Court of the State of California in and for the County of Los Angeles, Charles L. Bogue, Judge, for certiorari to review a judgment of contempt of court.

Writ granted, and judgment annulled.

Loeb, Walker & Loeb, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel and Earl O. Lippold, Deputy Co. Counsel, both of Los Angeles, for respondent.

STEPHENS, Presiding Justice.

Our writ of review previously issued to the respondent court in the matter of its judgment of contempt of court pronounced upon petitioner.

The statements of fact as contained in the briefs enable the issue to be stated in one question. Is an attorney at law, employed by an attorney at law, guilty of contempt by appearing in court under instruction of his employer and arguing a motion in a pending case, the employer but not the employee being attorney of record in the case? Respondent cites subdivisions 3, 6, and 9 of section 1209, Code of Civil Procedure, as follows:

"3. Misbehavior in office, or other willful neglect or violation of duty by an attorney, counsel, clerk, sheriff, coroner, or other person, appointed or elected to perform a judicial or ministerial service."

"6. Assuming to be an officer, attorney, or counselor of a court, and acting as such, without authority."

"9. Any other unlawful interference with the process or proceedings of a court."

[1] In addition to the statute, the inherent power of the court enables it to protect its orderly processes by punishing those who disturb them. "No court of justice could accomplish the object of its existence unless it could in some way preserve order and enforce its mandates and decrees. The common method of doing these things is by the process of contempt. Therefore the power to proceed thus is incident to every judicial tribunal, derived from its very constitution, without any express statutory aid." Bishop on Criminal Law, vol. 2 (7th Ed.) 243.

[2] Contempt is a disobedience of court by acting in opposition to its authority, justice, or dignity, and is an offense of a criminal nature which must be supported as other criminal charges are supported and subject to the same presumptions.

[3, 4] We will take judicial notice of the fact that in California it is, and for a long time has been, a general custom sanctioned by recognition of the courts for attorneys at law singly and by firms to employ attorneys at law to assist in legal work placed in their care, including appearances in court without the formality of being made attorneys of record. We doubt not that the court could refuse to recognize an attorney at law until he became an attorney of record; or that the court could prescribe a general rule requiring such in every case, but nothing of this sort is before us. The simple action of petitioner in line with the established custom neither satisfied the requirements of contempt of court nor the requirements for conviction of that offense.

The judgment is annulled and vacated.

We concur: CRAIG, J.; ARCHBALD, Justice pro tem.



138 Cal.App. 614

PEOPLE v. MANRIQUEZ.

Cr. 99.

District Court of Appeal, Fourth District, California.

May 22, 1934.

1. Obstructing justice ⇐16.

Facts *held* insufficient to show that defendant was guilty of resisting a public officer while in the discharge of his duties (Pen Code, § 148).

Facts disclosed that a search of premises of another under illegal warrant had been completed and that defendant was illegally arrested and taken to premises, that he protested against his arrest, made threat impossible of execution, and ineffectual attempt to get and use flatiron, and resisted so that officers were compelled to use force to take him away.

2. Criminal law ⇐829(4).
Obstructing justice ⇐18.

In prosecution for resisting an officer, refusal to instruct that illegal search warrant gave officers no authority to search premises *held* error and not cured by instruction that jury should not consider any evidence not admitted, where jury had not been informed of refusal to admit search warrant, and there was testimony that search had been made under search warrant.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Teofilo Manriquez was convicted of resisting a public officer while in discharge of his duties, and he appeals.

Reversed.

N. D. Meyer and Morris Cain, both of Santa Ana, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendant was charged, under section 148 of the Penal Code, with the crime of resisting a public officer while in the discharge of his duties. He was found guilty by a jury and has appealed from the judgment and from an order denying a motion for a new trial.

[1] The incident out of which this charge arose occurred in Tustin on the evening of October 28, 1933, at the home of the appellant's daughter, a widow, with whom the appellant lived. Several officers came to the house armed with a purported search warrant and demanded admittance. They were admitted and proceeded to search the house, finding a small quantity of liquor and also observing certain things which caused them to believe that other liquor had recently been consumed on the premises. After the search had been completed, some of the officers went into the back yard where they observed the appellant approaching the house. They ar-

rested him on a purported charge which has no connection with what occurred in the house and, in spite of his protest, took him into the house. There is evidence that after being brought into the house the appellant said he would get a gun and shoot the officers. It was obviously impossible for him to do any such thing as the officers gave him no opportunity. The main thing relied upon by the prosecution is that the appellant took hold of a flatiron. The testimony is that he did nothing with it as one of the officers immediately took it away from him. Shortly after he was brought into the house the officers arrested his daughter, and one of the officers testified that when they attempted to take the two from the house each of them "hung on to the doors and everything they could get hold of, and we had to take them out by main force."

The appellant's contention that the evidence is not sufficient to support the verdict and judgment must be sustained. It developed at the trial that the search warrant under which the officers were acting was illegal and the court properly held it void and of no effect. Not only did the officers have no right to make the search, but the search was completed before the appellant entered the house and, so far as the record shows, before he knew anything about the entire matter, and there is absolutely no evidence to even indicate that the appellant made or offered any resistance to the officers, in so far as their executing a search warrant is concerned. Some claim is made by the respondent that since some liquor was found in the house while the daughter was there an offense was committed by her in the presence of the officers, which justified them in arresting her. If this may be assumed, although the officers were not legally there, it is not claimed that the appellant committed this offense, he was not charged with or arrested for it, there is no evidence that he knew of or participated in any offense committed in the presence of the officers, and it appears, without conflict, that he was not present when any such thing was supposed to have occurred, and that he was not in the house at all until he was wrongfully brought in by the officers. While there is some evidence that he hung on to a door and tried to keep from being carried out by the officers, there is absolutely no evidence that he interfered with the officers or in any way obstructed them in arresting his daughter for the offense which is claimed to have been committed by her. The only evidence in the record in any way tending to show an obstruction of an officer, in so far as the appellant is concerned, is that he protested against his own arrest, that he would not go with them voluntarily, that he made an impossible threat, and that he made an ineffectual effort to get and use a flatiron. It conclusively appears that all of this was done in protest against and in resisting his own arrest. He was arrested outdoors on another charge and the court properly held that this arrest was invalid and that he had a perfect right to do the act for which he was arrested. The record shows that the court instructed the jury that any act of the appellant in protesting or resisting his own arrest, under these circumstances, would not be sufficient to sustain the charge against him. The appellant claims that this instruction, although marked in the record as given, was inadvertently not read to the jury by the judge. Assuming, as contended for by the respondent, that we are bound by the record, it clearly appears that this instruction, if given, was not followed by the jury or the appellant could not have been found guilty under the evidence.

[2] It further appears that one of the officers testified that they entered this house by virtue of a search warrant, that they then searched the house, and that they found certain things. Later, the search warrant itself was offered in evidence and objected to, whereupon an argument took place out of the presence of the jury. At the conclusion of this argument the court sustained the objection and ruled that the search warrant was invalid and that the officers had no right to be there. These rulings were not repeated in the presence of the jury and the jury was never informed thereof. Under these circumstances the jury might naturally conclude that the officers had a right to be there and that they were doing their duty in executing the search warrant, and the verdict may well have been the result of a conclusion on the part of the jury that such resistance as was offered by the appellant was by way of resisting the officers in discharging their duty in connection with the search warrant. The court refused an instruction to the effect that the search warrant should not be taken into consideration as authorizing or giving the officers a right to enter or make a search of the premises and, under the circumstances, we think the failure to give such an instruction was error. The respondent argues that the error was cured by another instruction to the effect that the jury must not consider any evidence which had been rejected or which had been stricken out by the court. The evidence that the officers entered and searched

the house by reason of a search warrant remained in the record and the jury was not informed of the fact that the search warrant itself, which was offered in evidence, was not admitted or that the court had held the same to be illegal and void.

Other points are raised by the appellant which need not here be considered.

The judgment and order appealed from are reversed.

We concur: MARKS, J.; JENNINGS, J.



139 Cal.App. 69

In re TAMAGNO'S ESTATE.

TAMAGNO et al. v. BRUNO.

Civ. 9419.

District Court of Appeal, First District, Division 2, California.

June 1, 1934.

1. Wills ⇐166(1).

Evidence *held* to show that aged testator was not acting under undue influence when making will shortly before death leaving property to his guardian.

Evidence showed that testator entertained real attachment for guardian whom he had known for many years and was deeply grateful to him for management of estate, and it was also shown that guardian was not present when will was made.

2. Wills ⇐166(2).

Fact that decedent did not have independent advice in making will shortly before death leaving property to guardian would not of itself show undue influence.

3. Wills ⇐408.

Reporter's fee for preparation of transcript during trial was properly included in cost bill in will contest, where service rendered was ordered by court on application by attorney (Code Civ. Proc. § 274).

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Petition by Natale Tamagno and others to revoke the probate of the purported will of Antonio Tamagno, deceased, opposed by George W. Bruno. From an adverse judgment, contestants appeal.

Affirmed.

Andriano & Lowery, of San Francisco, and Myron Harris and Leo A. Sullivan, both of Oakland, for appellants.

M. Martino and John L. McVey, both of Oakland, for respondent.

STURTEVANT, Justice.

Antonio Tamagno died September 29, 1932, leaving a purported will. October 17, 1932, the will was admitted to probate. On January 24, 1933, Natale Tamagno and others filed a petition to revoke the probate of the purported will. The defendant answered and after trial the court made findings in favor of the defendant and from the decree entered thereon Natale Tamagno and the other petitioners have appealed.

In their brief the petitioners set forth numerous points; however, those points are but different methods of presenting the contention which in their reply brief they state as the sole question involved on this appeal—the sufficiency of the evidence introduced by the respondent. The respondent in answer concedes such to be the case. We will therefore address ourselves directly to that point.

In the shortest form the contention is this: In 1926 George W. Bruno was appointed guardian of Antonio Tamagno. He qualified and continued to act until the death of Tamagno. While defendant was acting as guardian, the decedent made his will on the 24th day of September, 1932, in favor of him, the said George W. Bruno. Relying on these facts the petitioners assert that the burden rested on George W. Bruno to assume the burden of proof and establish the fact that no undue influence was exercised on the testator. This the petitioners assert Bruno did not do. In reply Bruno asserts that he did establish the fact and that the trial court found it in his favor and that said finding is conclusive on appeal.

For many years prior to 1926 the decedent had been a resident of Oakland. During the same time both George W. Bruno and his father had been residents of the same place. Tamagno at the time of his death was about seventy-five years of age. He was a native of Italy but had come to this country and engaged in the occupation of gardening. The record does not disclose that he ever married, but at one time he had brothers and sisters at Busala, Italy. For fifteen or twenty

years before his death Tamagno had not received any communications from any of his kith or kin residing in Italy. He owned a lot on which was a small building in which he resided. A short time before August 10, 1926, a woman called at his residence and while on the premises suffered some injury for which she commenced an action claiming damages in the sum of $15,000. With the summons in his possession he called at the Fugazi Bank, of which George W. Bruno was manager, and discussed with the officers of the bank the fact that he had been sued. In that conversation he vigorously asserted that he had not caused the plaintiff any injury, that he was innocent of wrong, and if the plaintiff wanted his property she could take it and he would commence all over again. Mr. Bruno and others thereupon commenced to interest themselves in the affairs of Tamagno. The result was that after a hearing before the late Joseph S. Koford sitting as a probate judge, George W. Bruno was appointed guardian of Antonio Tamagno. Thereafter it transpired that the incompetent had on deposit in different banks $6,679 and that he also owned the real estate above mentioned. After the guardian was appointed the incompetent proceeded to do some gardening from which he received small amounts of compensation and did not make many withdrawals. However, when he appeared and asked for moneys they were paid to him at once.

For some years prior to his death Antonio Tamagno suffered from a cancer on his nose. At one time the appearance of the infection consisted of knobs the size of grapes. Apparently sensitive of his appearance he was accustomed to remain closely at home. Early in July, 1932, the disease had developed to such an extent that the decedent went to a hospital. As soon as Mr. Bruno heard of the fact he made arrangements for Mr. Tamagno to be taken to Providence Hospital. There he underwent certain operations. He had the proper care of nurses and doctors and was furnished with proper food and medicines. Soon after he entered that hospital he stated to Mr. Bruno that he desired to make a will. At the same time he stated that he had relatives residing in Italy. Such facts as he gave to Mr. Bruno the latter repeated to Mr. Martino, an attorney at law associated with Mr. McVey, another attorney. Both of those attorneys had been attorneys for Mr. Bruno but, so far as we have noted, Tamagno had never had an attorney. Mr. Martino conferred with Mr. McVey and the latter drew a will which contained a clause, "I direct that my property and estate be disposed of in accordance with the laws of succession of the state of California." The will was witnessed by Dr. C. A. Queirolo and Mr. Martino on July 27, 1932. Mr. Martino speaks Italian, Mr. Tamagno did not speak Italian but spoke in the Genoese dialect, of which Mr. Martino had an understanding. Mr. Martino interviewed Mr. Tamagno and reported the data to Mr. McVey who in turn drew the will. The record does not disclose any irregularity on the part of Mr. Martino, or Mr. McVey, and it does not disclose that Mr. Bruno took any part in getting that will executed as hereinabove stated. Almost daily thereafter Mr. Bruno called on his ward and attended to all of his wants. These calls continued down to about the middle of September. At that time Mr. Bruno went up on Russian river on a vacation. Miss Joyce was day nurse, Miss Loftus was night nurse. The doctors in attendance were Hamlin, Queirolo, and Appeldorn. All of these witnesses were called by respondent and were examined and cross-examined. While Mr. Bruno was up country Mr. Tamagno stated to Miss Joyce that he wanted to see Mr. Bruno about making a will. Miss Joyce put in a telephone call which was transmitted to the residence of Mr. Bruno and when he returned to Oakland he took the will dated July 27, 1932, and went to the hospital. Mr. Tamagno told him he wanted that will destroyed and he wanted a will drawn that would leave everything to Mr. Bruno. Thereafter Mr. Bruno communicated those instructions to Mr. McVey and a new will was drawn on September 24, 1932, which was witnessed by Charles A. Wilhelm and W. Dean Agnew. Mr. Wilhelm is attached to the office of Mr. McVey. Mr. Agnew is engaged in the insurance business and associated with Mr. Bruno. When the will had been prepared and was ready for signature, Mr. Bruno, Mr. Wilhelm, and Mr. Agnew went to the hospital. For the purpose of seeing whether the patient could be seen Mr. Bruno went in alone and soon returned. Thereupon, he remained in the automobile and Mr. Wilhelm and Mr. Agnew went in and the will was executed. That will bequeathed all of the decedent's estate to Mr. Bruno and is the will under attack in this action. The respondent produced Mr. Wilhelm, Mr. Agnew and Mr. Bruno as witnesses and they were examined and cross-examined. At no place was any evidence developed that under any circumstances could be called undue influence. Miss Joyce testified that prior to the making of the will on September 24, 1932, Mr. Tamagno told her he wanted to make another will. She testified: "He said

he wanted to get in touch with Mr. Bruno, he wanted to leave his money to Mr. Bruno so he could take care of him as long as he lived. He asked me to get in touch with Mr. Bruno." Mr. Wilhelm testified regarding the execution of the will. Among other things he stated: "There was nothing said by Mr. Agnew and Mr. Tamagno. I read the will and when I got through reading the will I asked Mr. Tamagno very positively whether he wanted to leave all his property to Mr. Bruno and he said, 'Yes everything.' He waved his hands just like that, 'everything.' Then I asked him whether he wanted Mr. Agnew and myself to act as subscribing witnesses and he said 'Yes,' and then we signed our names to the will." Mr. Agnew testified to the same effect. After Mr. Tamagno had executed the will the witnesses left the will in his possession and left the hospital. The next day Mr. Bruno called at the hospital and Mr. Tamagno handed him the will. The first will was destroyed by Mr. Bruno acting upon the request of the decedent. If we understand the record in this connection the fact is that the first will was destroyed the day before the last will was executed.

The petitioners assert that Mr. Tamagno did not understand English. Several witnesses testified that he did. Furthermore, at the time of the guardianship proceedings Mr. Tamagno appeared before Judge Koford and was by him asked many questions regarding his age, his health, his properties, and in particular about the law suit brought to recover damages. That examination discloses that Mr. Tamagno had a fair understanding of English words and the meaning thereof.

[1] After Mr. Bruno was appointed guardian, such proceedings were had in the damage case that it was compromised for a nominal sum. Considering all of the record, we think it is quite clear that the testator entertained a real attachment for Mr. Bruno whom he had known for many years and was deeply grateful to him for the management of his estate. We think it is also clear that the respondent must be sustained in his contention that he showed affirmatively that in making the last will the testator was not acting under undue influence of any kind or nature.

[2] While it does not appear that the decedent had independent advice, that fact standing alone does not break down the other facts hereinabove recited. It was a circumstance for the trial court to consider and no doubt it was duly considered by that court.

[3] The petitioners presented an additional question regarding costs. At the termination of proceedings at the end of the first day of the trial, respondent's attorney stated:

"I would like to ask for an order that the daily record be written up and charged against the estate for the benefit of counsel on both sides and the court.

"The Court: Very well, the testimony may be written up, a copy for the proponent of the will and a copy for the contestants."

Thereafter the respondent filed a cost bill which contained the following item: "Reporter's fees for preparation of transcript during the trial upon court order, $219.80." The petitioners moved to tax the costs by striking out said item. The motion was denied. At this time the petitioners contend that the trial court erred in denying their motion. Section 274 of the Code of Civil Procedure states the fees of the official reporter. Continuing among other things it contains the following passage: "The fees for reporting and for all other transcriptions ordered by the court to be made must be paid by the parties in equal proportion, and either party may, at his option, pay the whole thereof; and in either case all amounts so paid by the party to whom costs are awarded must be taxed as costs in the case. The fees for transcripts and copies ordered by the parties must be paid by the party ordering the same * * *." We think the point may not be sustained. If Mr. McVey had gone to the court reporter and made the statement to him directly then the point might have support. However ex industria for the purpose of protecting the rights of his client, he applied to the court and the court granted his motion and directed the transcription. The service rendered was therefore "ordered by the court" and the cost was recoverable.

We find no error in the record.

The judgment and order appealed from are affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

138 Cal.App. 644

HAYWARD LUMBER & INVESTMENT CO. v. CORBETT et al.

Civ. 8947.

District Court of Appeal, First District, Division 1, California.

May 24, 1934.

1. Mortgages ⇐151(3).

Where loan company opens account for construction loan, lien of trust deed securing note therefor annexes as of recording of deed, regardless of time when money passes respecting priority over mechanic's lien.

2. Mortgages ⇐151(3).

Where advances or payments under agreement for construction loan are optional with beneficiary, lien of trust deed securing loan is postponed to dates of advances respecting priority of mechanic's lien.

3. Mortgages ⇐66.

Trust deed is ineffective without delivery.

4. Mortgages ⇐186(5).

Evidence showed that trust deed securing construction loan was legally delivered respecting priority over mechanic's lien.

5. Mortgages ⇐151(3).

Materialman could not question loan association's right to finish building, using money set over to borrower's account where borrower absconded after executing trust deed respecting priority over mechanic's lien.

6. Mortgages ⇐335.

Notice of default and election to sell under trust deed being placed solely on ground of nonpayment of installments, beneficiary could not subsequently assert other grounds for default to support his notice, respecting sufficiency of title acquired by sale.

7. Mortgages ⇐335.
Time ⇐5.

Note and trust deed requiring default for three "months" before foreclosure proceedings meant calendar months, and beneficiary acquired no valid title under trustees' sale based on premature notice of default (Civ. Code, § 870).

[Ed. Note.—For other definitions of "Month," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the Hayward Lumber & Investment Company against Ralph E. Corbett and the Los Angeles Mutual Building & Loan Association, which filed a cross-complaint. Judgment for the cross-complainant, and plaintiff appeals.

Affirmed in part, and reversed in part, with directions.

Le Roy B. Lorenz, of Los Angeles, for appellant.

George E. Cryer, of Los Angeles, for respondent.

JOHNSTON, Justice pro tem.

The principal question presented by this appeal is one of priority of a mechanic's lien over a recorded deed of trust. The defendant Corbett, on January 11, 1929, applied to respondent for a construction loan of $2,500, with which to build a dwelling. He signed a note for that amount and a deed of trust. The deed of trust was recorded on January 18, 1929, in the official records of the county of Los Angeles, the county in which the premises were located. These instruments had been left with the escrow department of the respondent, and contemporaneously with the escrow, one Fuller, the owner of the lot on which the deed of trust was executed, deposited a grant deed to the premises with authority to record it with the deed of trust from Corbett to Fuller to secure payment of a note for the purchase price. Respondent on the 15th day of January, 1929, delivered to the title insurance company the grant deed from Fuller to Corbett, the trust deed from Corbett to respondent, and the trust deed from Corbett to Fuller, with instructions to record when guarantee of title could be issued by the title insurance company. Subsequently, by telephone, respondent countermanded this order, and instructed the title insurance company to record the papers at once, regardless of the condition of the title. The note in question required monthly payments of $29.75, payable on the 1st day of February, 1929, and the 1st day of each month succeeding, for a period of months. On January 11, 1929, respondent set over on its books to the credit of Corbett for his building account $2,500, to be paid out as the building proceeded. On or about February 8, 1929, Corbett started the construction upon the lot in question and on that day appellant started to deliver material upon the lot for that purpose. The first money that was paid on the building of the house in question was paid on February 13, 1929. However, it appears that prior to February 8, 1929, the date on which the mechanic's lien annexed, certain expenses of the title insurance company and investigations therefor had been incurred and charged to the account in question.

[1] The question first presented is whether the mechanic's lien has priority over the recorded deed of trust by virtue of the contention of appellant that the lien of the deed of trust must annex as of the date that the first money was actually expended from the account for the construction of the building. It seems that the law is well settled in this state that when a loan company opens an account for a building loan, and a deed of trust is executed to secure a note covering the amount of money advanced, the lien annexes as of the time that the deed of trust is recorded, irrespective of when the money in the account actually passes. Smith v. Anglo-California Trust Company, 205 Cal. 496, 271 P. 898; Valley Lumber Co. v. Wright, 2 Cal. App. 288, 84 P. 58; Savings Bank of Southern California v. Asbury, 117 Cal. 96, 48 P. 1081.

The Smith Case, supra, pertinently states at page 500 of the opinion in 205 Cal., 271 P. 898, 900: "In our opinion, the securities company, by granting Smith's application for a building loan in the sum of $20,000, accepting his promissory note in that amount secured by deed of trust, and opening in his name a building loan account, became obligated to advance or pay to Smith, or on his behalf, the full sum of $20,000. * * * In other words, the amount payable by the securities company under the terms of the loan agreement was not an undetermined or optional amount, but was at all times capable of definite ascertainment. The authorities, both in this state and elsewhere, are legion to the effect that, where a mortgage or deed of trust has been recorded prior to the commencement of work or the furnishing of materials, but the consideration therefor has not passed until after work has commenced or materials have been furnished, the lien of the mortgage or deed of trust is prior and superior to the mechanics' lien claims where the making of the advances *is obligatory* on the part of the mortgagee or the beneficiary. * * * In other words, the mortgage or deed of trust, as against subsequent incumbrancers or mechanics' lien claimants, becomes a lien for the whole sum advanced from the time of its execution and recordation, and not for each separate amount advanced from the time of such advancement, although the right to enforce the collection thereof can only arise upon each advancement being made." (Italics ours.)

The case of Hayward Lumber & Investment Company v. Naslund, 125 Cal. App. 34, 13 P.(2d) 775, has settled the question that the lien does not annex as of the time that the consideration passes, but as of the date when the instrument is recorded, if an obligatory consideration can be found to have passed at any time during its life. It was stated in that case at page 38 of 125 Cal. App., 13 P.(2d) 775, 777: "Neither the note nor the trust deed involved in this case gives any indication that the consideration was to be optional. Even if it were optional, it is not necessary to state that fact in the instrument when the amount of liability to be incurred in it is expressly limited, as in the present case. * * * Each of the instruments provided on its face for an unconditional payment of a certain amount, at one specified time." Owens-Parks Lumber Co. v. McCarty, 121 Cal. App. 623, 9 P.(2d) 310.

We appreciate that the Hayward Case has the added factor that the holder of the note and deed of trust was a bona fide purchaser for value without notice, but that can cast no doubt upon the interpretation of the principles of law for which this case is cited here.

It is difficult to appreciate how courts might conclude to the contrary in the presence of the authorities in this jurisdiction. A conclusion like that advocated by the appellant would place mechanic's lienors in the position that they would never be able to know from the condition of the record whether their lien was prior or subsequent to the deed of trust.

[2] A contrary situation arises, however, where the advances or payments under the agreement are optional with the beneficiary and the lien of the deed of trust is in such case postponed to the date or dates respectively as of which the advances actually are made. Fickling v. Jackman, 203 Cal. 657, 265 P. 810; W. P. Fuller & Co. v. McClure, 48 Cal. App. 185, 191 P. 1027. It cannot be contended from the facts in this case that there was an intention under the terms of the deed of trust to make the advances optional with the beneficiary or to annex the lien when advances were made.

It is also difficult to conclude otherwise than that the defendant Corbett executed the trust deed for $2,500 to respondent in consideration of a loan then and there agreed to be made. The money was transferred to the account for that very purpose and became a present, subsisting obligation, enforceable by the defendant Corbett against the respondent from the inception. Smith v. Anglo California Trust Company, supra.

The deed of trust recites that the money was paid over and that all recitals in the instrument are conclusive as between the parties to the instrument.

[3, 4] As a second point appellant raises the question of delivery. It is elementary that a delivery of a deed of trust is necessary to give it effect. There is nowhere in the evidence an indication that the deed of trust was not given to respondent to secure the advance incident to the loan consummated on the 11th day of January, 1929. The instrument was in fact presented to the respondent by the defendant Corbett at that time and respondent notified the title company to record it. The court below was right, therefore, in concluding that a valid delivery had been made, and that the lien of the deed of trust annexed prior to that of the mechanic's lien.

[5] Thirdly, appellant raises the question of the right of respondent to proceed to complete the building, after Corbett had absconded. In view of the obligation requiring the money to be set over for the particular purpose of constructing the building only, and by reason of the obligation on the part of Corbett *to expeditiously proceed to completion*, it may not be said that the respondent erroneously proceeded *in the place of Corbett to complete the building, using only such money as was set over for that purpose by the respondent to Corbett's account.* Corbett would have been powerless to have used the money in question for any other purpose but the construction of the building. It may be that Corbett might question the respondent's right to proceed in his stead, but it does not follow from this that appellant also may raise this question.

[6] Respondent urges other grounds of breach to justify the giving of the notice of breach which was recorded on April 23d; but the notice of default and election to sell is placed solely on the one ground that "no installments of principal and interest due on and after February 1, 1929, have been made * * *"; consequently respondent is powerless to insist upon other grounds for default at this time, to support his notice. The sufficiency of the title secured by respondent under the sale must be determined solely upon the issue of default in the payment of the amounts required under the deed of trust and note.

[7] Fourthly, appellant contends, and we believe rightly, that the decree quieting title is not properly before this court because no breach is made out under the terms of the trust. It was stipulated that the three installments under the note were due February 1, March 1, and April 1, 1929. The notice of default is dated April 18, 1929, and was recorded April 23d of that year. Both the note and deed of trust required that default shall continue for "three months" before the whole amount of the obligation shall become due and payable. If the issues of this case were limited merely to the question of priority of liens, the question of the validity of the sale would not be before this court. However, the cross-complaint has raised the issue of quieting the title in the respondent. The finding of the court and the judgment are in the nature of a decree quieting the title of the respondent to the premises. Therefore the validity of the sale is before the court, and it would appear that the trial court was in error in concluding and decreeing the title quieted in the respondent.

It has been held repeatedly that a *month*, when used to designate the passage of time under a contract or statute, means a *calendar month*. Sprague v. Norway, 31 Cal. 173; Savings & Loan Society v. Thompson, 32 Cal. 347; Fairchild-Gilmore-Wilton Company v. Southern Refining Company, 158 Cal. 264, 110 P. 951; Estate of McNamara, 181 Cal. 82, 183 P. 552, 7 A. L. R. 313; Messner v. Superior Court, 101 Cal. App. 172, 281 P. 503. The authorities have held that when the words "two months" are used, the term by interpretation means two calendar months. Barbee v. Young, 79 Cal. App. 119, 249 P. 15.

By the requirement of the note and deed of trust, it must be shown that a default must have subsisted for three calendar months before proceedings for foreclosure might take place. Since the first breach of the obligation was on the 1st day of February, default could be declared only after three calendar months had passed. Notice of the breach of the obligation should have been recorded after the 1st day of May, therefore. In view of the fact that the notice of default was recorded on April 23d, it must follow that the filing of the notice of the breach was premature, and the trustees had no authority, under the lien of the deed of trust, to sell to respondent the premises in question. The Code provides to this end that "where a trust in relation to real property is expressed in the instrument creating the estate every transfer or other act of the trustees, in contravention of the trust, is absolutely void." Civ. Code, § 870; Mersfelder v. Spring, 139 Cal. 593, 73 P. 452; Savings & Loan Society v. Burnett, 106 Cal. 514, 39 P. 922.

The proceeding which resulted in the sale to the respondent is therefore void; and although the trial court correctly concluded that the lien of the deed of trust was prior to that of the mechanic's lien, it erred in quieting the

title to the premises in the respondent by virtue of the void sale. For the reasons stated, that portion of the judgment based on the issues raised by the complaint and the answer thereto is affirmed, and that portion of the judgment based on the issues raised by the cross-complaint and the answer thereto is reversed, with directions to the trial court to enter judgment against the cross-complainant on the cross-complaint; respondent to recover costs of appeal.

We concur: KNIGHT, Acting P. J.; CASHIN, J.



138 Cal.App. 625

PEOPLE v. PIVAROFF.

Cr. 2481.

District Court of Appeal, Second District, Division 2, California.

May 23, 1934.

1. Homicide ⇐159.

In prosecution for murder and assault with intent to kill, testimony of accused on cross-examination that three and one-half weeks before murder of child and shooting of wife he hit wife in eye and pointed gun at her, *held* admissible to show accused's feelings toward wife, his treatment of her, and motive for assault.

2. Homicide ⇐22(2).

Killing preceded by and result of concurrence of will, deliberation, and premeditation on part of slayer is "murder of first degree" no matter how rapidly acts of mind may succeed each other or how quickly they may be followed by act of killing.

[Ed. Note.—For other definitions of "Murder in First Degree," see Words & Phrases.]

3. Homicide ⇐253(3).

In prosecution for murder, evidence that accused, though he had been drinking, was able to drive truck before and after murder and that accused and wife quarreled for several days before murder and that accused intended to kill wife with shots that killed child *held* to support conviction of first degree murder.

4. Homicide ⇐332(6).

Verdict of conviction of first degree murder supported by evidence and approved by trial court by denial of motion for new trial would not be disturbed on appeal.

5. Homicide ⇐17.

Accused who purposely and of his own deliberate and premeditated malice attempted to kill wife, but through mistake or inadvertence killed child instead, *held* guilty of first degree murder, since law transferred felonious intent from object of assault.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Jack Pivaroff was convicted of murder and of assault with a deadly weapon with intent to commit murder, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

SCOTT, Justice pro tem.

Defendant was charged by an amended information filed November 2, 1933, in count I with the murder of his child, Geraldine Pivaroff, and in count II with assault with a deadly weapon with intent to commit murder on his wife, Sarah Pivaroff. The jury found him guilty as to count I with recommendation of life imprisonment, and guilty as to count II. From judgments of conviction entered on said verdict and from the order denying his motion for a new trial, defendant appeals.

In the early morning of September 5, 1933, defendant left the house where he resided with his wife and two year old child, driving away on his truck, which he used in making delivery of bottled water to his customers. Around noon he returned home and drove the truck into his garage. He had been drinking. He insisted that his wife join him in drinking some beer and then had her lie down on the bed with him. There was some quarreling and mutual recrimination. Defendant finally grabbed his wife, but she broke away and ran out of the house, taking the child with her. He then seized a double-barreled shotgun and fired both shots at them, wounding the wife and killing the child. While neighbors were assisting the victims, defendant went to his garage, backed out his machine, and had gone several blocks when he was overtaken and arrested.

[1] Appellant contends that the court erred in permitting the defendant to be cross-examined as to previous conduct toward his

wife. On direct examination he testified that he had a habit of kissing his wife and baby every morning when he left; that he had done so on this morning; and that he was not "mad" at his wife. On cross-examination he was asked if he had not beaten her three and a half weeks previous to the shooting, to which he replied: "Well, we got in an argument once and I did not beat her. I just swung at her once and accidentally caught her in the eye." Defendant was then asked if he had not pointed a loaded gun at his wife and he replied: "I pointed a gun but it was not loaded." The conduct of defendant toward his wife was properly admissible as tending to show the state of his feelings toward her, his treatment of her, and in some degree to show a motive for taking her life. People v. Kern, 61 Cal. 244; People v. Chaves, 122 Cal. 134, 54 P. 596.

[2-5] Appellant further contends that the trial court should have granted his motion for a new trial or reduced the verdict to manslaughter, on the ground that the evidence does not support a verdict finding him guilty of first degree murder in that he was too drunk to know what he was doing and evidence of malice was lacking. It is not disputed that defendant had been drinking on the day of the shooting. When he arrived home, however, he was able to drive his truck into the garage. After the shooting, he carefully backed down the driveway, stopped on the sidewalk to let a bus go by, and proceeded down the street until overtaken by officers. When the latter stopped him, he said: "Well, you got me," and at the sheriff's substation a few minutes later he told them he intended to kill his wife with the two shells he had in the gun and then to kill himself, but that he got excited, ran out of the door, and drove away. He later related the story of a quarrel which had lasted several days up to the time of the shooting and culminated just before the tragedy in his attempt to grab his wife and her breaking away and running out of the house, whereupon defendant seized the shotgun and fired the fatal shots. Defendant stated that he intended to kill his wife but did not intend to kill the baby.

The killing is murder of the first degree if the act is preceded by and is the result of a concurrence of the will, deliberation, and premeditation on the part of the slayer, no matter how rapidly these acts of the mind may succeed each other or how quickly they may be followed by the act of killing. People v. Maughs, 149 Cal. 263, 86 P. 187; People v. Fowler, 178 Cal. 657, 174 P. 892. The evidence is sufficient to support the verdict of murder in the first degree under the rule just stated, and the jury having determined the facts by their verdict and the trial court having approved the verdict by its denial of the motion for a new trial, that determination will not be disturbed on appeal. People v. Tom Woo, 181 Cal. 315, 184 P. 389. The fact that defendant's shots actually killed the child instead of the wife does not alter the case. Where a person purposely and of his deliberate and premeditated malice attempts to kill one person but by mistake or inadvertence kills another instead, the law transfers the felonious intent from the object of his assault and the homicide so committed is murder in the first degree. People v. Suesser, 142 Cal. 354, 75 P. 1093.

Judgment and order affirmed.

We concur: STEPHENS, P. J.; DESMOND, J.



FAITH et al. v. MORELLO et al. *

Civ. 1300.

District Court of Appeal, Fourth District, California.

May 16, 1934.

Rehearing Granted June 12, 1934.

1. Contracts ⇐147(3).

Intent of parties to contract must be ascertained by consideration of instrument in its entirety.

2. Vendor and purchaser ⇐77.

Contract for sale of vineyard providing for purchasers' payment of interest and principal installments on outstanding incumbrance, with provision for extension in event of insufficiency of net income from property to make "payments herein required to be made by buyer," *held* to require payments on incumbrance only to extent of net income from property.

3. Vendor and purchaser ⇐77.

Purchasers *held* not entitled to include initial contract payment as disbursement in determining net income from property available for payments on incumbrance, where contract did not include such initial payment as part of first year's installment in clause

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 37 P.2d 183.

providing for purchasers' deposit of excess proceeds of crops in trust.

4. Vendor and purchaser ⇐77.

Amounts paid for automobile, for receiver of vineyard and his attorney, and cash balance remaining when receiver was discharged, *held* not deductible from crop income as "operating expense" in determining net income available under vineyard purchase contract for payment on incumbrance.

[Ed. Note.—For other definitions of "Operating Expenses," see Words & Phrases.]

5. Specific performance ⇐97(1).

Failure of purchasers to apply all profits from vineyard to payment of interest and principal on incumbrance, under purchase contract requiring application of net income for that purpose, precluded them from recovering decree for specific performance.

6. Vendor and purchaser ⇐186.

That purchasers had used private funds to pay operating expenses of vineyard *held* not to excuse their default in failing to apply part of proceeds of crops to payment of incumbrance, as required by contract, where contract required them to use their private funds to make payments.

Appeal from Superior Court, Fresno County; H. S. Schaffer, Judge.

Action by Harry Faith and another against E. Morello and another. Judgment for defendants, and plaintiffs appeal.

Modified and affirmed.

W. H. Stammer and Percy C. Church, both of Fresno, for appellants.

Ray W. Hays, of Fresno, for respondents.

JENNINGS, Justice.

This is an appeal by plaintiffs from a judgment rendered in favor of defendants by the superior court of Fresno county. The action was instituted by plaintiffs for the purpose of obtaining a decree compelling specific performance by defendants of a certain contract entered into between plaintiffs and defendants whereby defendants had agreed to sell and plaintiffs had agreed to buy a certain parcel of land for a stipulated sum of money. The complaint alleged that upon execution of the contract plaintiffs had entered into possession of the property and had fully performed their part of the agreement, that defendants had wrongfully secured possession of the property and refused to surrender possession to plaintiffs who were entitled thereto. The defendants filed an answer and cross-complaint wherein they admitted execution of the contract and that they had retaken possession of the land, but alleged that they had done so for the reason that plaintiffs had violated the terms of the contract of sale. The pleading concluded with the prayer that the title of defendants to the property be quieted as against the claims of plaintiffs.

It is conceded that there was no material conflict in the evidence which was submitted during the trial of the action. The main question presented on this appeal relates to the construction by the trial court of a certain provision of the aforesaid contract. It is the contention of appellants that the trial court incorrectly interpreted this provision. Consideration of this contention necessitates a brief statement of the facts which were developed by the evidence.

On August 4, 1930, respondent Paradise Vineyards, Inc., was the owner of a tract of land in Fresno county comprising approximately 320 acres. On this date the said corporation entered into a written contract with appellants whereby it agreed to sell and appellants agreed to purchase the property for the sum of $90,000, of which amount the sum of $2,500 was paid in cash on the execution of the agreement and a further sum of $22,500 was to be paid from the proceeds to be derived from the sale of grapes that were then being grown on the land. The balance of the purchase price, which amounted to the sum of $65,000, was to be paid in specified annual instalments. The contract recited that "both parties hereto understand that said property is subject to" a lien of the Bank of Italy in the sum of $46,250. It is also evident from the terms of the contract that the lien of the bank was one which existed by virtue of a trust deed or mortgage executed by respondent and that by the terms thereof the respondent was obligated each year to make a payment of $7,500 on account of the principal of the indebtedness to the bank and also to make semiannual payments of interest due on the unpaid balance of the principal. The contract between the respondent corporation and appellants contained the following provision which it is contended the trial court improperly construed: "In the event the income from said real property, due to frost injury, market conditions, or other conditions beyond the control of buyers, is so reduced that it is insufficient, after deducting operating costs, to make the payments herein required to be made by buyers, then

should buyers and both of them be unable financially to make said payments from funds or other resources under their control, seller agrees that they will for such year consent to an extension of the payment accruing for such year to the December first following, provided that the actual net income from said real property is applied towards the payment of taxes first, the payments of interest on the first incumbrance, secondly, and thirdly towards the payment of any installments on said first incumbrance accruing during said year, and sellers expressly consent that buyers may procure from the holder of said incumbrance an extension of the installment payment accruing in such year after the application of the net proceeds from operations of said real property have been applied as herein required. Should, however, owing to insufficient net income or insufficient resources of buyers, exclusive of income from said real property, be insufficient to prevent a foreclosure of the incumbrance on said real property and a foreclosure occur, buyer shall in that event have no cause of action or claim against seller by reason of the loss of his investment in said real property. In this connection buyers agree that they shall keep careful record of all operating expenses for each year, which record and expenses shall be furnished to seller in the event an extension is required under this paragraph."

The court found that after the execution of the contract appellants went into possession of the property and performed all terms, covenants, and conditions of the agreement which they were required to perform except that they failed to make the payments of principal and interest to the Bank of Italy which were due on December 1, 1931. The court also found that during the year 1931 the crops which were produced on the land were approximately one-third of the normal crops, due to excessive heat and other conditions beyond the control of appellants and that for this reason the proceeds from the sale of crops were so reduced that they were insufficient to pay the operating expenses of the property and that appellants were not nor was either of them financially able to make the payments required of them by the contract or to the bank and that there was no actual net income from the property during the year 1931. The court, however, further specifically found that by the terms of the contract appellants were bound to make the payments of principal and interest due the Bank of Italy on December 1, 1931, even though the net income from the property during the year 1931 due to frost injury, market conditions, or other conditions beyond the control of appellants was so reduced that it was insufficient to make the payments required to be made by appellants and even though appellants were and each of them was financially unable to make such payments from funds under their control or the control of either of them and even though there was no actual net income from the property. In other words, the court so interpreted the contract that appellants were required to make the annual payments due to the bank and so construed the agreement that the obligation to make such payments was not included within the language of the provision by which the respondent corporation expressly agreed to extend for one year the payments which were specified to be made to it by appellants in the event that the net income from the property should prove insufficient to make such payments and appellants were financially unable to make the payments from their private funds.

[1, 2] The language of the so-called extension clause of the contract hereinabove quoted appears to lend support to the contention of appellants. It is therein stated that if it should develop that the net income from the property, by reason of specified conditions, including the very general contingency of the occurrence of conditions beyond the control of appellants, should be so reduced as to make it insufficient to make the payments which appellants were required to make by the terms of the contract and if appellants should be financially unable to make these payments from funds under their control, the respondent corporation agreed that it would "for such year consent to an extention of the payment accruing for such year to the December first following." The court found and there is no contention that there was not ample evidence to support its finding that the very situation mentioned in the extension clause did come into existence during the year 1931. The evidence showed that this year was an unusually dry year and that the quantity of crops produced was slightly more than one-third of that which had been produced during the preceding year and that consequently there was no net income derived from the land, but that, on the contrary, appellants paid more than $6,000 from their private funds to supply a deficiency in the amount required to pay operating expenses. The undisputed evidence also showed that neither appellants jointly were, nor either of them severally was, able to

make the payments required of them by the terms of the contract. This situation, which was exactly the one which was evidently anticipated might occur, would seem to fall within the express terms of the aforesaid clause of the contract and to require the respondent corporation to grant to appellants an extension of one year in the payment of the installment which was due from appellants on December 1, 1931.

Furthermore, it is a familiar and well-established rule that, in the interpretation of written agreements, the essential element of the intent of the parties to a contract is to be discovered by a consideration of the instrument in its entirety rather than by an examination of detached portions of the instrument. Hunt v. United Bank & Trust Co., 210 Cal. 108, 291 P. 184; Nakagawa v. Okamoto, 164 Cal. 718, 130 P. 707; Mente & Co. Inc. v. Fresno Compress & Warehouse Co., 113 Cal. App. 325, 298 P. 126; 6 Cal. Jur. 259. The application of this rule lends further support to the contention advanced by appellants. Analysis of the lengthy and complicated contract which was entered into between the respondent corporation and appellants shows that on the date of the agreement the corporation was the owner of the land; that the property was subject to the lien of a trust deed or first mortgage which had been executed by the corporation to secure the payment of an indebtedness owing from the corporation to the Bank of Italy; that the corporation was obligated on December 1st of each year to make a payment of $7,500 on the principal of the indebtedness and on June 1st and December 1st of each year to make semiannual payments of interest on the balance of such indebtedness; that on the date of the agreement the principal of this indebtedness was $46,250. As above noted, appellants agreed to purchase the property for the sum of $90,000, of which they paid $2,500 in cash and agreed to make a further payment of $22,500 from the proceeds to be derived from the sale of grapes which were then growing on the land. The balance of the purchase price, amounting to $65,000, was to be paid as follows: "$7500.00 on or before December 1, 1931; $7500.00 on or before December 1, 1932; $7500.00 on or before December 1, 1933; $7500.00 on or before December 1, 1934; $6000.00 on or before December 1, 1935; $6000.00 on or before December 1, 1936; $5000.00 on or before December 1, 1937; and $5000.00 on or before the first day of December of each succeeding year until the entire balance of the purchase price hereunder shall have been paid." Deferred payments were to draw interest at the rate of 7 per cent. per annum, payable on December 1 of each year. It was expressly provided that appellants were required on the 1st day of December and the 1st day of June next succeeding the date of the agreement to make the semiannual payments of interest which should be due on those dates on the balance of the principal indebtedness due the Bank of Italy, "but aside from the payment of the interest on this incumbrance which must be made semi-annually, buyers' interest shall be paid annually on the first day of December of each year." The buyers were expressly accorded the privilege of making "all payments accruing hereunder to the Bank of Italy directly, in lieu of making payments to seller, and payments so made to the Bank of Italy shall as and when made be credited as payments upon this contract." It was then further provided that if the interest on the unpaid balance of the indebtedness due the Bank of Italy were paid "as it matures each year by seller, in accordance herewith, that the balance of the accruing interest on this contract may be added to the principal until such time as a flat loan can be secured on said real property from the Bank of Italy or elsewhere, and that from the time the flat loan is secured buyer shall thereafter, on the 1st of December of each year, pay all accruing interest for the previous year under this contract." The next paragraph, after reciting that the property is subject to the aforementioned lien of the Bank of Italy in the amount heretofore specified, contains an express agreement by the seller to make payment on or before December 1, 1930, of the installment due on the principal of the indebtedness due the Bank of Italy and of the interest due the bank on said date. Then follows a statement to which both parties to the contract expressed their agreement that, if the Bank of Italy could be induced to accept a less sum than the amount of the $7,500 installment which would be due on the principal of the indebtedness on December 1, 1930, the amount thus retained should be used for drilling an additional well and installing a pump provided that such money, together with funds "available from buyer," would be sufficient for such purpose. The succeeding paragraph contains a covenant of mutual agreement that both parties will cooperate in attempting to secure from the Bank of Italy or from any other lender a flat loan on the property for a term of three years at an

interest rate not to exceed 7 per cent. per annum and that the parties will join in the execution of whatever instruments may be required for the securing of such a loan. The next paragraph contains the so-called extension agreement of the seller as hereinbefore quoted in full. The paragraph following contains an express covenant by appellants that, after the payment of the additional sum of $22,500 has been made from the net proceeds of the 1930 crop, whatever balance of such net proceeds remains will be deposited in a separate bank account to be used in taking care of the property for the year 1931, "including the payment of taxes," and appellants declare themselves trustees of the proceeds of the crops for the purpose of making the payments required. It is further specified in this paragraph that appellants agree that, prior to the commencement of operations in the year 1931, they will convince the seller and the bank that they have sufficient resources available to farm and take care of the land properly during the year 1931, "including payments of taxes and interest to the Bank of Italy." A number of additional paragraphs follow which contain provisions that are not particularly helpful in disclosing the intent of the parties. The final paragraph contains the usual provision that if appellants as buyers fail to make any payment required to be made by them or to perform any of the terms or conditions required to be performed by them, the seller, respondent corporation, will be authorized, at its election, to cancel and terminate the contract, in which event appellants agree to deliver possession of the property to the respondent corporation and all payments theretofore made by appellants under the contract shall be retained by the corporation as a reasonable rental of the property.

From the above-described complicated and not altogether unambiguous provisions of the contract, certain deductions respecting the intention of the parties may reasonably be drawn. In the first place it appears evident that the parties intended and expected that whatever payments that were to be made under the contract, other than the initial payment of $2,500, would be derived from the net proceeds of crops that would be grown on the land. In the second place, it is obvious that the parties recognized the existence of a lien which had been placed upon the property by the respondent corporation and a definite obligation of the seller to make an annual payment of the sum of $7,500 on the principal of the indebtedness which the lien secured and two semiannual payments of interest on the unpaid balance of such indebtedness. In the third place, it is apparent that appellants were expressly permitted to deal directly with the owner and holder of this lien and to make to such owner any payments required to be made by the contract. In the fourth place, it is evident that the respondent corporation was primarily interested in securing from appellants, each year, sufficient money to meet the annual payment of the installment due on the principal and the semiannual interest charges.

Taking specifically the language of the extension clause of the contract whose proper interpretation presents the legal problem which is here involved, we find that the respondent corporation expressly agreed that, if the net income from the property due to certain stated conditions, including the very general contingency of "other conditions beyond the control of buyers," should be insufficient to enable the buyers to make the payments required of them and if the buyers should further be financially unable to make such payments from their private funds or resources, it would consent to an extension of the payment accruing for such year to the December first following. What were these payments which by the terms of the contract appellants were required to make during the year 1931? They were first a payment of $7,500 on the $65,000 balance and, second, a payment of interest on this balance at the rate of 7 per cent. for one year. Both of these payments were to be made on December 1, 1931. If these payments were not made, due to insufficiency of net income from the property caused by any of the specified conditions, the respondent corporation became obligated to grant an extension. This, however, had nothing to do with the corporation's obligation to make payments on the principal and interest of the indebtedness which it owed to the third party. That obligation was separate and distinct from the obligations of appellants as defined by the contract. However, the existence of the obligation of the respondent corporation was specifically recognized, and this respondent hoped and expected that appellants would be able to make the payments required by the contract and appellants were expressly granted the option to make payments direct to the third party. Appellants were expressly required by the proviso which is contained in the extension clause to apply whatever net income that should be derived from the property during the year 1931 to the payment of certain specified charges. They were required, first, to pay the taxes assessed against the property; second, to pay

the interest on the "first incumbrance"; and, third, to pay any installments "on said first incumbrance accruing during the year." With respect to the application of the net income to the payment of any installments of the principal indebtedness secured by the so-called "first incumbrance" there is a modification consisting of an express consent by the respondent corporation that appellants might procure from the holder of such incumbrance an extension of the installment payment which was due from the corporation after the net proceeds from the property had been applied to the payment of taxes and interest on such first incumbrance. What would happen if the net income from the property were insufficient and appellants were unable from their private funds to make the payments required of them and the holder of the first incumbrance should bring an action of foreclosure? This very contingency was evidently considered, for the last sentence of the extension clause expressly provides that in such event "buyer shall have no cause of action or claim against seller by reason of the loss of his investment in said real property."

In support of the trial court's interpretation of the so-called extension clause, respondents rely on certain language which appears in another part of the contract and upon certain evidence which was produced whose effect was, it is urged, to show a practical interpretation of the extension clause by appellants which amounted to the same interpretation placed upon the extension clause by the trial court.

The language of the contract upon which respondents thus rely is as follows: "Buyers must pay interest semi-annually on June 1st and December 1st, next succeeding, to the amount of interest accruing on the present incumbrance now held by the Bank of Italy, or on any incumbrance or substitution thereof that may be placed thereon, but aside from the payment of the interest on this incumbrance which must be made semi-annually, buyers' interest shall be paid annually on the first day of December of each year." It is contended that the foregoing language clearly imposed upon appellants the definite duty to make the semiannual interest payments which were required to be made on the unpaid balance of the principal indebtedness secured by the lien of the so-called first incumbrance and indicated that the payment of interest charges on the first incumbrance was not covered by the language of the extension clause.

However, if it be assumed that the above-quoted language imposed upon appellants the obligation of paying the semiannual interest charges on the first incumbrance, it must be conceded that this duty was one that was created solely by the contract. No one has had the temerity to suggest that it came into existence in any other manner. Certainly it could not have been imposed by the terms of the trust deed or mortgage which represented the lien of what is so frequently called the "first incumbrance" in the contract. The first incumbrance was in existence when the contract between the parties to the present action was executed. It was placed upon the property either by the respondent corporation or by one of its predecessors in interest. It is nowhere suggested, nor does the record contain any evidence tending to show, that appellants were parties to the trust deed or mortgage which was owned by the Bank of Italy. Since the obligation to make the semiannual payments of interest charges on the first incumbrance was one that was imposed upon appellants solely by the terms of the contract, it would appear that it is clearly covered by the following language of the extension clause: "In the event the income from said real property * * * is so reduced that it is insufficient, after deducting operating costs, *to make the payments herein required to be made by buyers*" (italics ours). The intent of the respondent corporation that the payment of interest on the first incumbrance should be considered as an obligation imposed upon appellants by the contract is further indicated by the language of the proviso which appears in the extension clause wherein the promise of the respondent corporation to grant an extension is qualified by the condition that the actual net income from the property shall be applied, first, to the payment of taxes; second, to the payment of interest on the first incumbrance; and, third, to the payment of any instalments on the principal of the first incumbrance that have become due during the year.

The contention of respondents that there had been a practical interpretation of the contract by appellants which coincided with the trial court's interpretation is based upon certain evidence which was produced during the trial. It was shown that prior to June 1, 1931, appellants had negotiated directly with the Bank of Italy with respect to the payment of interest on the first incumbrance which would be due on June 1, 1931, and that as a result of these negotiations the bank, on May 28, 1931, accepted from appellants their promissory note for the sum of $1,582.29, representing the interest which would be due on the first incumbrance on June 1, 1931, payment of which note was se-

cured by a chattel mortgage executed by appellants and likewise delivered to the bank. By this action in thus dealing directly with the bank and by thus paying the interest on the first incumbrance to the bank, it is argued that appellants themselves so construed the provisions of the contract as to indicate that they recognized that they were obligated to make the semiannual payments of interest on the first incumbrance and further recognized not only a distinct obligation to pay the interest but an obligation to pay the interest direct to the holder of the first incumbrance. The next step in this line of reasoning is that the recognition of an obligation to pay the interest direct to the third party amounted to a practical admission by appellants that all payments, both of interest and of installments of the principal of the first incumbrance, were required to be paid by them, not to the respondent corporation, but to the holder of the first incumbrance. The final step in this reasoning is that the trial court correctly interpreted the language of the extension clause in exact conformity with the practical interpretation placed upon it by appellants themselves.

There are two difficulties which prevent the acceptance of this reasoning. In the first place it does not take into account the fact that whatever obligation rested upon appellants to make any payments on the first incumbrance was an obligation which was created by the contract. These payments were therefore payments which were required by the contract to be made by the buyers (appellants) and as such were included within the very language of the extension clause. In the second place, the action of appellants in dealing directly with the holder of the first incumbrance cannot be construed as an admission by appellants of a distinct obligation thus to deal for the reason that appellants were expressly accorded the privilege of making all payments which should fall due under the terms of the contract directly to the Bank of Italy "in lieu of making payments to seller, and payments so made to the Bank of Italy shall as and when made be credited as payments upon this contract." In other words, appellants were given the option of making all payments required of them under the contract directly to the bank and their exercise of this option may not be construed as an admission by them that such payment so made is not included within the language of the extension clause.

It is therefore our opinion that the trial court incorrectly interpreted the extension clause of the contract and that its finding which expresses this improper interpretation is not justified.

[3] However, our opinion that the trial court incorrectly construed the extension clause is not conclusive of the case. The trial court found that "during the year 1931 the crops raised and produced upon said real property were approximately one-third of the normal crops, due to excessive heat and other conditions beyond the control of Harry Faith or Melville Levy, and the proceeds from the sale of such crops, due to conditions beyond the control of Harry Faith or Melville Levy, were so reduced that they were insufficient during the year 1931 to pay the operating costs. Harry Faith and Melville Levy were not, nor was either of them, able financially to make the payments due under the agreement or to the Bank of America from funds or other resources under their control, or the control of either of them. There was no actual net income from said property during the year 1931." It is our opinion that the whole of this finding is not supported by the evidence as will hereafter appear.

A detailed statement of gross income derived from the proceeds of crops grown on the property from August 1, 1930, to December 31, 1930, as rendered by appellants was admitted in evidence. This statement showed that the total amount of such receipts was $45,945.61. A statement of the disbursements made during the same period showed that the total amount of such disbursements was $47,877.10. This indicated and appellants contended that there was a loss of $1,931.49 in the operation of the property for this four-month period. However, an examination of the statement of disbursements shows that a payment of $25,000 to the respondent corporation is included among the items of disbursement. Appellants were not entitled under their contract to include the entire amount of $25,000 as a disbursement so that the funds available for the payment of their specified obligations would thereby be reduced. They were not entitled to charge as an operating expense or to deduct from the proceeds received by them from the sale of grapes during the year 1930, the sum of $2,500, which they paid as an initial payment on the contract. If, therefore, a deduction of this sum from the total operating expense is made it shows that the total disbursements properly chargeable amounted to $45,377.10. Since the total receipt for the period amounted to $45,945.61, it follows that appellants embarked upon the year 1931 with a balance of $568.51. In this connection it is

to be noted that it was specifically agreed in the contract "that all net returns from the sale of crops grown on said lands during the year 1930 shall be kept intact and in a separate fund, and after payments from each car have been made until the $22,500 additional has been received by seller, buyers agree to deposit the balance of the net proceeds from said grape crop in a separate bank account to be used in taking care of the place for the year 1931, including the payment of taxes; and the buyers are hereby made and do declare themselves to be trustees of the proceeds of said crops, and all thereof, for the purpose of making the payments and application of said proceeds in accordance herewith. From this language it is evident that appellants were expressly permitted to pay from the net proceeds received by them from the sale of grapes grown on the land during the year 1930 the sum of $22,500 and no more and that they were obligated to use whatever balance of the net proceeds that should remain after payment of the aforesaid sum of $22,500 to the maintenance of the property during the year 1931.

[4-6] It further appears from the evidence which was produced during the trial that in the month of April 1931, three persons who alleged that they were interested with appellants in the operation of the property as a joint adventure instituted an action against appellants for an accounting and settlement of the business and for the winding up and closing of the business. The complaint prayed for the appointment of a receiver and on April 20, 1931, a receiver was appointed and so far as appears the receiver continued to operate the property until his discharge in the month of December, 1931. The receiver filed an account of his administration of the property, wherein he showed receipts of $14,521.03 and disbursements of $12,706.18 and a balance on hand of $1,814.85. He later filed a supplemental report showing receipt of an additional sum of $196.89 and additional disbursements amounting to $1,790.36 and a final balance of $221.38 on hand. Included among the items of disbursement made by the receiver is one for $308.50 for a Ford coupe. The receiver testified that this automobile was one that was registered in the name of appellant Faith, that when the receiver took over the property he took possession of this automobile and placed it in storage, and that when he completed his receivership he released the automobile to appellant Levy. The receiver's report shows that the sum of $308.50 paid by the receiver on account of the automobile was the balance which was due on the purchase price of the automobile and that it was paid by the receiver from moneys derived from the proceeds of the property. The receiver's supplemental report further shows that he was allowed by the court and that he received the sum of $600 for his services and that his attorney was allowed and was paid the sum of $250 and that payment of these two items was made from proceeds derived by the receiver from the operation of the property.

It is our opinion that the above amounts constituted funds which were shown to have been derived from the proceeds of the property and that they should have been applied to the payment of interest due on the first incumbrance on December 1, 1931. It is our opinion that the sum of $308.50, which was paid by the receiver as the balance due on the Ford automobile from proceeds of the property, cannot be justified as a proper expense of operation. It is also our opinion that the sum of $600 allowed for receiver's services and $250 allowed for attorney's fees for the receiver's attorney may in no sense be considered as proper items of operating expense. If appellants and their coadventurers desired to indulge in the luxury of a proceeding in receivership, they are not here entitled to say that there was no net income from the property during the year 1931 and that they were entitled to an extension of one year in making the payments required to be made by them on December 1, 1931, and that they were therefore not in default when the undisputed evidence shows that on December 1, 1931, there should have been available to be applied on the payment of interest due on the first incumbrance a total amount of $1,948.39, which is made up of the following items: (1) The sum of $568.51 profits for the year 1930; (2) the sum of $308.50 paid by the receiver as the balance due on the Ford automobile; (3) the sum of $850 paid to the receiver and his attorney; and (4) the sum of $221.38 representing the cash balance on hand when the receiver was discharged. While it is true that the undisputed evidence also shows that appellants had used more than $6,500 from their private funds to pay operating expenses during the year 1931, they may not rely upon such payment to excuse their default, for by the very terms of the extension clause of the contract which forms the basis for their cause of action for specific performance it is expressly provided that they were required to use their private funds to the limit of their ability to make the payments required by them by the contract. We are entitled to assume that the amount shown t

have been paid by them from their private funds in the year 1931 represented the limit of their financial ability in this regard. If the above-mentioned sum of $1,948.39, which as we have seen was derived from the proceeds of the property, had been used to pay actual expenses of operation, the amount required to be paid from private funds of appellants would have been correspondingly reduced and there would have been available from such private funds for the payment of interest charges on the first incumbrance on December 1, 1931, the said sum of $1,948.39. This sum would have paid the semiannual interest on the first incumbrance, which amounted to $1,356.25 on December 1, 1931, and there would have been available for other payments required of appellants by the contract the further sum of $592.14.

It is apparent, therefore, that appellants were not entitled to a decree of specific performance since they were in default in the obligations which they were required to perform by the terms of the contract whose specific performance by respondents they here seek. The trial court, therefore, reached the correct conclusion. In order to affirm the judgment, however, some alteration and addition to the findings must be made.

It is therefore ordered that finding III of the trial court, wherein the court found that by the terms of the contract appellants were required on December 1, 1931, to pay the successor of the Bank of Italy the installment then due on the principal amount of the first incumbrance and interest on said principal amount even though there was no net income from the property during the year 1931, and even though appellants were or either of them was financially unable to make such payments from funds or other resources under their control, be stricken and in lieu thereof the following finding is made by this court and adopted as a proper finding: "The agreement made on August 4, 1930, by plaintiffs, Harry Faith and Melville Levy, as buyers and defendant Paradise Vineyards, Inc., as seller, contained the following provision: 'In the event the income from said real property, due to frost injury, market conditions, or other conditions beyond the control of buyers, is so reduced that it is insufficient, after deducting operating costs, to make the payments herein required to be made by buyers, then should buyers and both of them be unable financially to make said payments from funds or other resources under their control, seller agrees that they will for such year consent to an extension of the payment accruing for such year to the December first following, provided that the actual net income from said real property is applied towards the payment of taxes first, the payments of interest on the first incumbrance, secondly, and thirdly towards the payment of any installments on said first incumbrance accruing during said year, and sellers expressly consent that buyers may procure from the holder of said incumbrance an extension of the installment payment accruing in such year after the application of the net proceeds from operations of said real property have been applied as herein required. Should, however, owing to insufficient net income or insufficient resources of buyers, exclusive of income from said real property, be insufficient to prevent a foreclosure of the incumbrance on said real property and a foreclosure occur, buyer shall in that event have no cause of action or claim against seller by reason of the loss of his investment in said real property. In this connection buyers agree that they shall keep careful record of all operating expenses for each year, which record and expenses shall be furnished to seller in the event an extension is required under this paragraph.'"

It is further ordered that the following finding be made and adopted as a correct finding to be designated III-A: "On January 1, 1931, there remained, after deducting from the proceeds derived from the operation of the said real property by plaintiffs the costs of operation and the sum of $22,500 which by the terms of the contract was required to be paid from the sale of grapes growing on the land at the time the contract was executed, the sum of $568.51."

It is further ordered that finding IV of the trial court be modified as follows: The following sentence is incorporated in said finding IV in lieu of the last sentence but one thereof, and made a part thereof: "Although Harry Faith and Melville Levy were not, nor was either of them, financially able to make the payments required of them on December 1, 1931, there should have been available for such payments from funds and resources under their control or under the control of one of them the sum of $1,948.39, and such sum would have been available if it had not been applied on expenditures that were not contemplated by the parties to the contract and which were not proper expenditures under the terms of the contract."

The judgment based on the trial court's findings as herein modified is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

138 Cal.App. 628

WHITSETT v. MORTON et al. (two cases).

Civ. 4979, 4980.

District Court of Appeal, Third District, California.

May 23, 1934.

1. Appeal and error ⇐931(1).

Where sufficiency of evidence to support a finding is challenged, appellate court must accept as true all evidence and inferences logically drawn therefrom tending to establish correctness of finding.

2. Automobiles ⇐244(56).

Evidence sustained finding that host was intoxicated and not driving automobile with necessary care, that guest, knowing host's condition, continued to ride with him notwithstanding chance to leave at safe place, and that guest went to sleep in disregard of own safety, rendering guest contributorily negligent.

3. Automobiles ⇐224(8).

It is contributory negligence for guest to go to sleep while riding with intoxicated, and therefore incompetent, automobile driver.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by Newell Francis Whitsett, a minor, by and through Thomas Whitsett, his guardian ad litem, and action by Thomas Whitsett in his own right, against Mathew Morton and others. Judgments for defendant, and plaintiffs appeal.

Affirmed.

Jesse W. Carter, of Redding (Glenn D. Newton, of Redding, of counsel), for appellants.

Chenoweth & Leininger, of Redding, and Morgan J. Doyle, of San Francisco, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal in the two cases entitled above and tried together, denying damages to Newell Francis Whitsett for personal injuries which he suffered as a result of an accident while riding as a guest in an automobile operated by the defendants, and denying plaintiff Thomas Whitsett damages for the loss of services of his son, resulting from such injuries.

[1] The principal issue here presented is whether the finding that plaintiff Newell Francis Whitsett was guilty of contributory negligence is supported by the evidence. Where the sufficiency of the evidence to support a finding is challenged, a court of review must accept as true all evidence and inferences logically drawn therefrom tending to establish the correctness of the finding. We need not therefore point out the evidence which might tend to support a contrary finding, but concern ourselves only with that testimony which, if given credence by the trial court, would lead by logical steps to the finding as made by the trial court. This testimony may have been disputed or contradicted, but that is not important at this stage of the proceeding.

The questioned finding is to the effect that plaintiff Newell Francis Whitsett was guilty of carelessness and negligence in the manner in which he conducted himself at the time and place of the accident and at all times prior thereto on said automobile trip, that before becoming an occupant of said automobile he knew that said defendants Marion Morton and Herbert R. Wise had been drinking intoxicating liquor, and that plaintiff was voluntarily drinking intoxicating liquor with Marion Morton and Herbert R. Wise. After becoming an occupant of said automobile, he likewise knew that said defendants continued to drink intoxicating liquor and that he continued to drink intoxicating liquor with them, that, at the time and place of the accident and prior thereto, plaintiff knew that Herbert R. Wise was intoxicated and that prior to the time Herbert R. Wise commenced to drive and operate said automobile the plaintiff knew that defendant Wise was intoxicated and knew that the operation of an automobile by an intoxicated person was liable to result in an accident, but, knowing all of the aforesaid facts, plaintiff carelessly, negligently, and voluntarily entered the automobile and thereafter rode and continued to ride in said automobile notwithstanding that plaintiff had opportunities to alight from and remain out of said automobile he failed, neglected, and declined so to do.

The finding further recites that, after becoming an occupant of the automobile and with knowledge that defendant Wise was intoxicated as aforesaid, plaintiff carelessly, negligently, and voluntarily in disregard of his own safety, went to sleep, and at the time of the accident was and prior thereto had been asleep, and, by reason of his being asleep at the time of the accident, plaintiff was unable to protect himself against injury to any

extent whatsoever and thereby rendered himself unable to observe the approaching danger or warn the defendant Wise thereof, and that, by reason of such carelessness and negligence on his part, plaintiff Newell Francis Whitsett proximately contributed to the damages and injuries of which he complains, which carelessness and negligence amounted to and constituted contributory negligence on his part.

In support of this finding, the testimony reveals that Newell Francis Whitsett, one of the appellants herein, was at the time in question, about 16 years of age, and resided with his parents in the town of Montague, county of Siskiyou. He was a student at the Yreka High School, being transported from his home to the high school at Yreka by Herbert Wise, one of the defendants, with whom Thomas Whitsett, the father of Newell Francis Whitsett, had made arrangements for that purpose. After school on that day, Newell had attended a baseball game, where he had one drink of whisky which was given to him by Wise. About 5:30 o'clock p. m. Newell and Wise left the baseball game, and Wise took him to the Wise ranch, a few miles from Yreka, arriving at about 7 o'clock p. m. There they met Marion Morton, a young man of about 18 years of age, one of the respondents herein, and Whitsett was invited by either Wise or Morton to enter the car of Morton, which he did, and the three boys then returned to Yreka. After spending some time in Yreka, it was suggested by Wise that they drive to Grenada, a distance of twelve miles from Yreka. On the way to Grenada, Wise produced a pint bottle of whisky which he had purchased at Yreka, from which bottle each occupant of the car drank. At Grenada they stopped at a restaurant where Whitsett and Morton had their supper. There they bought some ginger ale which was mixed with the whisky, and other drinks were had. All together, the three, Wise, Morton, and Newell Whitsett, drank about two-thirds of the pint bottle of whisky. The remainder was drunk by others at Grenada. After leaving the restaurant, Wise suggested they go to Weed. About that time Morton said he was tired, and Wise thereupon took the wheel, and thereafter drove the car with Morton's permission. About a mile south of Grenada, Wise stopped at a ranch and purchased one quart of wine. They stopped twice on the road to Weed and all drank from the jar. At Weed they drove around the town, and Wise then suggested they go to Mt. Shasta City. It was prior to reaching Mt. Shasta City that Newell Whitsett first observed that Wise was intoxicated. In answer to the question:

"And could you tell whether or not he (Wise) was intoxicated? A. Well, I thought he was.

"Q. You believed at that time (at Weed) that Herbert Wise was somewhat intoxicated? A. Yes.

"Q. You also believed at that time that Marion Morton was somewhat intoxicated? A. Yes.

"Q. Both Wise and Morton showed signs of intoxication at Grenada, did they not? A. Well, I think they were. I don't remember much about Marion Morton but I think Herb was.

"Q. Now, while you were there in the restaurant you observed that Herbert Wise in particular was showing signs of intoxication? A. I observed what I thought was.

"Q. Well, it was your belief there in the restaurant that Herbert Wise was somewhat intoxicated? A. Yes.

"Q. And you thought that Marion Morton there at the restaurant in Grenada was somewhat intoxicated, did you not? A. Yes. * * *

"Q. Did you at any time object to riding in the automobile with Herbert Wise and Marion Morton? A. No, I don't think I did."

At Mt. Shasta City, Wise suggested they go to Dunsmuir. Whitsett was awake at Weed, but, after leaving Mt. Shasta City, went to sleep, and remained asleep during the remainder of the trip. They arrived at Dunsmuir about midnight. From Dunsmuir the party proceeded toward Redding. South of Dunsmuir, Morton also went to sleep and did not wake up until after the accident. The three boys were riding in one seat of a Ford roadster with Whitsett in the middle, and both Morton and Whitsett were asleep when the car collided with a cement abutment of a bridge, badly damaging the car and inflicting the injuries complained of to Newell Francis Whitsett.

Further testimony which supported the finding is given by Mattie Whitsett, mother of Newell Francis Whitsett, as follows:

"Q. Mrs. Whitsett, after the accident referred to in this case, did you have a conversation with Herbert Wise? A. Well, I didn't talk direct to him myself but I stood and heard him talking to Newell. That was just a day or two after he (Newell) became conscious. * * *

"Q. And state what you heard Wise say at that time? A. He asked Newell if he saw the piece in the paper about the accident * * * and he said that he didn't know whether there was any fog or not, * * * said the bunch of them was so drunk they couldn't have seen the fog if there was one."

This witness also testified further:

"Q. Did he (Wise) say at any time whether or not he was asleep at the time of the accident? A. He didn't say anything about being asleep but he did make the remark that he acted the fool when he gave Newell the liquor in Yreka."

The deposition of Newell Whitsett had been taken previous to the trial, and upon his cross-examination he was asked concerning the same. Question by Mr. Chenoweth: "Q. I will ask you, Newell, if these questions were not asked you by me and you did not give these answers at the time of the taking of your deposition on September 26, 1931? Q. Did the liquor that you had either on the way from Yreka to Grenada or at Grenada affect you? A. Yes. Q. Made you a little intoxicated? A. Yes. Q. Was Wise a little intoxicated? A. Yes. Q. And Morton too? A. Yes. Q. You could tell that? A. Yes. Q. You could tell from the way they acted? A. Yes. Q. And the way they talked? A. Yes. Q. You gave that testimony? Those questions were asked you and you gave those answers, did you not? A. Yes."

And, reading further from the same deposition, the following questions and answers were given:

"Q. Wise and Morton were both somewhat intoxicated at Grenada, weren't they? A. Yes, I think they were. I am not sure.

"Q. You could tell from the way they acted? A. No, I am not sure whether they were or not but I think so.

"Q. But after they drank this wine on their way to Weed they were intoxicated, weren't they? A. Yes, I think they were.

"Q. Well, when you say you think so, you know they were don't you? A. Yes.

"Q. Those questions were asked you and those answers given by you at the time of the taking of your deposition? A. Yes."

[2] Herbert R. Wise did not appear as a witness at the trial, he having defaulted. We believe, however, that sufficient has been quoted to show that the trial court was justified in the finding that Wise was intoxicated at the time of the accident which occurred about 4 o'clock on the morning of March 28, 1931.

Appellant contends that there is no evidence to show that the drinking of intoxicating liquor by Wise impaired his ability to operate the car in a prudent or cautious manner.

It is true that both of the companions of Wise were asleep and had been for some time prior to the accident, and they could not enlighten the court as to any of the events at the time of or for some time prior thereto. The testimony was that they had all been drinking of wine and whisky to the extent that Whitsett declared they were all intoxicated a few hours prior thereto, and therefore the testimony that neither Whitsett nor Morton observed anything in their journey in the driving of Wise that gave them any concern as to their safety is of little value, for the driver might have been reckless, which to his passengers, in their condition, would have been but mildly exhilarating. An intoxicated driver might not drive erratically nor at an unlawful speed and still be intoxicated and fail to act in a crisis as should a sober normal person. It is also true that Wise, the only one who might shed any light upon the accident, after being served with summons and complaint in the action, failed to appear at the trial, but we have his version of the collision from the testimony of Mrs. Whitsett to the fact that he was too drunk to see the bridge.

From the physical facts it appears also that the party left Dunsmuir about midnight and the accident occurred about 4 o'clock a. m., fifty miles south thereof. Just what Wise was doing all of that time is not known. It may be recalled, however, that part of the jar of wine was left in the car after leaving Grenada. There is no testimony of the investigating officers that any was found at the scene of the accident the following morning.

An examination of the tracks of the car show that for some distance, the measurement thereof not being given, the car had been traveling on the dirt shoulder on the west or right-hand side of the highway, and, when it reached a point 130 feet north of the bridge, the car bore to the left and came in contact with the northeast abutment of the bridge with sufficient force to completely wreck the car.

It has been held that the doctrine of res ipsa loquitur applies in a case when it is shown that an automobile is wrecked on an open highway for no apparent reason, and raises an inference of negligence. Crooks v. White, 107 Cal. App. 304, 290 P. 497. Ireland v. Marsden, 108 Cal. App. 633, 291 P. 912.

It, too, is some indication of lack of sober judgment to start at midnight on a sixty-five mile journey merely to call upon some other boys in a town in a direction opposite from the homes of Wise and his companions.

We think enough has been suggested from which the court could reasonably conclude that Wise was intoxicated and not driving with the necessary care and caution required of him.

Appellant also contends that the evidence fails to take into consideration another essential element of the rule which imputes negligence to a guest for riding with an intoxicated driver, namely, that Whitsett knew of the driver's condition, and, knowing that fact, he thereafter continued to ride with him. The record discloses, however, that, first at Grenada and later at Weed, Newell Whitsett knew that both Wise and his companion Morton were intoxicated, yet nevertheless he continued to ride in the car with Wise driving.

Appellant further claims that it is not shown that Whitsett had a chance to leave the automobile at a safe place after learning of the intoxication of his companions, but ample opportunity was afforded him both at Grenada and Weed when he could have left the car.

In the case of Jones v. Pacific Gas & Electric Co., 104 Cal. App. 47, 285 P. 709, plaintiff became a guest of one whom she knew at the time to be intoxicated. The car under the control of the intoxicated host collided with a pole of the Pacific Gas & Electric Company. In an action by plaintiff against the company, the question of the contributory negligence of plaintiff was presented, and the court in its opinion refusing relief to plaintiff cited and analyzed many of the leading authorities from this and other jurisdictions.

[3] The last portion of the questioned finding is that appellant Newell Whitsett, in disregard of his own safety, went to sleep, and by reason thereof was unable to protect himself against injury and rendered himself unable to observe the approaching danger or to warn the defendant Wise thereof. The law requires of a guest that he exercise ordinary care as to his own safety. It is not the rule that a guest who goes to sleep when riding with a careful and competent driver is guilty of contributory negligence. In the case of Malone v. Clemow, 111 Cal. App. 13, 295 P. 70, 73, that contention was made, and the court there held:

"The fact that one or more of the guests was asleep at the time of the collision does not constitute negligence as a matter of law, for, as we have already seen, there was no obligation on the part of the guests to exercise an oversight as to the way in which the automobile was to be operated, or keep a lookout for impending danger."

But the court, continuing, clearly indicates that such rule is not applicable where one is put on notice of the recklessness or incompetency of the driver. "Furthermore," the opinion continues, "the evidence shows that Mrs. Clemow was an experienced driver, and the guests had no reason to complain of her driving. Mrs. Clemow testified herself that at the time of the accident she was not tired, but was in fact refreshed by the cold air of the bay."

In a case from Massachusetts of Oppenheim v. Barkin, 262 Mass. 281, 159 N. E. 628, 61 A. L. R. 1228, the plaintiff while riding with defendant in an automobile as his guest was injured when the automobile in which he was riding at 4 o'clock a. m. turned from the right side of the road to the left and ran into a post. The court there said:

"A guest on the rear seat of an automobile cannot be expected to control its operation or interfere with its movement, but he must exercise some care. If the plaintiff saw that the defendant was asleep, or, if he were awake and the plaintiff saw him turning away from the line of travel across the highway to the left, it could have been found to be the plaintiff's duty to arouse the defendant or warn him of the approaching danger; or for the plaintiff to take some precaution for his own safety."

In Lambert v. Eastern Massachusetts R. Co., 240 Mass. 495, 134 N. E. 340, 22 A. L. R. 1291, the judge instructed the jury, in effect, that a guest in an automobile cannot completely surrender himself to the care of the driver and then successfully contend he was in the exercise of proper care; that it was the plaintiff's duty to exercise such caution as a reasonably prudent person would use. It was there held that such instruction was a correct statement of the law of that jurisdiction.

In the instant case the guest went to sleep while riding with an intoxicated and therefore incompetent driver. If it is contributory negligence to ride with an intoxicated driver, it must also be deemed contributory negligence for a guest to go to sleep while riding with such a driver. He had no right to trust himself entirely to the driver in such a

known condition, rendering himself, by sleep, unable to use any precaution or care whatsoever for his own safety.

We believe the record justifies the finding of the trial court that plaintiff Newell Francis Whitsett was guilty of negligence which proximately contributed to his injury, and the judgments of the trial court to that effect are hereby affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.



138 Cal.App. 558

PILCHER et al. v. TANNER MOTOR LIVERY et al.

Civ. 9315.

District Court of Appeal, First District, Division 2, California.

May 16, 1934.

Hearing Denied by Supreme Court July 12, 1934.

1. Carriers ⇐321(12).

In action by passengers injured when car of livery corporation collided with automobile at street intersection, instructions that driver of car was negligent as matter of law for violating speed law *held* reversible error in view of evidence, excessive verdict, and statute imposing upon passengers burden of establishing that violation of speed law constituted negligence (St. 1931, p. 2120, § 113 (b, d).

2. Constitutional law ⇐191.

Statute imposing upon opposing party burden of establishing that violation of speed law constituted negligence *held* applicable to automobile accident case tried when statute was in effect, though statute was not in effect when accident occurred, since statute does not affect substantive rights but goes to remedy for enforcement thereof (St. 1931, p. 2120, § 113(d).

3. Constitutional law ⇐191.

Changes in rules of evidence may be made applicable to existing causes of action.

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action by Rufus J. Pilcher and Rosemary C. Pilcher against the Tanner Motor Livery, a corporation, William Graves and others. From a judgment in favor of plaintiffs against named defendants, they appeal.

Reversed.

Cooley, Crowley & Supple, of San Francisco (A. P. G. Steffes, of Los Angeles, of counsel), for appellants.

E. B. Drake, of Los Angeles, for respondents.

NOURSE, Presiding Justice.

The two plaintiffs were passengers for hire riding in a motor vehicle owned by the defendant corporation and operated by its employee Graves. In crossing an intersection of streets in the city of Los Angeles the vehicle was struck by one operated by defendant Harding. Mrs. Pilcher was thrown from the car and suffered a slight strain in her back. In a trial with a jury plaintiffs had a verdict for $12,000 against the defendant corporation and Graves. Mrs. Harding had a verdict against the plaintiffs. The appeal is from the judgment on the verdict in favor of the plaintiffs.

Three grounds involving instructions are assigned for a reversal of the judgment, together with a claim of excessive damages. We will confine our opinion to the error of the instructions covering section 113 of the California Vehicle Act (St. 1923, p. 553, § 113, as amended by St. 1931, p. 2120), but in passing should add that the verdict of $12,000 against the corporate defendant for the slight injury suffered by Mrs. Pilcher is so grossly disproportionate to the injuries proved that this result, taken with the favorable verdict for Mrs. Harding, who, under all the uncontradicted evidence was equally as guilty of negligence as the other, compels the conclusion that the error herein referred to was prejudicial to these appellants.

[1] There is no material conflict in the evidence covering this issue. Both vehicles approached the intersection at approximately the same time and at a speed in excess of the limit fixed in section 113 (b). The defendant Harding increased her speed passing through the intersection. The evidence does not show whether the speed of appellants' car was increased or not. The front part of the Harding car struck the left rear wheel and left rear fender of appellants' car in the northeast sector of the crossing. The uncontradicted evidence presents a set of facts from which the jury might have inferred that if appellants had been driving faster the collision would not have occurred. Hence the er-

ror of the instruction that the law presumed them to be negligent.

Section 113 (b) of the California Vehicle Act fixes a speed limit of fifteen miles per hour at intersections similar to that where the collision occurred. In 1931 subdivision (d) was added to section 113, reading as follows: "In any civil action the driver of a vehicle who has operated such vehicle at a speed in excess of the miles per hour set forth in subdivision (b) applicable at the time and place shall not be deemed to have been negligent by reason thereof as a matter of law but in all such actions the burden shall be upon the opposing party to establish that the operation of such vehicle at such speed constituted negligence." Stats. 1931, p. 2121. On November 2, 1931, when the cause was submitted to the jury, the trial court gave three instructions covering subdivision (b) of this section advising the jury that any violation of that section was negligence as matter of law. The effect of these instructions was to impress upon the jury that appellants were presumed to have been negligent if they traversed the intersection at a speed in excess of fifteen miles per hour. These instructions were in direct conflict with subdivision (d) of the section which imposed the burden of proof upon the respondents to "establish that the operation of such vehicle at such speed constituted negligence."

[2] Respondents seek to excuse the error of these instructions upon the ground that, though subdivision (d) was in full operation at the time of the trial, it was not in effect at the time of the accident, which occurred July 24, 1929. From this it is argued that they had a substantive right to damages at the time of the accident which could not be taken away by the subsequent enactment. But the statute does not affect respondents' substantive rights. The amendment goes to the remedy for the enforcement of those rights only. It is nothing more than a change in the manner of proof by which respondents' right of action is to be enforced, but it does not deny or impair their right of recovery.

[3] The rule applicable to such cases is stated in 10 Ruling Case Law, pp. 863, 864: "The general power of the legislature to prescribe rules of evidence and methods of proof is undoubted. * * * No person or corporation has a vested right in the rules of evidence. They pertain to the remedies provided by the state for its citizens, and do not constitute a part of any contract. They are subject to control and modification by the legislature, whether affecting proof of existing rights or rights subsequently acquired, and changes in them may be made applicable to existing causes of action."

In 6 Ruling Case Law, pp. 462, 463, it is also said: "As to what shall be evidence, and who shall assume the burden of proof, its power is unrestricted so long as its rules are impartial and uniform; but it has no power to establish rules which, under pretense of regulating evidence, altogether prohibit a party from exhibiting his rights, since this would substantially deprive him of due process of law. * * * If, however, the legislature in prescribing the rules of evidence in any class of cases, leaves a party a fair opportunity to establish his case or defense, and give in evidence to the court or jury all the facts legitimately bearing on the issues in the cause, to be considered and weighed by the tribunal trying the same, such acts of the legislature are not unconstitutional."

A restatement of the same principles is found in Cooley, Constitutional Limitations (8th Ed.) p. 590, reading: "Laws which change the rules of evidence relate to the remedy only; and while, as we have elsewhere shown, such laws may, on general principles, be applied to existing causes of action, so too, it is plain that they are not precluded from such application by the constitutional clause we are considering." And again on page 754: "As a general rule, every state has complete control over the remedies which it offers to suitors in its courts. It may abolish one class of courts and create another. It may give a new and additional remedy for a right or equity already in existence. And it may abolish old remedies and substitute new; or even without substituting any, if a reasonable remedy still remains."

Authorities in support of the rule are too numerous to cite. Reference may be had to Estate of Patterson, 155 Cal. 626, 638, 102 P. 941, 26 L. R. A. (N. S.) 654, 132 Am. St. Rep. 116, 18 Ann. Cas. 625; Buck v. Canty, 162 Cal. 226, 233, 234, 121 P. 924, as California cases in approval.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

138 Cal.App. 552

ELLIS v. SUPERIOR COURT, IN AND FOR RIVERSIDE COUNTY et al.

Civ. 1330.

District Court of Appeal, Fourth District, California.

May 15, 1934.

1. Certiorari ⇐17.

Creditor's petition for certiorari vacating appointment of receivers for debtor, made at request of attorney who recovered simple money judgment against debtor for services, authorized issuance of writ, since court had no jurisdiction to appoint receivers in attorney's action (Code Civ. Proc. § 564).

2. Receivers ⇐12.

Statutory power to appoint receiver after judgment to carry judgment into effect applies only where judgment affects specific property, not where judgment is simple money judgment (Code Civ. Proc., § 564, subd. 3).

3. Certiorari ⇐33(2).

Petitioner *held* authorized to apply for certiorari to vacate order appointing receivers for corporation, notwithstanding petition alleged petitioner was beneficial owner of only an undivided one-half interest in judgment procured by petitioner against corporation, where petition failed to show that corporation consented to or ratified assignment.

4. Judgment ⇐838.

Assignment of portion of judgment has no effect against judgment debtor, unless made with debtor's consent or ratified by debtor.

5. Certiorari ⇐42(3).

Petition for certiorari to vacate order appointing receivers *held* not specially demurrable because of vagueness of allegation that respondent court made order appointing receivers, and because failing to show that order was signed and filed, in view of copy of order attached to petition.

6. Certiorari ⇐41.

Petitioner *held* not barred by laches from obtaining certiorari to vacate order appointing receivers for corporation in attorney's action for services, notwithstanding petition was filed 20 months after order was made, and petitioner had commenced action wherein she recovered judgment against corporation nine months before institution of attorney's action, where petitioner was not party to attorney's action, and it did not appear that she knew of pendency of attorney's action or of order when it was made.

7. Certiorari ⇐42(3).

Petition for certiorari to vacate order appointing receivers *held* to sufficiently show absence of another remedy, so that petition was not fatally defective, even if allegation that petitioner had no plain, speedy, or adequate remedy by appeal or otherwise was insufficient.

Petition by Ethel Ellis for certiorari to review an order of the Superior Court of the State of California, in and for the County of Riverside, O. K. Morton and G. R. Freeman, Judges thereof.

Order vacated and annulled.

J. A. Chase, of Visalia, for petitioner.

Walter Gould Lincoln and David G. Kling, both of Los Angeles, for respondents.

JENNINGS, Justice.

This is an original application for a writ of certiorari. The petition which was filed with this court on February 20, 1934, alleges that prior to March 17, 1931, an action numbered 20966 was instituted in the superior court of Riverside county in which Walter Gould Lincoln was plaintiff and W. F. Dreher, Fairview Farms Company, a trust, Fairview Finance Corporation, a corporation, Dreher & Philpott, Inc., a corporation, and Farms Finance Company, Limited, a corporation, were defendants; that the action was one at law instituted for the purpose of recovering a money judgment for services alleged to have been rendered by the plaintiff therein as an attorney at law for the defendants in said action; that such proceedings were taken in said action that on May 5, 1932, a judgment was rendered therein in the plaintiff's favor and against the said defendants for the sum of $5,000, together with interest amounting to $1,050, and costs; that the defendants waived their right to appeal from the judgment in writing; that on May 20, 1932, the plaintiff in said action applied for the appointment of a receiver of all the properties of the defendants, and his petition therefor was filed in the respondent court; that on June 7, 1932, the respondent court made an order appointing receivers for all the defendants in the aforesaid action and particularly for the defendant Farm Finance Company, Limited; that pursuant to said order the receivers so appointed seized and took possession of all properties of the defendants and especially the properties of the defendants W. F. Dreher and Fairview Farms Company, a trust; that the respondent court in making the aforesaid order for the appointment of receivers acted in excess of its jurisdiction, and the order thus made was a void

order; that Ethel Ellis, the petitioner herein, is a creditor of Fairview Farms Company, a trust, and of W. F. Dreher, and was a creditor of said defendants at the time the aforesaid action was filed by Walter Gould Lincoln, plaintiff therein; that on May 23, 1930, she filed a complaint in the Superior Court of Riverside County in an action entitled Ethel Ellis, Plaintiff, v. Fairview Farms Company, a Voluntary Trust; W. F. Dreher, M. A. Kandelin, John Doe, Richard Doe, and Jane Doe as Trustees, and W. F. Dreher, Defendants, numbered 20754 and thereafter on January 23, 1933, judgment was entered in her favor against the defendants Fairview Farms Company, a voluntary trust, and W. F. Dreher, for the sum of $4,741.70, which judgment has not been paid or discharged and is now in full force and effect, and the petitioner herein is now the beneficial owner of an undivided one-half interest in said judgment; that petitioner was not at any time a party to the action No. 20966 instituted by Walter Gould Lincoln and has no standing in the respondent court to raise the question of the lack of jurisdiction of said court to make the order appointing receivers in said action; that, notwithstanding the invalidity of the order appointing receivers, the respondent court, through the receivers thus appointed, has taken possession of all the assets and properties of Fairview Farms Company and W. F. Dreher, and is continuing to hold possession thereof and to operate and sell the same, and is thereby preventing the petitioner herein from interfering with said properties in disregard of the rights of petitioner; that petitioner has no plain, speedy, or adequate remedy by appeal or otherwise, and will suffer irreparable loss and damage, and will be deprived of her right to enforce a levy of execution upon the property of her judgment debtors if the aforesaid order appointing receivers is enforced and continues in effect. The prayer of the petition is for the issuance of a writ of review vacating said order of appointment.

To the petition filed herein as aforesaid the respondents have filed a demurrer specifying as the grounds therefor that the petition does not state facts sufficient to justify the issuance of a writ of review; that the petition is uncertain in numerous designated particulars; that the petition shows on its face that petitioner is guilty of laches in making application for the writ; that the petition shows on its face that petitioner is without legal capacity to make the application. It is stipulated that the application for the writ may be determined on the record which is here presented.

[1, 2] It is our opinion that the demurrer, in so far as it attacks the petition on the general ground of failure to state facts which will justify the issuance of a writ of review, is not well taken and must be overruled. In the final analysis, the single question which is presented by the general demurrer is whether or not the respondent court exceeded its jurisdiction in making the order appointing receivers for the properties of the various defendants named in the action in which the order was made. The petition shows that this action was one at law brought by an attorney to recover a money judgment for services alleged to have been performed by him for the defendants named in the action. Section 564 of the Code of Civil Procedure is the statute which authorizes the appointment of receivers generally. Subdivision 3 of said section is the only subdivision upon which reliance may be had to support the order attacked by the petition herein. This subdivision authorizes the appointment of a receiver "after judgment, to carry the judgment into effect." However, the power to appoint a receiver conferred by subdivision 3 of the statute has been construed as applying only to cases where the judgment affects specific property. It does not apply to a simple money judgment. White v. White, 130 Cal. 597, 62 P. 1062, 80 Am. St. Rep. 150.

[3, 4] It is urged as a ground of demurrer that the petition shows on its face that the petitioner lacks the legal capacity to apply successfully for the issuance of the writ, for the reason that the petition alleges that she is the beneficial owner of an undivided one-half interest in the judgment. It is argued that the assignment of a part of a judgment is not permitted by law; that she can be the owner of the whole judgment, or that she has no interest in it; that the allegation aforesaid that she is the owner of an undivided one-half interest indicates that she has made a partial assignment and has thereby divested herself of the capacity to apply for the remedy which she here seeks. The contention thus presented is not meritorious. It is the rule that an assignment of a portion of a judgment has no effect against the judgment debtor unless the assignment was made with the consent of the debtor or, if made, without consent, the debtor subsequently ratifies it. Buckeye Refining Co. v. Kelly, 163 Cal. 8, 12, 124 P. 536, Ann. Cas. 1913E, 840. Since the petition herein fails to show con-

sent or ratification by the judgment debtors in the action in which the judgment was rendered, it is apparent that the objection of legal incapacity in petitioner is untenable.

[5] Various specifications of uncertainty in the petition are urged in support of the special demurrer. Among these it is pointed out that the petition alleges that "the respondent court * * * made an order, purporting to be in said action, appointing receivers. * * *" It is contended that this allegation is fatally uncertain, in that it cannot be ascertained whether it amounts to a positive allegation that the order was made or an allegation on information and belief; and, further, that the allegation is defective in that it fails to show that the order was signed and filed. It may be conceded that the aforesaid allegation is not entirely free from uncertainty. However, there is attached to the petition a copy of the court's order appointing receivers. This copy bears the title Walter Gould Lincoln, Plaintiff, v. W. F. Dreher et al., Defendants. It bears the same number as that which the petition alleges was the number assigned to the action wherein Walter Gould Lincoln sought to recover a money judgment for his services rendered as an attorney at law. The copy of the order further shows that it was made on the application of Walter Gould Lincoln, and that it was signed by a judge of the respondent court on June 7, 1932. This copy, to which reference is made in the petition and which is attached to the petition, clarifies whatever uncertainty exists in the aforesaid allegation, and makes it evident that the order attacked by the petition was actually signed by the respondent court on the date stated in the petition.

[6] One of the chief objections urged by the demurrer is that the petition shows on its face that it was not filed until more than twenty months had elapsed after the order sought to be vacated was made, although, as disclosed by the petition, petitioner had commenced her action more than nine months prior to the institution of the action in which the order appointing receivers was made. It is contended that the petition thus discloses that petitioner is guilty of laches which should bar her from obtaining the relief which is here sought.

It may be conceded that, if the petition had shown that petitioner was a party to the action in which the order appointing receivers was made, her failure to apply for a writ of review until the time allowed for taking an appeal had expired would be sufficient to bar her from obtaining the writ. Smith v. Superior Court, 97 Cal. 348, 32 P. 322. The petition here shows, however, that petitioner was not a party to the action in which the order sought to be annulled was made, and it is not disclosed that she sought at any time to intervene in said action. So far as appears from the petition, she had no knowledge of the pendency of the action brought by Lincoln and no knowledge of the making of the order at the time it was made. We think, therefore, that the contention that petitioner is barred from obtaining the issuance of the writ because of her laches in applying therefor may not be sustained.

[7] Although it was not specifically urged as a ground of demurrer, respondents contend that the petition is fatally defective in that it fails to show that petitioner has no plain, speedy, or adequate remedy at law. The allegation in this regard is "that petitioner has no plain, speedy, or adequate remedy by appeal or otherwise, and will suffer irreparable loss and damage and will be deprived of her property and constitutional rights and her right to have an execution levied upon the property of said debtors, if said orders are enforced." It is said that this bald allegation, unsupported by allegations of facts tending to show the absence of another remedy and the existence of loss and damage which will be suffered by petitioner if the writ is refused, is insufficient. Assuming that the allegation attacked is insufficient, it does not follow that the objection thus raised is well taken. If the petition in its entirety discloses the absence of another remedy we think that it is sufficient. The petition, as above noted, does show that the petitioner was not a party to the action in which the order appointing receivers was made, and that she made no attempt to intervene in said action or to have the order which is here attacked vacated by the court which made it. It is also disclosed that the defendants in the action brought by Lincoln waived their right to appeal from the judgment rendered in said action, and that the judgment had become final. These facts are sufficient in our opinion to show the absence of any other remedy in the ordinary course of law.

For the reasons stated herein the demurrer of respondents to the petition is overruled, and it is ordered that the order made by the respondent court on June 7, 1932, appointing receivers in action No. 20966 in the respondent court be vacated and annulled.

We concur: BARNARD, P. J.; MARKS, J.

138 Cal.App. 585

JAMES v. PARAMOUNT-FAMOUS-LASKY CORPORATION et al.

Civ. 7837.

District Court of Appeal, Second District, Division 1, California.

May 18, 1934.

1. Master and servant ⇐80(13).

In action on contract for services in making motion picture, evidence *held* to justify nonsuit as against defendant whose only connection with picture was that it had contract to act as distributor of picture when completed.

2. Master and servant ⇐80(13).

In action on contract for services in making motion picture, evidence not showing that plaintiff ever rendered any services for defendant, or that there was ever agreement between plaintiff and defendant, whereby he employed her to render services *held* to justify nonsuit.

Evidence, including letters between parties showed that no contract was in existence when plaintiff came to California but that she came there in hope that she might secure a part in picture, although plaintiff testified that she was told she had been selected to play particular part in picture; that she was never given such part but took minor part for which she was paid compensation, signing receipts for "payment in full to date."

3. Evidence ⇐318(2).

Testimony as to contents of telegram sent plaintiff by her father which purported to relate substance of conversation he had had with third person *held* inadmissible as hearsay.

4. Master and servant ⇐79.

One accepting payment for services, signing receipts as payment in full for services rendered to date of payment cannot recover in action for reasonable value of services.

5. Evidence ⇐75.
Master and servant ⇐80(6).

In action against individual for services rendered in making motion picture, plaintiff had burden to show that concerns connected with making of picture were in fact operating names under which defendant was producing it, and plaintiff's failure to produce evidence as to who constituted such concerns justified inference that it would have been adverse to her contention.

6. Fraud ⇐64(1).

Evidence *held* to justify nonsuit in action for fraud in inducing plaintiff to leave position and come to California to take part in filming of picture without any intention on part of defendants of fulfilling their agreement.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Action by Jessie Estelle James against the Paramount-Famous-Lasky Corporation and another, to recover on a contract for personal services. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

L. H. Phillips, W. C. Dalzell, and Chas. R. Thompson, all of Los Angeles, for appellant.

Faries & Williamson and McIntyre Faries, all of Los Angeles, for respondent Faries.

Frank James, Henry Herzbrun, and Everett H. Mills, all of Los Angeles, for respondent corporation.

HAHN, Justice pro tem.

Appeal by plaintiff from a judgment of nonsuit rendered in an action brought to secure a money judgment.

The controversy arises out of the filming of a picture intended to portray the activities of the notorious Jesse James, who was the grandfather of the plaintiff. The amended complaint contains three counts. The first alleges that plaintiff performed services for defendants at their request, and that the reasonable value of the services so performed was $20,000. The second count is based upon an alleged contract which plaintiff avers she had with defendants, whereby she was employed to perform certain services "as an actress, and as an assistant and means of obtaining publicity in the production and distribution of a certain moving picture dealing with the life of Jesse James, from and after the 23rd day of June, 1927, to the time of completion of said picture in approximately eight months." Plaintiff further alleges that at the time of making the contract, defendants agreed to pay plaintiff the reasonable value of her services, payments to be made monthly and upon completion of the picture. "That plaintiff entered upon the performance of her duties under said contract on the 23rd day of June, 1927, and from that date until on or about the 1st day of October, 1927, plaintiff presented herself daily at the picture lot of the Paramount-Famous-Lasky Corporation, and did whatever service she was requested. * * *"

The complaint then alleges that on Octo-

ber 1, 1927, she was informed by defendants they had no further use for her services, "that they had engaged another actress to take the part which plaintiff had been engaged to take" and refused "to employ her any further in any capacity whatsoever." As damages for this alleged breach of contract, she asks for the sum of $35,000.

In the third count, which sounds in fraud, plaintiff alleges she was induced to enter into the alleged contract declared in count two, and induced to leave her position in Kansas City, where she was employed at $110 per month, and to come to California to take part in the filming of the picture referred to by defendants, without any intention on their part "of performing or fulfilling their agreements with, and their promises made to the plaintiff." That defendants, in all their dealings and representations and promises "were, and each of them was, guilty of oppression, fraud and malice." As damages in this third count, plaintiff asks for $1,000 compensatory damages and $50,000 as exemplary damages.

At the outset of the trial, the court granted a motion made by the defendant Paramount-Famous-Lasky Corporation to require plaintiff to elect as between counts two and three, upon which cause of action she would proceed to trial. Pursuant to the court's order, plaintiff elected to proceed on counts one and two.

Appellant has assigned seventy-two alleged errors committed by the court as grounds for a reversal of the judgment. In view of our conclusion, we deem it necessary to consider but a few of the points raised.

[1] Taking up first the court's ruling on the defendant Paramount-Famous-Lasky Corporation's motion for a nonsuit, we fail to find in the record any evidence whatever that would support a finding that plaintiff had any contract with said defendant, or that she rendered any services for it. The only connection which the record discloses that the defendant corporation had with the picture was that it had a contract to act as distributor of the picture when completed. No connection is shown between any of the persons with whom plaintiff corresponded or with whom she had any conversations, and the defendant Paramount-Famous-Lasky Corporation.

In view of our conclusion that neither the alleged contract nor the alleged services rendered by plaintiff were brought home to defendant corporation, the court's ruling on this defendant's motion to require plaintiff to elect between her causes of action, set forth in counts two and three, becomes of no importance.

The cause of action set forth in count three was predicated upon the same alleged contract upon which count two was based. Plaintiff was given unlimited opportunity to prove the contract with the Paramount Corporation, as alleged in count two. This she failed to do. Hence, had said defendant's motion to require plaintiff to elect been denied, the judgment of nonsuit would have been as well foundationed with count three still in the case, as it is with the court's ruling requiring her to elect. Nor does it appear by inference, or otherwise, that any of the questions to which objections of defendant were sustained, would have furnished the necessary evidence to show that plaintiff either rendered services to defendant Paramount-Famous-Lasky Corporation, or that she had any contract with said defendant whereby she was employed to render any of the services as alleged in her complaint.

As to the defendant David R. Faries, executor of the last will and testament of Fred C. Thomson (for the sake of brevity, we will refer to this defendant as Faries), there are other considerations which merit attention.

Inasmuch as Faries did not join in the motion to require the plaintiff to elect as between her second and third causes of action, the court's ruling on this motion does not affect his case.

[2, 3] In support of the court's ruling on his motion for a nonsuit, Faries urges that there is no substantial evidence in the record to support plaintiff's claim that she ever rendered any services to or for Fred C. Thomson, or that there ever was an agreement between plaintiff and Fred C. Thomson, whereby he employed her to render any services for him as an actress or otherwise.

After a careful examination of the record, we have come to the conclusion that respondent Faries' contention on this point must be sustained.

Plaintiff's case, so far as the alleged contract is concerned, is predicated upon the theory that while she was employed in Kansas City, defendants entered into a contract with her whereby she was to come to California and take the part, as an actress, of one Zerelda Samuels in the filming of a picture that was to be made depicting the life of Jesse James, her grandfather, and also to assist in creating publicity for the picture. The record is devoid of any evidence that would

support such a theory or contention. In a letter written at Kansas City, dated June 6, 1927, and directed to one Lloyd Ingraham as "Director, Fred Thomson Productions" at Hollywood, plaintiff says: "I am planning to leave Kansas City for Los Angeles, on June 15th, to join my family, Mr. and Mrs. Jesse James, Jr., and am very anxious to obtain a small part in the picture of my Grandfather's life."

A reply to this letter was written by one Alfred L. Werker, who gave himself the title of "Prod. Supervisor" on a letterhead bearing the inscription "Fred Thomson Productions." which reads as follows: "Your father * * * has already spoken to me about a screen test for you when you arrive in Hollywood. We will be very happy to make a test of you and may possibly find something for you to do in the filming of the picture."

Other than testimony as to the contents of a telegram sent to plaintiff by her father which purported to relate the substance of a conversation he had with Alfred L. Werker, writer of the letter just referred to, which was clearly hearsay, the letters quoted from constitute all the evidence in the record as to plaintiff's negotiations with any one connected with the picture while she was in Kansas City. That this evidence not only fails to support the theory of such a contract, but clearly shows that no such contract was at that time in existence, but that she came to Los Angeles in the hope that she might secure a part in the picture, seems too clear to require discussion.

Plaintiff arrived in Los Angeles on June 22d. A day or two later she first visited the F. B. O. studios, where the picture was being filmed. On this occasion, she met at the studio Lloyd Ingraham, the director to whom she had directed her letter written in Kansas City; Alfred L. Werker, who had written a reply to her letter, and who had the title of "Production Mgr."; also one Douglas S. Dawson, who was known as "business and production manager"; James M. Jerauld, a publicity man for Paramount-Famous-Lasky Corporation, and Neal Harbarger, a cameraman, who testified he was then working for "the Thomson Company." On this and one or two subsequent visits to the studio, plaintiff posed, either alone or with other members of her family for still pictures which were taken by the cameraman Neal Harbarger. On the occasion of her first meeting with Werker, Dawson, Jerauld, and Ingraham, one or all of these gentlemen told her that she had been selected to play the part of Zerelda Samuels, her father's grandmother, in the Jesse James picture. On her second visit to the studio, she first met Fred Thomson, who as the star in the picture was taking the part of Jesse James. Concerning this meeting, plaintiff testified as follows:

"Q. Were you introduced to Mr. Thomson? A. Yes sir.

"Q. Any conversation take place between you and Mr. Thomson? A. Yes sir.

"Q. And when I say 'Mr. Thomson', I refer to Fred C. Thomson. A. Yes sir.

"Q. The defendant in this action. What was said by Mr. Thomson? A. Mr. Thomson told me that I was to play the part of Zerelda Samuels in the picture, 'Jesse James'.

"Q. Did you make any reply? A. Yes sir, I did. I laughingly said, 'Well, I feel rather young to have a son as old as you are.'

"Q. And what was his reply? A. Mr. Thomson replied, 'Well, maybe I am not so very old.' He said, 'Evidently, you are not acquainted with the arts of movie make-up, that we can make you appear just as old as we want to;' and Mr. Thomson, at that time made reference to a picture; as I recall it now, I think it was Colleen Moore's picture, 'So Big'; and he asked me if I had seen it. He said, 'You remember that Colleen Moore played the part of an old lady in this picture, and she is not much older than you.'"

Mrs. Jo Frances James Ross, a sister of plaintiff, testified concerning this conversation with Fred Thomson, as follows: "Mr. Thomson told her that they had decided to let her play the part, or to give her the part, of Zerelda Samuels, and she jokingly said that she felt quite young to have a son as old as he; and he told her that the make-up—by the use of make-up they could make her look as old as they wanted to."

Plaintiff never was given the part of Zerelda Samuels. Instead, this part was played by one Mary Carr. After plaintiff learned she was not to have the part, she took a minor part in a courtroom scene. As compensation for her services in the part she took, she was paid $22.50 by the F. B. O. Studios, Inc. The three receipts she signed for these payments, other than the dates and the amounts shown in the receipts, are identical, and read as follows:

"F. B. O. Studios, Inc. No. 480.
"Los Angeles.
"Talent Pay Check, Date: Jul. 30, 1927.
"Pay to Jesse James - - - $10.00. Exactly Ten Dollars only Dollars, In full payment for services in pictures No. 370.

"Approved for payment: Martha Lennan. "I hereby acknowledge receipt of the above sum from the F. B. O. Studios, Inc., as payment in full to date for services in posing, and hereby consent to the public exhibition, for the purpose of trade or advertising, of any picture ever posed by me for the F. B. O. Studios, Inc.

"Signature: Jesse James. (Stamped): Cashier, Jul. 30, 1927. Reimbursed."

It does not appear that at any time during the filming of the picture which was completed about September 30th, that the plaintiff made any complaint because she was not given the part of Zerelda Samuels, although she knew quite early in July that Mary Carr was to play that part. Having this information, she seemed content to accept the minor part assigned to her, and accepted without comment the compensation paid her for the work she actually did do. Nowhere does it appear that she ever made any claim for monthly compensation, as she alleged the contract provided she was to have.

There are other considerations which might be dwelt upon at length that give support to respondents' contention that appellant has failed to bring home to Fred Thomson any contract of employment, such as is alleged by plaintiff in counts two and three of her complaint. We feel that the reasons pointed out are sufficient to support our conclusion on this point.

[4, 5] As to count one, which is an action to recover the reasonable value of services which plaintiff alleges she rendered for and at the request of defendants, respondent Faries offers two answers, both of which have merit.

The receipts in evidence show that plaintiff accepted from the F. B. O. Studios, Inc., a corporation, three payments for the services she actually did render in the filming of the pictures, for which she signed receipts as payment in full for services rendered up to the date of payment. Again, there is no evidence in the record that the services she performed in the filming of the picture were rendered for, or at the request of Fred Thomson, or any duly authorized agent of his. There is evidence that justifies the inference that the Fred Thomson Pictures, the Fred Thomson Productions, and the Fred Thomson Company, each and all had some connection with the making of the picture. If these concerns were in fact operating names under which Fred Thomson was producing the pictures, the burden was upon plaintiff to so show. It would have been a simple matter to adduce evidence as to who constituted the concerns named. The fact that no evidence was offered by plaintiff on this point justifies the inference that the evidence, if presented, would have been adverse to plaintiff's contention.

[6] In view of our conclusions with regard to the alleged contract, which forms the basis of the cause of action in count two, the evidence is fatally lacking in the necessary proof to support a judgment in favor of plaintiff and against defendant Thomson in the cause of action set forth in count three.

We find nothing in any of the court's rulings which forms the basis of the remaining alleged errors that in any way affects our conclusions on the points discussed.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.



138 Cal.App. 680

PEOPLE v. ANDERSON.

Cr. 1777.

District Court of Appeal, First District, Division 2, California.

May 25, 1934.

Criminal law ⇐1130(4).

Reviewing court would be justified in treating appeal from conviction as abandoned, where accused's counsel, though notified that brief was overdue, failed to file brief within time granted for filing.

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Jack Anderson was convicted of grand theft, and he appeals.

Affirmed.

See, also, 83 P.(2d) 67.

Raine Ewell, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

SPENCE, Justice.

Defendant was convicted of the crime of grand theft. He has appealed from the final judgment of conviction and the order denying his motion for a new trial.

The transcript herein was filed on December 22, 1933, and the cause was regularly on the calendar on the 19th day of February, 1934. Counsel for appellant appeared at that time and requested further time for the filing of appellant's brief. Pursuant to said request appellant was granted 15 days' time for said purpose. Although said time has long since expired and counsel for appellant has on several occasions been notified that appellant's brief was overdue, no brief has been filed. We would no doubt be justified in treating the appeal as abandoned but we have nevertheless examined the transcript on file. The evidence points unerringly to appellant's guilt, and we find no prejudicial error in the record.

The judgment and order denying the motion for new trial are affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



138 Cal.App. 681

PEOPLE v. ANDERSON.

Cr. 1778.

District Court of Appeal, First District, Division 2, California.

May 25, 1934.

Criminal law ⇐1110(1).

Order denying accused's motion to correct clerk's transcript on appeal would be affirmed, where transcript at request of accused's counsel was transferred from one division of appellate court to another and was placed on calendar for hearing, but no briefs were filed.

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Jack Anderson was convicted of grand theft, and he appeals from an order denying a motion to correct the clerk's transcript on appeal.

Affirmed.

Raine Ewell, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

SPENCE, Justice.

This is a companion appeal to People v. Anderson (Cal. App.) 33 P.(2d) 66, the opinion in which last-named appeal has been this day filed. The appeal herein was taken from an order denying a motion to correct the clerk's transcript on appeal in the companion case.

The transcript on this appeal was filed December 27, 1933. At the request of counsel for appellant this appeal was transferred from Division 1 to Division 2 of this court and was placed on the calendar for hearing in this division on February 19, 1934, together with the main appeal. No briefs have been filed on either appeal. The record herein discloses no error on the part of the trial court in denying appellant's motion.

The order denying appellant's motion to correct the clerk's transcript on appeal is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



138 Cal.App. 637

ARNOLD v. HUMPHREYS.

Civ. 5063.

District Court of Appeal, Third District, California.

May 23, 1934.

Hearing Denied by Supreme Court July 19, 1934.

1. Joint adventures ⇐5(2).

In suit to recover one-half of profit derived by defendant from sale of realty, evidence *held* to support findings, to effect that realty was sold by joint efforts of plaintiff and defendant, pursuant to oral agreement to engage in joint enterprise of selling ranch and to divide commissions.

2. Joint adventures ⇐5(2).

In suit to recover one-half of profit derived by defendant from sale of realty pursuant to oral agreement to engage in joint enterprise of selling ranch, evidence introduced at trial *held* not at variance with allegations of complaint.

Complaint alleged that plaintiff and defendant entered into oral agreement to engage in enterprise whereby they agreed to use their joint efforts to consummate the purchase and sale of certain real property, and that, in event they were successful in effecting such sale, they would divide the profits equally between them. The evidence, in general, tended to support the allegations of the complaint.

3. Joint adventures ⇐1, 4(1).

Joint adventure created for specific purpose partakes of nature of limited partnership between parties thereto, and is governed by same principles, including fiduciary relationship existing between parties requiring each member to exercise highest degree of good faith towards others.

4. Joint adventures ⇐1.

That parties to alleged joint enterprise maintained separate real estate firms *held* not to prevent them from entering into valid joint enterprise with respect to particular piece of property.

5. Joint adventures ⇐4(1, 2).

In absence of evidence to contrary, members of joint adventure participate equally in profits and losses of enterprise.

6. Joint adventures ⇐1.

Relationship of joint adventurers may be terminated by mutual consent or otherwise.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action by Max B. Arnold against Ray Humphreys. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment affirmed.

G. L. Aynesworth, of Fresno, for appellant.

Barcroft & Barcroft, of Madera, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendant has appealed from a judgment which was rendered against him for one-half of the commissions or profit derived from the sale of real property pursuant to an oral agreement which he had with the plaintiff by the terms of which a joint adventure was created with relation thereto.

The complaint alleges that the plaintiff and the defendant were duly licensed real estate brokers in Madera, and that they entered into an agreement "whereby they engaged to use their joint efforts to consummate the purchase and sale of certain real property," and, "in event they were successful in effecting such purchase and sale, that the profits arising from the sale so effected by the efforts of the parties hereto would be divided between them share and share alike." The record discloses no demurrer to this complaint. The answer denies generally the foregoing allegations of the complaint regarding the joint adventure, and affirmatively alleges that the defendant "made a sale of real property and made a profit thereon within the last year, but that plaintiff had no rights in relation to the same."

The appellant contends that the findings and the evidence fail to support the judgment chiefly because there is a fatal variance between the allegations of the complaint and the proof which was adduced in support thereof. It is asserted the complaint alleges only a joint enterprise between the parties to buy and sell real estate as principals, and that the evidence merely tends to prove that they were acting as agents in attempting to procure the sale of land in behalf of the owners thereof.

The plaintiff and defendant are real estate brokers who have maintained separate realty firms at Madera for several years. They had frequently co-operated in other realty transactions. In October, 1931, the defendant contacted a prospective customer by the name of J. J. Johnson. Humphreys told the plaintiff he had a prospective purchaser of a large stock ranch whose name was Johnson and asked the plaintiff if he had any suitable ranch listed. Arnold obtained all the necessary information regarding the Forrest ranch in Merced county, which was on the market for sale. A friend of the plaintiff by the name of Buchenau was also joint owner with Simonson and two other parties of another 1,900-acre ranch in the same county, called the High ranch. The plaintiff first recommended the sale of the Forrest ranch. Together both agents frequently communicated with the prospective purchaser, J. J. Johnson. The plaintiff personally showed him the property and sought to consummate the sale in the latter part of October, 1931. Johnson finally refused to purchase the Forrest ranch for the reason that the soil contained too much sand and gravel. In a joint effort to sell this ranch the plaintiff and defendant often conferred in the office of Arnold. At one of these conferences, Buchenau, the friend of plaintiff, was present, and it was then agreed that, if the sale of the For-

rest ranch failed, they would attempt to sell the High ranch to Mr. Johnson. After Johnson expressed his dissatisfaction with the Forrest ranch, the defendant procured his check for $100, which he gave to the plaintiff to offer to Buchenau for the purchase of the High ranch at a proposed selling price of $43,200. This offer was rejected by Buchenau. On October 21, 1931, in the presence of Buchenau, in the office of the plaintiff, both agents agreed to attempt to procure a better offer from their customer, Johnson. Arnold then requested Buchenau to execute a written authorization for them to sell the High ranch at a price of $45,000 or $50,000, agreeing to pay them 5 per cent. commission in the event of a sale. Buchenau wrote the document in their presence, addressing it to the defendant, and handed it to the plaintiff, who immediately turned it over to the defendant. The check for $100 was returned to the defendant by the plaintiff with the statement, "I returned the check to Mr. Humphreys with the suggestion * * * that we could not get by with this offer, but that it would be possible to get by with a reasonable offer, somewhere between 43 and 50 thousand." In behalf of their customer Johnson, Mr. Buchenau was later offered $45,000 for the High ranch, which he promptly rejected. Apparently the defendant had been secretly negotiating with Mr. Simonson, one of the joint owners of the High ranch, to induce him to persuade his associates to sell the ranch for $46,000. It is undisputed that he agreed to pay Simonson $500 for that strategic service. He was actually paid $250 on that account. The plaintiff was not informed of this conspiracy. Neither had the defendant said anything to him about terminating their former agreement to jointly attempt to consummate the sale of the High ranch for an even division of the commission to be earned thereby. Having procured the consent of the owners of the High ranch to sell it for $46,000 net, the defendant, on January 6, 1932, took an option for the purchase of the ranch at that price from the owners in his own name. The following day he executed escrow instruments of conveyance of the ranch to John Johnson, the son of their former customer, J. J. Johnson, in consideration of the agreed price of $50,000. The initial payment of $3,000 was made in the form of a check which was signed by their customer J. J. Johnson. The sale was consummated. The defendant admitted at the trial that he received a net profit from the sale in excess of $3,000.

There can be no doubt that the plaintiff and defendant entered into an oral agreement to participate in a joint enterprise for the purpose of selling this High ranch and dividing the commission or net profits therefrom equally between them. The frequent conferences and joint negotiations between them regarding the matter furnishes convincing evidence of the existence of the agreement. In addition to corroborating evidence which appears in the deposition of the plaintiff, which was taken by the defendant and filed in the case, Mr. Arnold testified in that regard:

"Q. By the way, did you have any agreement concerning a commission on the High deal? A. Yes sir.

"Q. And what was it? A. The agreement was, Mr. Humphreys would have to expend $500.00 with a broker * * * and then the rest would be divided equally."

The defendant conceded there was an original agreement between them in that regard. He testified:

"Q. And you proceeded to effect a sale of that property, did you not? A. Yes, I sold the property.

"Q. Mr. Arnold was in that deal with you at the start, was he not? A. At the beginning, yes."

There is neither an allegation of the answer nor proof that the defendant ever attempted to terminate that agreement for a joint enterprise, until after the sale was consummated. In fact, it appears that the defendant sought to defeat the plaintiff of his interest in the transaction by secretly conniving with one of the owners of the ranch and taking an option to purchase it in his own name, passing the title to the son of their former customer. The court was justified in assuming this conduct on the part of the defendant amounted to a mere subterfuge and a violation of his trust, and that the joint enterprise agreement with the plaintiff was in full force at the time of the sale, entitling him to one-half of the commissions or net profit from the sale.

Upon the foregoing evidence the court adopted findings in favor of the plaintiff upon all of the allegations of the complaint, except as to the amount of the net profit alleged to have been derived, which the court reduced to the sum of $3,000. Judgment was accordingly rendered in favor of the plaintiff for the sum of $1,500. From this judgment the defendant has appealed.

[1] The evidence is adequate to support

the findings to the effect that the High ranch was sold by the joint efforts of the plaintiff and defendant, pursuant to the terms of their oral agreement to engage in the joint enterprise of selling the ranch and to divide equally between them the commission or net profit derived from the sale; that the defendant received in excess of $3,000 net profit from the sale, one-half of which belongs to the plaintiff. The judgment of $1,500 which was rendered against the defendant is therefore just and valid.

[2] There is no variance between the allegations of the complaint and the proof which was adduced at the trial. The appellant contends that the complaint alleges only an agreement between the parties to jointly engage in the enterprise of buying and selling real estate, and that upon the contrary the proof shows that they merely acted as real estate agents in attempting to sell property belonging to another person. The appellant's position seems inconsistent, for the only real defense which he appears to have made at the trial is that he first terminated the joint enterprise with the plaintiff and then bought the ranch in question in his own name and resold it at a profit. In effect, we think both of these assertions are incorrect. The complaint does not allege that these parties were to jointly engage in buying and selling real property. It alleges that they were to engage in an enterprise whereby they agreed to "use their joint efforts to consummate the purchase and sale of certain real property." The complaint further recites that, "in event they were successful in effecting" such sale, they would divide the profits equally between them. The defendant could not have been misled by this language. It is quite evident he was not misled. The complaint clearly charges a joint enterprise between two real estate agents to co-operate in effecting or procuring the sale of the High ranch, with the agreement to divide the commission or profit derived from such sale equally. It is immaterial whether they were to engage in that joint enterprise to sell real estate as principals or as agents. It further appears quite conclusively that the defendant did not purchase the High ranch himself in good faith. The procuring of the option in the defendant's name, and conveying the title to the son of their real customer, was apparently a mere subterfuge to deceive the plaintiff. Evidently the defendant was really acting as an agent in consummating that sale. There is therefore no variance between the allegations of the complaint and the evidence adduced in support thereof.

[3, 4] We are persuaded the transaction which is involved in this case constitutes a joint adventure between the parties based upon an oral agreement to co-operate in the sale of real property and to divide equally the net profit derived therefrom. 14 Cal. Jur. 760, § 2; Koyer v. Willmon, 150 Cal. 785, 90 P. 135, 137; Sly v. Abbott, 89 Cal. App. 209, 264 P. 507; Ford & McNamara, Inc., v. Wilson, 119 Cal. App. 475, 6 P.(2d) 996. A joint adventure which is created for a specific purpose partakes of the nature of a limited partnership between the parties thereto. It is governed by the same principles which apply to a partnership, including a fiduciary relationship existing between the parties requiring each member to exercise the highest degree of good faith towards the others. The fact that the parties to this action maintained separate real estate firms did not prevent them from entering into a valid joint enterprise with respect to a particular tract of property. Koyer v. Willmon, supra. In the case last cited it is said: "The fact that he [the plaintiff] had a general partner, with whom he was engaged in the real estate business, did not prevent him from entering into a particular partnership with Willmon relating to a particular lot, or lots, of land, to buy and sell the same for their joint benefit, or to engage in any other joint enterprise concerning such lands."

[5] In the absence of evidence to the contrary, the members of a joint adventure will participate equally in the profits and losses of the enterprise. 14 Cal. Jur. 761, § 2; Butler v. Union Trust Co., 178 Cal. 195, 172 P. 601; Irer v. Gawn, 99 Cal. App. 17, 277 P. 1053; Ford & McNamara, Inc., v. Wilson, supra.

[6] It is true that the relationship of joint adventurers may be terminated by mutual consent or otherwise. 33 C. J. 848, § 21; Irer v. Gawn, supra. In the present case the defendant admitted that the plaintiff was originally associated with him in the joint enterprise of selling the High ranch and dividing with him the profit derived therefrom. There is no evidence to indicate that he attempted to terminate that relationship. He accepted the benefits of the plaintiff's services and then surreptitiously sought to deprive him of the profits thereof.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

139 Cal.App. 62

STRAUSS et al. v. BRUCE et al.

BRUCE et al. v. STRAUSS et al.

Civ. 8963, 8964.

District Court of Appeal, First District, Division 1, California.

June 1, 1934.

Hearing Denied by Supreme Court July 30, 1934.

1. Reformation of Instruments ⇐45(8).

That all parties to notes and attorney who drafted them testified that provisions for 12 per cent. interest were inserted by mistake and did not express prior agreement justified reformation of notes for mutual mistake to eliminate provision for usury (Usury Act, § 3 [St. 1919, p. lxxxiii]).

2. Reformation of Instruments ⇐17(2).

Where it is shown that, due to mistake of scrivener, writing does not set forth true contract which parties had made, writing may be reformed (Civ. Code, § 3399).

3. Reformation of Instruments ⇐25.

Mere failure of parties to read instrument with sufficient attention to perceive mistake will not prevent reformation.

4. Bankruptcy ⇐155.

Jurisdiction of equity to correct errors in contracts caused by mutual mistake is not suspended by bankruptcy law.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by Arthur C. Bruce, as trustee in bankruptcy, and another against Louis D. Strauss and another, copartners doing business as Strauss Brothers, wherein defendants filed cross-complaint and also filed a separate action. From judgments, trustee in bankruptcy appeals.

Affirmed.

Walter H. Sprague and Franklin J. Cole, both of Los Angeles, for appellant.

O'Melveny, Tuller & Myers, Pierce Works, and Samuel A. Miller, all of Los Angeles, for respondents.

PER CURIAM.

Walter C. Hartman, one of the defendants above named, in the year 1928 executed to Louis S. Strauss and Edgar L. Strauss, copartners doing business as Strauss Brothers, six promissory notes. Five of the notes contained a provision for the payment of the principal "with interest payable monthly at the rate of one (1) per cent per month from date until paid * * * should the interest not be paid when due it shall thereafter bear like interest as the principal, and at the option of the holder of this note the whole sum of principal and interest shall become immediately due and payable." The sixth provided for such payment "with interest at the rate of twelve per cent per annum from date until paid, interest payable * * *, and if not so paid, to bear the same rate of interest as the principal." Hartman paid interest thereon until January, 1929, when he was adjudicated a bankrupt, and Arthur S. Bruce was appointed trustee of his estate. The trustee also paid certain interest on the notes; the total amount paid by the maker and his trustee being the sum of $7,591.80. The trustee then brought suit to recover this amount and the further amounts as provided by section 3 of the Usury Act (St. 1919, p. lxxxiii), on the ground that the payments of interest under the provisions of the notes as quoted above were usurious. Strauss Brothers answered, and therewith filed their cross-complaint, asking that the notes be reformed by striking therefrom the above provisions upon the same grounds as set forth in their complaint filed in a separate action, wherein they sought the same relief. As grounds for relief they alleged that the notes were copied by a scrivener from a printed form in general use, and that by a mistake the above provisions were included in the notes executed by Hartman, that the same did not express the intention of the parties, they not having agreed that the interest payments provided therein should bear interest in case of default, and that the provisions were inserted by mutual mistake.

[1] The actions were tried together. The trial court found in accordance with the above allegations, and a decree was entered in each suit that the notes be reformed as prayed. Bruce as trustee has appealed from these judgments.

According to the testimony of all the parties to the instruments and the attorney who drafted the same the provisions in question were inserted by mistake and did not truly express the agreement previously made. This evidence was amply sufficient to support the finding of the trial court.

But appellant claims that the instruments being usurious on their face they cannot be reformed, and that the court erred in its admission of evidence for that purpose and in its conclusion that the usurious provisions

should be stricken therefrom. He cites the following cases in support of his contention: Merced County v. Shaffer, 40 Cal. App. 168, 180 P. 342; Ainsworth v. Morrill, 31 Cal. App. 509, 160 P. 1089; and Martin v. Kuchler, 212 Cal. 536, 299 P. 52, 53. The first mentioned was an action to reform a bail bond, it being alleged that through mutual mistake of the parties it did not express their true intent. The bond did not in form comply with the requirements of the statute nor with the order of the court fixing the amount of bail. It was held that such a bond, being statutory, must conform to the statute and the order of the court, and that if it fails to do so it is not good as a common-law obligation and cannot be reformed. The second was an action by a husband and wife for the reformation and specific performance of a contract made by the husband alone for the sale of certain real property incumbered with a homestead declaration of the wife. It was held to be the policy and purpose of section 1242 of the Civil Code to prevent the destruction or incumbrance of a homestead by either spouse acting alone, and that a purported conveyance or incumbrance not made in strict compliance with the section is invalid and inoperative. The last, Martin v. Kuchler, was an action to recover usurious interest paid upon a promissory note. The defense was that none of the parties "intended or knew that the note was usurious or in violation of the Usury Act." It was held that their lack of knowledge of the legal effect of the note was no defense. The court said: "There is no pretense that the parties to said transaction did not fully comprehend and know the terms and conditions of the promissory note which formed the basis of the transaction and did not understand that it contemplated by its express language the payment of interest at the rate of 12 per cent. per annum payable monthly in advance upon the principal of the note, and that if said interest was not paid as it thus became due it was to be added to the principal and become a part thereof, and thereafter bear interest at the same rate." It was not sought to reform the instrument; no inequitable incidents were shown and the writing embodied the contract actually made.

It has been said that equity will not contravene the positive enactments and requirements of law and defeat its policy by applying under the guise of amending defective instruments those deficient elements of form without which the agreement is absolutely void even as between the parties to it; nor will it fabricate for contracting parties those essential ingredients of a contract without which in the eye of the law there subsists no valid contract whatever (Dickinson v. Glenney, 27 Conn. 111; Oatman v. Niemeyer, 207 Cal. 424, 426, 278 P. 1043); and such was the effect of the two cases first cited above. In such cases it has been uniformly held that no ground for equitable relief is presented. Kopp v. Gunther, 95 Cal. 63, 30 P. 301; Klinker v. Guarantee Title Co., 98 Cal. App. 469, 277 P. 177; Ottenheimer v. Cook, 57 Tenn. (10 Heisk.) 309. However, in the cases at bar the facts are different and another principle applies.

[2] Section 3399 of the Civil Code provides that, when through fraud or the mutual mistake of the parties, or the mistake of one party which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised to express that intention; and where it is shown that due to a mistake of the scrivener a writing does not set forth the true contract which the parties had made, relief by way of reformation may be granted (Lestrade v. Barth, 19 Cal. 660; Tarke v. Bingham, 123 Cal. 163, 55 P. 759; San Jose Ranch Co. v. San Jose L. & W. Co., 132 Cal. 582, 64 P. 1097; Oatman v. Niemeyer, supra; Mortara v. Rizzi, 104 Cal. App. 420, 285 P. 1071); where such is the case and through an honest mistake in drafting the instrument a usurious provision is inserted therein which is contrary to the agreement and true intent of the parties, the right to relief by a revision thereof has frequently been recognized both in law and equity. Norris v. W. C. Belcher Land Mortgage Co., 98 Tex. 176, 192, 82 S. W. 500, 83 S. W. 799; Goodale v. Wallace, 19 S. D. 405, 103 N. W. 651, 117 Am. St. Rep. 962, 9 Ann. Cas. 545; Ward v. Anderberg, 31 Minn. 304, 17 N. W. 630; Long v. Greene County, etc., Co., 252 Mo. 158, 158 S. W. 305; Wheeler v. Meray, Bailey, Eq. (S. C.) 507; 29 Eng. & Am. Ency. of Law (2d Ed.) 463. See, also, Williston on Contracts, § 1599.

[3, 4] The mere failure of the parties to read the instrument with sufficient attention to perceive the mistake will not prevent reformation (Los Angeles & R. R. Co. v. New Liverpool Salt Co., 150 Cal. 21, 87 P. 1029); nor is the jurisdiction of equity to correct errors in contracts caused by mutual mistake suspended by the bankruptcy law. Zartman v. First Nat. Bank, 216 U. S. 134, 30 S. Ct. 368, 54 L. Ed. 418. The relief asked was properly given, and the record discloses nothing which would justify a reversal of either judgment.

The judgments appealed from are affirmed.

CITIZENS' NAT. TRUST & SAVINGS BANK OF LOS ANGELES v. MESERVE et al. (two cases).*

Civ. 9698, 9648.

District Court of Appeal, Second District, Division 2, California.

June 4, 1934.

Rehearing Denied July 2, 1934.

Hearing Denied by Supreme Court Aug. 2, 1934.

Constitutional law ⇐55.

Statute requiring service of findings of fact and conclusions of law where court orders them prepared by counsel *held* directory, since court has inherent power to give its reasons for its judgment in its findings of fact and to order judgment entered without interference from legislative department (Code Civ. Proc. § 634).

Action by Citizens' National Trust & Savings Bank of Los Angeles against Edwin A. Meserve and others. From a judgment for plaintiff, the defendants Marguerite Maloney Mayo, and G. C. De Garmo, substituted for Julia B. Burns, also known as J. B. Burns, appeal. On separate petitions by appellants to change the bill of exceptions so as to show that findings of fact and conclusions of law were not served on them.

Petitions denied.

Hiram E. Casey, of Los Angeles, for petitioner Marguerite Maloney Mayo in Civ. 9698.

G. C. De Garmo, in pro. per. and W. M. Crane, both of Los Angeles, for petitioner G. C. De Garmo in Civ. 9648.

STEPHENS, Presiding Justice.

This opinion and ruling covers two petitions to change the bill of exceptions under section 652, Code of Civil Procedure.

The above-entitled case is on appeal to this court and defendants-appellants Marguerite Maloney Mayo and G. C. De Garmo substituted for Julia B. Burns by separate petitions request this court to proceed under section 652, Code of Civil Procedure, and change the bill of exceptions so as to show that the findings of fact and conclusions of law were not served on defendants according to the requirements of section 634, Code of Civil Procedure, and in fact were never served on defendants at all. Said defendants have regularly requested the trial judge to make such change, but he has refused so to do.

The petitions are denied for the reason that section 634, Code of Civil Procedure, requiring the service of findings of fact and conclusions of law where the court orders them prepared by counsel, is directory; the court having inherent plenary power to give its reasons for its judgment in its findings of fact, and to order its judgment entered without interference from the legislative department of the government. Lorraine v. McComb (Cal. Sup.) 32 P.(2d) 960. It may also be mentioned that section 634, Code of Civil Procedure, does not require service of findings except where they are ordered by the judge to be prepared by counsel and it does not appear that the judge made such an order in this case. It is apparent, therefore, that the requested change in the bill of exceptions, if made, could not affect the merits of the appeal.

We concur: DESMOND, J.; ARCHBALD, Justice pro tem.



139 Cal.App. 34

CITIZENS' NAT. TRUST & SAVINGS BANK OF LOS ANGELES v. BESSOLO & GUALANO, Inc., et al.

Civ. 7875.

District Court of Appeal, Second District, Division 1, California.

May 31, 1934.

1. Bills and notes ⇐518(1).

In action on note, evidence showing that investment broker sold note to plaintiff bank, and that plaintiff paid over proceeds to maker, *held* to negative defense of "no consideration" interposed by maker.

2. Appeal and error ⇐205.

Where testimony offered by defendants was excluded, and defendants made no offer of proof indicating materiality of evidence offered, defendants could not complain on appeal of alleged error in excluding evidence.

3. Appeal and error ⇐1058(1).

In action on note sold by investment broker to plaintiff bank wherein maker and guarantors alleged fraudulent representations inducing execution of note, excluding evidence showing transaction and conversations between bank and broker, and investigations made by bank, if error, *held* not prejudicial, in view of other evidence.

*Rehearing denied 34 P.(2d) 730.

4. Appeal and error ⇐1056(1).

In action on note sold by investment broker to plaintiff bank, excluding question to officer of bank whether broker had told him, before bank purchased note, that full face amount of note was not to be paid to maker, *held* not prejudicial; it being immaterial how maker disbursed proceeds of note.

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action by the Citizens' National Trust & Savings Bank of Los Angeles against Bessolo & Gualano, Inc., and others. From a judgment in favor of the plaintiff, the defendants appeal.

Judgment affirmed.

Lawrence M. Cahill, of Los Angeles, for appellants.

Mott, Vallee & Grant and J. Edward Haley, all of Los Angeles, for respondent.

HOUSER, Justice.

From the record herein it appears that on January 9, 1929, Bessolo & Gualano, Inc., a corporation, executed a promissory note in favor of itself for the sum of $13,500, payable six months after date, with interest thereon at the rate of 8 per cent. per annum, payable quarterly. Contemporaneously therewith, on the reverse side of said note, the corporation indorsed the same, and Angelo Bessolo, V. A. Gualano, and M. Angelo Bessolo executed a guaranty thereof. Two days thereafter, through the instrumentality of an investment broker, the plaintiff purchased said note at its full face value, and in payment of the purchase price issued and delivered to Bessolo & Gualano, Inc., one cashier's check for the sum of $12,150, and another cashier's check for the sum of $1,350, which latter check Bessolo & Gualano, Inc., indorsed in blank and thereupon delivered it to an agent of the investment broker by whom it was subsequently cashed. Following the maturity of the note, no part of either the principal or the accrued interest thereon having been paid, the plaintiff brought an action against the defendants to recover judgment on said note.

Defendants denied that the plaintiff was the owner of the note. They also interposed several separate defenses to the action, among which were that prior to the execution of the note an agent of the investment broker had stated to the president and the secretary of Bessolo & Gualano, Inc., that said agent would lend to it the sum of $12,200 "in consideration of the making, execution and delivery to him of the note described in plaintiff's complaint"; also that for its execution no consideration was received by Bessolo & Gualano, Inc., or by one of the guarantors of the note. Furthermore, that the execution of the note was induced by certain alleged fraudulent acts of the said agent. On all the issues raised by the pleadings of the respective parties to the action, the court found in favor of the plaintiff. It is from the ensuing judgment that the instant appeal is taken.

Prejudicial error, alleged to have been committed by the trial court, is predicated upon its refusal to permit the vice president of the plaintiff corporation to answer certain questions asked of him as a witness by the attorney who represented the defendants. In substance, those questions related to a time immediately preceding the purchase by the plaintiff of the note and were: (1) As to what conversation, if any, had occurred between the witness and the agent of the investment broker relative to the manner or means whereby he was acquiring the note in question, or what he was paying for it; (2) whether the witness had made any investigation to determine what the relationship was between said agent and the maker of the note "with reference to the execution of this note"; (3) whether anything had been said to the witness by the said agent to the effect "that this note had already been executed and that he was the owner and holder thereof"; (4) what the agent had said when he approached the witness at the time the note was purchased; and (5) from whom the note had been purchased.

In substance, appellants charge that the rulings made by the trial court in relation to such questions prevented appellants from showing that the respondent acquired the note in question with knowledge that the makers and the guarantors had not received, and would not receive, full consideration therefor; from showing that the signature of defendant Angelo Bessolo, as a guarantor, was obtained by fraud; also that such rulings prevented the appellants from showing that said guarantor had received no consideration for his guaranty. In this connection, at the outset it should be noted that on the trial of the action all the material facts with reference to the execution of the note, its guaranty, the receipt by Bessolo & Gualano, Inc., of two checks aggregating the sum of $13,500, and the delivery by Bessolo & Gua-

lano, Inc., to the agent of the investment broker of the one check for $1,350, were either admitted directly by the defendants, or testified to by them. In addition thereto, the witness to whom the several questions were propounded either already had testified, or later did testify, regarding the subject-matter involved therein. Among other things, he stated that he first saw the note on January 11, 1929; that "I had had the matter put up to me as an officer of the bank probably a day or two before that time, and in the interim I was investigating the names on that note. * * * We were asked if we would be interested in the purchase of such a note, and in the usual course of business I investigated the names thereon, especially as to one of the endorsers that we knew already in a general way and knew to be a man of responsibility, checked the name again through the bank account which is in the Farmers & Merchants National Bank. The information received from that bank was very good; it certainly amply entitled us to purchase or discount that note, and on the face of that information and the fact that the note appeared to be a good investment for the bank and bore a higher rate of interest than the run of our loans—that is, eight per cent instead of six or seven—we bought the note and paid for it. * * * Its face value. * * * It was made by checks, cashier's checks, to the firm of Bessolo & Gualano. * * * We have an almost invariable rule to make the checks always to the makers or payees of the note, which in this case I am certain is Bessolo & Gualano, Inc." He also stated that he made the checks payable to Bessolo & Gualano, Inc., on the instructions of Mr. J. M. Berry, "whom we recognized as the broker."

[1] Even from the testimony presented by the defendants themselves, it becomes evident that the defense of "no consideration," as far as the maker of the note was concerned, was of no avail. As to the guarantors of the note, their liability was determined by the provisions of section 2792 of the Civil Code, which provides that: "Where a guaranty is entered into at the same time with the original obligation, or with the acceptance of the latter by the guarantee, and forms with that obligation a part of the consideration to him, no other consideration need exist. In all other cases there must be a consideration distinct from that of the original obligation."

[2, 3] The defendants offered no evidence with reference to the separate defense of fraud; nor on the refusal of the trial court to permit the witness to answer the several questions of which complaint is made, did defendants make any offer of proof—that is, any statement by which the materiality of the evidence was indicated—which fact in itself affords a sufficient reason for failing to recognize appellants' claim on appeal from the judgment. Dougherty v. Ellingson, 97 Cal. App. 87, 99, 275 P. 456; Merz v. Poole, 82 Cal. App. 12, 15, 254 P. 914. But in any event, since in the circumstances any statement which might have been made by the witness in answer to the questions would have had no material effect upon the situation, it becomes apparent that, even conceding the fact that ordinarily the objections to the questions should have been overruled and the witness permitted to answer, the result of the assumed error or errors was not prejudicial to the substantial rights of the defendants.

[4] Appellants also contend that as to them the trial court committed prejudicial error in its refusal to permit the vice president of the plaintiff corporation to answer a question propounded to him by the attorney who represented the defendants on the trial of the action as to whether, prior to the date when the plaintiff purchased the note, the broker had told the witness "that the full face amount of the note was not to be paid to Bessolo & Gualano, Inc." But in view of the conceded fact that the president of the defendant corporation testified that by the two checks, to which reference hereinbefore has been had, it did receive from the plaintiff corporation "the full face amount of the note," it is not apparent how or in what manner the defendants could have been injuriously affected by reason of the assumed (although not conceded) error of the trial court. Since it is undisputed that the defendant corporation was paid and had in its possession and control all the money that was represented by its promissory note, it was immaterial what disposition the defendant corporation thereafter made of such funds. After the plaintiff corporation had delivered its cashier's checks to the defendant corporation, the manner of the disposition of the money represented thereby was wholly beyond the control of the plaintiff corporation, and what the defendant corporation saw fit to do with the money was entirely its own affair. If, in the exercise of its discretion in that regard, any part of such money was unwisely disbursed the defendant corporation has no cause for complaint against the plaintiff corporation either that the latter did not supervise the expenditure of such money, or prevent its possibly improvident outlay.

Since the foundation for each of the other alleged errors of which appellants complain is included within those to which attention hereinbefore has been devoted, it becomes unnecessary to discuss any of them.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.



139 Cal.App. 67

ROSE v. SUBWAY TERMINAL CORPORATION.

Civ. 9306.

District Court of Appeal, First District, Division 2, California.

June 1, 1934.

1. Jury ⇐26.

Plaintiff waived right to jury trial by failure to deposit jury fees within time specified (Code Civ. Proc. § 631, subd. 7).

2. Dismissal and nonsuit ⇐60(1).

Dismissing action for want of prosecution upon plaintiff's failure to deposit jury fees, instead of dismissing jury and setting cause down for trial by court without jury, *held* not abuse of discretion, in absence of request for trial without jury (Code Civ. Proc. § 631, subd. 7).

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by C. T. Rose against the Subway Terminal Corporation. From a judgment dismissing the action, the plaintiff appeals.

Judgment affirmed.

Randall J. Hood, Lester E. Hardy, and Claude A. Shutt, all of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondent.

SPENCE, Justice.

This is an appeal by plaintiff from a judgment of dismissal entered by the trial court upon the ground of want of prosecution.

Plaintiff had demanded a jury, and the trial before a jury proceeded during the first day. It was regularly continued to 10 o'clock of the morning of the following day. Plaintiff was advised by his counsel on the first day of the trial that it would be necessary for him to deposit $31.50 in cash with the clerk in payment of jury fees at the beginning of the trial on the second day. Plaintiff failed to produce these jury fees, but requested that the clerk accept his check for the amount. The clerk refused to do so but apparently agreed that he would accept said check if any one of the three attorneys then representing plaintiff would indorse said check. The record shows that each of said attorneys refused to make such indorsement. The trial court granted a recess until 10:30 a. m. in order to permit plaintiff to produce the necessary fees. He failed to obtain the money and a second recess was taken to give plaintiff a further opportunity. Shortly after 11 o'clock the case was again called and counsel for plaintiff stated: "In this matter we are not ready to proceed, by reason of the fact that our client has not produced the jury fee for this morning." Some discussion followed in which counsel for plaintiff stated that he and his associates had refused to indorse their client's check; that they had told him to send for the money but that the necessary amount had not been produced. He further stated: "So for that reason we are not ready to pay the jury fees at this time." Thereupon counsel for defendant moved for a dismissal for want of prosecution. The court indicated its view that there was nothing to do but grant the motion. After certain further discussion the motion was granted. No suggestion or request was made at any time that the jury be dismissed and the cause be tried by the court. Plaintiff's counsel made nothing more than a feeble suggestion that the jury fees might be produced if further time was granted.

[1, 2] Appellant concedes that a trial court has inherent power to dismiss an action upon the ground that it has not been diligently prosecuted and further concedes that the question of diligent prosecution is one largely committed to the discretion of the trial court. Raggio v. Southern Pacific Company, 181 Cal. 472, 475, 185 P. 171; 9 Cal. Jur. 526. He seems to take the position, however, that the trial court abused its discretion in the present case in dismissing the action rather than dismissing the jury and setting the cause down for a trial by the court without a jury. In our opinion it cannot be said that the trial court abused its discretion in dismissing the action. A jury had been demanded by plaintiff and he was insisting upon a jury trial without paying the jury fees required by law

and without making any request for a trial by the court. As a matter of law he had waived his right to a trial by jury by a failure to deposit the jury fees at the time specified (Code Civ. Proc. § 631, subd. 7), and the delay resulting from the granting of his requests for time within which to produce the fees obstructed the orderly and expeditious handling of the business of the court. If appellant had desired to have the jury dismissed and the cause set for trial before the court sitting without a jury, he should have made such request. The trial court might well have granted such request upon condition that appellant pay the jury fees incurred for the second day of trial before the time set for the trial by the court. In the absence of such request we believe that the trial court properly dismissed the action.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



138 Cal.App. 652

PEOPLE v. ALLEN.

Cr. 2495.

District Court of Appeal, Second District, Division 1, California.

May 24, 1934.

Rehearing Denied June 8, 1934.

Hearing Denied by Supreme Court June 22, 1934.

1. Criminal law ⇐407(2).

Accusatory statements made in presence of accused are admissible only when they are offered in connection with evidence of statements or conduct of accused, tending to give credibility to accusation.

2. Criminal law ⇐407(2).

In grand theft prosecution against administrator for embezzlement of estate funds, minute order of probate court that certain facts would be evidence that administrator had not embezzled or mismanaged estate should not have been admitted, where it did not appear that contents of order were known to accused at time of entry thereof.

3. Criminal law ⇐1169(2).

In grand theft prosecution against administrator for embezzlement of estate funds, error in admitting minute order of probate court that certain facts would be evidence that administrator had not embezzled or mismanaged estate *held* not prejudicial, where jury heard by other evidence that probate court was questioning administrator concerning his management of estate.

4. Criminal law ⇐547(2, 3).

In grand theft prosecution against administrator for embezzlement of estate funds, testimony concerning questions asked by probate court upon hearing where there was no stenographer and replies made by administrator, testimony of accused's conversations regarding hearing and reporter's transcript of proceedings on day when probate court suspended administrator *held* properly admitted.

5. Criminal law ⇐1169(2).

In grand theft prosecution against administrator for embezzlement of estate funds, alleged error in receiving admissions by accused when necessary foundation had not been established became harmless when, in further course of trial, state produced evidence which, apart from confession, was in itself evidence that accused misappropriated funds of estate.

6. Criminal law ⇐829(1).

Requested instructions which were covered by given instructions *held* properly refused.

7. Criminal law ⇐814(17).

Instruction stating rules pertaining to case based upon circumstantial evidence alone *held* properly refused where prosecution did not rely upon circumstantial evidence alone.

8. Larceny ⇐71(1).

Instructions that it was defense to charge of grand theft that property alleged to have been disposed of was disposed of openly and under claim of title preferred in good faith, even though such claim was untenable, *held* properly refused as inapplicable (Pen. Code, § 1127).

9. Criminal law ⇐814(1).

Requested instructions not pertinent to issues should not be given (Pen. Code, § 1127).

10. Larceny ⇐71(1).

Instruction that every crime is composed of act and intent, and if jury found that accused believed that he had right to retain custody of funds as administrator then intent to steal or embezzle funds was lacking and accused should be acquitted, *held* properly refused as omitting condition that jury should find that accused actually did keep funds in his possession.

11. Larceny ⇐70(3).

In grand theft prosecution against administrator for embezzlement of estate funds,

instructions relating to effect of pendency of appeal from order of distribution of estate upon authority of superior court in exercising control over administrator and funds in his possession *held* properly refused, since proceedings of superior court by which administrator was suspended because of mismanagement of funds were not proceedings upon order of distribution from which administrator had appealed.

12. Criminal law ⇐824(2).

In grand theft prosecution against administrator for embezzlement of estate funds, accused could not object because in instruction using words "uses and purpose not in due and lawful execution of trust" court did not further instruct explaining such words, where accused did not ask for such additional instruction.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

W. S. Allen was convicted of grand theft, and he appeals.

Affirmed.

Lawrence W. Allen and Matot, Stafford & Linn, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

CONREY, Presiding Justice.

The evidence produced at the trial of this case, upon which the defendant was convicted of the crime of grand theft, is evidence tending to prove that the crime was committed by embezzlement of trust funds lawfully in possession of the defendant. At the time when, according to the indictment, the crime is charged to have been committed, viz., February 24, 1933, defendant was the administrator of the estate of Sabrina L. B. Farrow, deceased, and had received into his possession money of the estate. The amount of this fund was alleged to be $9,196.72; and if the evidence does not show that the amount with which defendant was thus chargeable at the time was the full sum above stated, at least it does show that the true amount for which he was then chargeable was a sum in excess of $5,000.

Defendant appeals from the judgment of conviction, and from an order denying his motion for a new trial. His first assignment of error as stated in the opening brief is as follows: "The evidence relating to a minute order of the probate court, and the stenographer's report of testimony taken before the probate court and the testimony of the witness, Arthur E. White, as to what took place in certain proceedings in the probate court, and the testimony of Joseph A. Boland regarding an alleged extrajudicial statement or admission of the defendant was highly prejudicial to the defendant, and the court committed grave error in admitting the same into evidence over the objection of the defendant." From the reporter's transcript herein it appears that on January 31, 1933, in the matter of said Farrow estate, the court was making an inquiry concerning the funds in the hands of the administrator Allen. Whether this hearing was upon a citation to the administrator or upon a voluntary and informal appearance is not shown, but from the court's minute order of that date it is apparent that the inquiry was made pursuant to section 521 of the Probate Code, which provides that: "Whenever a judge of the court has reason to believe from his own knowledge, or from credible information, that any executor or administrator has wasted, embezzled or mismanaged, or is about to waste or embezzle the property of the estate committed to his charge, * * * he must cite such executor or administrator to appear and show cause why his letters should not be revoked, and may suspend his powers until the matter is investigated." At the trial in this action it was shown that there was no stenographic reporter present at said hearing of January 31st, and for that reason the court at the trial herein received testimony of the witness White concerning said proceedings of January 31st. According to the testimony of White, he questioned the administrator Allen concerning the amount of money with which he was then chargeable, and Mr. Allen stated that he was chargeable for $9,196.72 less some credits which, he claimed, approximately amounted to $3,000; that in answer to further questioning Allen said that he had the money in his possession; that he did not have it in any bank account, and did not think he had to have it in such an account. Finally, Allen said, "I have $5,000 in money," and exhibited to the court a cashier's check in the sum of $5,000 payable to W. S. Allen. White then testified that Allen stated that the cashier's check was money belonging to said estate. "I asked him whether he would deposit that check in a joint control account—that is, an account in his name as administrator of the estate, controlled jointly by the bonding company which I represented, and he said that he would not." In connection with the testimony of the witness White, the court received in evidence a minute order made by the court at

said hearing of January 31st, in which the court said: "Under section 521 of the Probate Code, the powers of the administrator are suspended pending investigation, except that administrator may deposit the funds belonging to said estate in any bank or depository, in a separate account in his name as administrator; if the administrator so deposits said fund and agrees to joint control, with his bondsman, such facts will be evidence that he has not embezzled or mismanaged said estate." With reference to that part of the order closing with the words, "such facts will be evidence that he has not embezzled or mismanaged said estate," the district attorney offered the same, not as proof of the matters set forth therein, but merely in effect as an alleged accusatory statement, and the court ordered that the jury consider it for that limited purpose, and for the purpose of further considering the conduct of the defendant subsequent thereto.

[1-3] Accusatory statements made in the presence of the accused person are admissible, only when they are offered in connection with evidence of statements or conduct of the accused, tending to give credibility to the accusation. In the present instance it does not appear that the contents of the minute order were known to the defendant at the time of entry thereof, and it must be held that the objection should have been sustained. But the jury had heard, by means of other evidence, that the court in said proceedings of January 31st was questioning the administrator concerning his conduct as custodian of the funds of that estate. Assuming, therefore, that the objection to the use of the minute order as an accusatory statement should have been sustained, the error was not one which could have impaired the defendant's right to a fair trial.

The testimony of the witness White covered the matter of the questions asked, and the replies made by the administrator, at said hearing of January 31st. The stenographer's report of the hearing before the court on February 24th, 1933, contains further examination on the same subject, that is to say, concerning the amount of the fund, and the circumstances of its custody by the defendant. The testimony of the witness Boland related to conversations held by him with the defendant in September, 1932, and thereafter, as well as the court proceedings above mentioned.

[4, 5] The objections of the defendant, to the admission of the testimony of White and of Boland, and to the admission of the reporter's transcript of the proceedings of February 24th, were properly overruled. The principal specific objection was that admissions of fact, by defendant, were being received in evidence when the necessary foundation, the corpus delicti, had not first been established. To this objection the sufficient reply is that even though the ruling was erroneous when made, such error became harmless when, in the further course of the trial, the state produced evidence which, separate and apart from any confession of guilt, was in itself evidence that the administrator had misappropriated the funds of the estate. People v. Barnnovich, 16 Cal. App. 427, 430, 117 P. 572.

[6, 7] Appellant suggests error in the court's refusal to give certain instructions requested by him. There are twelve of these items, and in the absence of any numbering we will use the page numbers of the clerk's transcript containing said requested instructions. The subject of 27 was covered by the instructions 43 and 49 as given by the court; 28 was without merit; 29 was an instruction stating rules pertaining to a case based upon evidence relating to circumstantial evidence alone. Since the record discloses that the prosecution did not rely upon circumstantial evidence alone or chiefly to obtain the defendant's conviction, it is obvious that the proposed instruction was properly refused. People v. Gorman, 31 Cal. App. 762, 161 P. 757.

[8, 9] Defendant's proposed instruction 31 reads as follows: "The court instructs you that it is a legal defense to the charge of grand theft as set out in the information that the property alleged to have been disposed of herein by this defendant was so disposed of openly and avowedly and under a claim of title preferred in good faith, even though such claim is untenable." The refused instructions 32 and 33 were variations upon the same theme. We think that they were not pertinent to the case which under the evidence was to be decided by the jury. Requested instructions not pertinent to the issues should not be given. Pen. Code, § 1127; People v. Adams, 79 Cal. App. 373, 377, 249 P. 536.

In the progress of the trial it became clearly an undisputed fact that the defendant had received into his possession funds of the estate of which he was administrator; that as the result of an inquiry made by the court relating to the defendant's conduct as administrator, the court by order of February 24, 1933 (reporter's transcript, p. 55), removed defendant as administrator of the Farrow es-

tate, and appointed a special administrator and ordered that defendant deliver to said special administrator the property of the estate, and the evidence was that defendant did not deliver any of the property to the special administrator. But while the evidence incidentally showed the facts just mentioned, the real ground of complaint on the part of the people, and the real theory of the prosecution, was that the defendant, at the time when the court made said inquiry and order, did not have in his possession the said fund of money, but on the contrary had used the same for his own benefit. In relation to this phase of the case the defendant offered a series of explanations culminating in his testimony (which it is plain that the jury did not believe) to the effect that he was held up at night by a highwayman, who took from him an envelope containing the sum of $12,500 in bills, a part of which was the money of the Farrow estate.

The second instruction No. 33 requested by defendant was properly refused by the court, because the court did give the instruction concerning reasonable doubt as provided by Penal Code, section 1096. The subject of refused instruction No. 34 was very fully covered by other instructions given.

[10] Refused instruction No. 35 reads as follows: "Every crime is composed of the act and intent, and if you find that the defendant believed that he had the right to retain custody of the funds and that it was his duty to do so and keep the funds in his hands and under his control as administrator pending his appeal to the Supreme Court, then I instruct you that the intent to steal or embezzle the funds is lacking and you should find the defendant not guilty." This proposed instruction omits the necessary condition that the jury should first find that the defendant actually did keep said funds in his possession. By way of explanation of the reference in the proposed instruction, to defendant's "appeal to the Supreme Court," it may be noted that long prior to January, 1933, the court had made an order determining the interests of the heirs of the estate, and ordered the administrator to distribute the funds in his possession to the persons named in said order; the final account of the administrator having been filed and approved. On June 21, 1933, the Supreme Court dismissed the appeal upon the ground, among others, that there was no contest between the heirs concerning their shares of the estate, and that the appellant administrator had no interest therein. In re Farrow's Estate (Allen v. Adkins et al.) 218 Cal. 375, 23 P.(2d) 34.

[11] The second refused instruction numbered 35, and refused instructions 36 and 37, were instructions in relation to the effect of the pendency of such appeal upon the authority of the superior court in exercising control over the administrator and the funds in his possession. These instructions were properly refused. It is true, as appellant contends, that the perfecting of the appeal stayed further proceedings as to the matters embraced in the order from which the appeal was taken. But the proceedings of the superior court by which the court investigated the conduct of the administrator in relation to his custody of the funds of the estate, and the order which the court made as the result of its investigation, were not proceedings upon the order of distribution from which the administrator had appealed. It would be a strange omission in the law's provision for care of estates in probate if the mere taking of an appeal from an order of distribution would enable an unfaithful administrator to successfully dispute the continuing right of the court to protect and preserve the assets of the estate.

[12] Appellant objects to one instruction given to the jury (clerk's transcript, p. 41), because in the course of the instruction where the court used the words "uses and purpose not in the due and lawful execution of the said trust," the court did not give a further instruction explanatory of those words, showing what the court meant by them. With respect to a criticism of this nature, appellant should not be heard to object when he did not ask for such additional instruction. People v. Martin, 44 Cal. App. 45, 185 P. 1003.

The two assignments of error amounting to misconduct, in one instance by the district attorney and in the other by the judge of the court, are without sufficient merit to require discussion here.

The judgment is affirmed, and the order denying motion for a new trial is affirmed.

We concur: HOUSER, J.; YORK, J.

139 Cal.App. 79

CALIFORNIA BANK v. NOTRICA et al.

Civ. 9346.

District Court of Appeal, First District, Division 2, California.

June 4, 1934.

1. Sales ⇐125.

Buyer, who bought fruit and vegetable stand under escrow agreement whereby purchase price was deposited with bank to hold for benefit of creditors, and thereafter acquired lessor's claim for rent due from seller by assignment, and then had attachment and judicial sale of business in order to defeat claims of other creditors, *held* not entitled to rescind escrow agreement because completion of sale was prevented by such attachment and judicial sale, since buyer could not take advantage of his own wrong (Civ. Code, § 1689).

2. Estoppel ⇐78(1).

Buyer of fruit and vegetable stand, who prevailed upon creditors to withhold attachment of assets and to look only to escrow fund of purchase price for settlement of their claims, and then himself had attachment and judicial sale of business as assignee of claim for rent due lessor from seller, *held* estopped to rescind escrow agreement because completion of sale was prevented by such attachment and judicial sale (Code Civ. Proc. § 1962, subd. 3).

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Suit by the California Bank, a corporation, against Morris Notrica and others, wherein named defendant filed a cross-complaint against Carmela Trerotola and others. From an adverse judgment, cross-complainant appeals.

Affirmed.

Louis Budway, of Huntington Park, for appellant.

James H. Mitchell, of Los Angeles, for respondent Elsie Kristovich.

Amos Friedman, of Los Angeles, for respondent Leo Greenwald.

G. C. De Garmo and W. M. Crane, both of Los Angeles, for respondent C. Ganahl Lumber Co.

Milton A. Krug, of Los Angeles, for respondent Gordon Jenkins.

Leo M. Zinner, of Los Angeles, for respondents Isma u and Mataji Rikimaru.

Charles F. Lowy, of Los Angeles, for respondent James W. Mullen.

Paul Peipers and George W. Fenimore, both of Los Angeles, for respondents Charles Lechler et al.

NOURSE, Presiding Justice.

The plaintiff sued to interplead the several claimants to a fund held by the bank under escrow. An order of interpleader was duly made, the fund was deposited in court, and the cause went to trial on the answers and cross-complaints of the respective parties. From the judgment the defendant and cross-complainant, Morris Notrica, has appealed on a bill of exceptions.

Briefly the facts are that defendant Trerotola and his wife, as owners of a fruit and vegetable stand operated in the Jess Willard market, entered into a written agreement with appellant to sell the entire business for the sum of $3,130, plus an item of $390 which was paid by appellant to satisfy a claim of an attaching creditor. The principal sum was deposited with the bank as escrow holder under instructions to the bank to hold for the benefit of creditors and until the further joint instructions of both parties. Notice of sale was given and recorded and the appellant took immediate possession of the premises operating the same for about two months. During this period the appellant, through his attorney, acquired by assignment the claim of the lessor for rent due and immediately caused an attachment to be levied and the premises, including fixtures and all other property, to be sold at judicial sale. The appellant thereupon secured a new lease from the owner, supplied new fixtures and stock in trade, and operated the business in his own name. Thereupon the appellant gave written notice to the bank that, because of this attachment and sale of the business he elected to cancel and rescind the sale from Trerotola and demanded a return of the money left in escrow.

Upon this evidence the trial court found that the creditors relied on the assets of the business for the payment of their claims and that the appellant had permitted and directed the subject-matter of the escrow to be dissipated and wasted. It was further found that, under the express terms of the escrow, the appellant could not rescind for the reason given or in the manner followed by him. From these findings the conclusion followed that appellant was estopped from asserting

any right to the return of the purchase price to the injury of the creditors.

[1] We cannot follow the statement of questions assigned by the appellant because no one of them is in accord with the evidence of record. The whole case is controlled by two elementary principles. First, that a party cannot take advantage of his own wrong. Thus, if the completion of the sale was prevented by the attachment and sale for rent due, this was brought about by the connivance of the appellant for the purpose of defeating the just claims of other creditors. As this was the only ground assigned for the attempted rescission it is apparent that appellant did not qualify under section 1689, Civil Code, as a party entitled to rescind.

[2] Secondly, the judgment must be affirmed because it presents all the elements of an estoppel within the provisions of section 1962, subd. 3, Code of Civil Procedure. Here the appellant prevailed upon the creditors to withhold suit and attachment of the available assets and to look only to the escrow fund for settlement of their claims. He then secured for his own use or dissipated all the available assets and sought a rescission of the escrow agreement and a return to him of the entire fund. As the Supreme Court said in Burgess v. California Mutual Bldg & Loan Ass'n, 210 Cal. 180, 188, 290 P. 1029, 1032, this doctrine of equitable estoppel "is applied, when necessary, to prevent the acts of a party from operating as a fraud upon one who has been deliberately led to rely thereon."

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

1 Cal.(2d) 83

DE GARMO v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

L. A. 14503.

Supreme Court of California.

May 31, 1934.

Rehearing Denied June 29, 1934.

1. Appeal and error ⇐461.

Stay of execution could not be had where appeal bond was part cash and part surety, and judgment exceeded the part cash (Code Civ. Proc. §§ 942, 948).

This is so since a stay of execution upon a judgment on appeal therefrom is a matter of statutory regulation, and an appeal bond which is part surety and part cash, the cash not being equal to the amount of the judgment, is not a substantial compliance with Code Civ. Proc. § 942, which expressly provides for a bond binding sureties personally and makes no provision for a bond of a dual nature, nor a substantial compliance with section 948 which provides that a deposit in court of the amount of the judgment shall be equivalent to filing the bond.

2. Mandamus ⇐55.

Mandamus to compel issuance of execution on judgment *held* to lie against county clerk, whose refusal rested upon void superior court order (Code Civ. Proc. § 1085).

PRESTON, J., dissenting.

In Bank.

Application by G. C. De Garmo for a writ of mandate prayed to be directed to the Superior Court of the State of California, in and for the County of Los Angeles, Walton J. Wood, as Judge thereof, to compel the cancellation of an order approving an undertaking upon an appeal, and to secure issuance of a writ of execution by L. E. Lampton, as the County Clerk of the County of Los Angeles.

Writ granted against county clerk.

Prior opinion, 24 P.(2d) 868.

Rehearing denied; PRESTON, J., dissenting.

Newby & Newby, G. C. De Garmo, and W. M. Crane, all of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and Fred M. Cross, Deputy Co. Counsel, both of Los Angeles, for respondents.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for respondent L. E. Lampton, County Clerk of Los Angeles County.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, Second Appellate District, Division 1. Upon further consideration, we are satisfied that the said court has correctly determined the issues, and we therefore adopt the opinion of Mr. Justice pro tempore Desmond, together with a part of the opinion of the court on petition for rehearing, as the opinion of this court. They read as follows:

This is an application for a writ of mandate or such other writ as may be appropriate to secure cancellation of an order made by a judge of the superior court of Los Angeles county approving an undertaking upon an appeal from a judgment entered in favor of plaintiff for the sum of $37,480; and also to secure issuance by the county clerk of a writ of execution upon the judgment which plaintiff, here the petitioner, has obtained.

While the trial court was conducting the hearings to determine the sufficiency of the undertaking entered into by various sureties, the defendants offered to post the sum of $5,000 with the county clerk to be held as additional security under the bond, the court having indicated that it desired an additional $20,000 in the way of sureties above those appearing on the undertaking, and the $5,000 cash being offered in lieu thereof. Counsel for defendant agreed that a cashier's check indorsed to L. E. Lampton, county clerk, should stand as part of the bond or undertaking, "the sum to be held by the County Clerk, to abide the decision of the reviewing court in case judgment appealed from is affirmed shall be applied in satisfaction of the judgment." This arrangement followed a declaration by the trial judge that he hesitated about allowing every item presented as a part of the aggregate undertaking of $74,960. There can be no question, therefore, that the $5,000 was intended for and was accepted by the court as part of the undertaking, especially in view of the language employed in the indorsement entered by the court upon the document as follows: "May 22, 1933. The appellants having deposited with the clerk the sum of $5,000.00 as part of the undertaking and to be used to satisfy any final judgment against appellants, the written undertaking is approved.

Walton J. Wood, Judge." This conclusion is confirmed by consideration of the formal order approving the undertaking signed May 24, 1933, nunc pro tunc as of May 22, 1933.

It is apparent from the foregoing that the undertaking upon appeal, furnished by appellant and by the court approved, does not meet the requirement of section 942 of the Code of Civil Procedure, because that section makes no provision for a bond of a dual nature, part cash and part surety, but expressly provides for a written undertaking binding sureties personally to pay whatever is due from appellant upon affirmance of the judgment, if appellant fails to pay. Section 948 of the Code of Civil Procedure provides that: "In all cases where an undertaking is required on appeal by the provisions of this title a deposit in the court below of the amount of the judgment appealed from, shall be equivalent to filing the undertaking." Inasmuch as the judgment in this case was $37,480, it is manifest that the deposit of $5,000 does not meet the requirement of section 948.

[1] We have then a situation in which appellant has failed to furnish a sufficient undertaking or a sufficient cash deposit within the terms of the Code provisions. As stated in Mohn v. Superior Court, 53 Cal. App. 425, 428, 200 P. 360, 361: "A stay of execution upon a judgment on appeal therefrom is a matter of statutory regulation, and can only be had upon a substantial compliance with the provisions of the Code." Since there is here no substantial compliance with the Code requirements, it follows that petitioner is entitled to his writ.

It is suggested by respondent Lampton in his petition for rehearing that the writ of mandate may not properly issue against him, because the superior court was not made a party before this court. In the argument under that heading it is further suggested that, where the interests of parties will be affected by the issuance of a writ, they must be made parties to such proceedings.

The superior court, together with respondent Lampton as county clerk, was named as a respondent in this proceeding. The court issued its alternative writ to the clerk alone. If we admit for the purposes of the argument that we should have issued the writ to the superior court as well as to the clerk, and if we further agree that it would have been better practice to direct that the parties in interest in the action in the court below be brought in to defend their interests in the matter, nevertheless the actual presentation to this court was, in fact, not thereby altered. Respondent Lampton was represented here by the same counsel who had appeared for the defendants in the action in the court below; and we do not doubt that the argument made by them in the proceeding here upon the merits was exactly the same argument which they would have made if the writ had been issued to the superior court and to the parties in interest in the action. Therefore it would be an idle act to grant a rehearing merely for the purpose of bringing in additional parties.

[2] The order herein made for issuance of the peremptory writ has been by this court rested solely upon the opinion that the order of the superior court relied upon by respondent to justify his refusal to issue the execution was a void order. From this we concluded that the case here presented "a situation in which appellant has failed to furnish a sufficient undertaking or a sufficient cash deposit within the terms of the code provisions." We adhere again to the resulting conclusion that the writ should issue against respondent clerk, the purpose being "to compel the performance of an act which the law specially enjoins, as a duty resulting" from his office. Code Civ. Proc. § 1085.

It is ordered that a writ of mandate issue to the county clerk of Los Angeles county, respondent herein, commanding him to issue an execution upon the judgment as prayed for, unless within thirty days from the entry of this order the appellants file an undertaking to stay execution approved by the lower court.

PRESTON, Justice (dissenting).

I think the bond is sufficient.

1 Cal.(2d) 100

GOBEL v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 14585.

Supreme Court of California.

June 11, 1934.

Rehearing Denied July 9, 1934.

Master and servant ⇐419.

Where employee, who had received compensation for temporary total disability, filed, two days before expiration of 245-week limitation period, an application for award based on new and further disability in nature of permanent disability, and was not seeking amendment or modification of original award, application *held* timely so as to give Industrial Accident Commission jurisdiction, though there was no opportunity to give reasonable notice of and hold hearing on the application within the 245-week period (St. 1917, pp. 841, 850, §§ 11 (c), 20 (d).

Application was timely, since application came within St. 1917, p. 841, § 11 (c), which provides that injured employee may institute proceeding for collection of compensation within 245 weeks after date of injury on ground that original injury has caused new and further disability, and since application did not come within section 20 (d) which provides that commission shall have continuing jurisdiction over its orders and awards and may at any time, on notice and after opportunity to be heard is given to parties in interest, rescind, order, or amend any such order, decision, or award on good cause appearing therefor, provided that no award of compensation shall be rescinded, altered, or amended after 245 weeks from date of injury.

In Bank.

Proceeding under the Workmen's Compensation Act by George Gobel, employee, opposed by the Thompson Paint & Glass Company, employer, and the United States Fidelity & Guaranty Company, insurer. The Industrial Accident Commission dismissed employee's petition to reopen and adjust a claim, and employee petitions to review and annul the action of the Commission.

Order dismissing the petition annulled, and proceeding remanded.

Rehearing denied; SHENK and PRESTON, JJ., dissenting.

Geo. W. Rochester and Burke Mathes, both of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

PER CURIAM.

By this application the petitioner seeks to have this court review and annul the action of the respondent commission in dismissing for an asserted lack of jurisdiction, a petition to reopen and to adjust a claim based on an alleged new and further disability in the nature of permanent disability resulting from the original accident for which petitioner has already received an award for temporary total disability. The dismissed petition was filed with the commission two days before the expiration of 245 weeks from the date of the accident.

It appears that petitioner on September 3, 1928, and while acting in the course and scope of his employment for the Thompson Paint & Glass Company, slipped and fell to the ground from a window sill on the fifth floor of a building and was severely injured. Compensation benefits and necessary medical services were furnished by the employer and its insurance carrier until May 9, 1929.

Petitioner thereafter, and on August 22, 1930, made application to the respondent commission for an adjustment of his claim for compensation for temporary disability resulting from the accident. Upon hearing had the commission on November 19, 1930, found, in substance, that petitioner had suffered temporary total disability from the date of the accident on September 3, 1928; that the employer and the insurance carrier had paid all compensation and furnished all necessary medical treatment during that period; and that the evidence failed to show that petitioner suffered any disability subsequent to May 9, 1929, by reason of the accident. It was therefore ordered that petitioner take nothing. No petition for a review was filed.

Thereafter and on May 13, 1933, and within two days of the expiration of 245 weeks from the date of injury, the petitioner filed a petition with respondent commission to reopen the case and to make an award of compensation upon the ground that the original injury had caused "new and further disability." The commission gave notice of its intention to dismiss this proceeding and on July 3, 1933, made its order dismissing the same on the ground that sufficient time did not remain to permit of reasonable notice and hearing before expiration of the 245-week period. Application for a rehearing was denied and this proceeding was thereupon commenced. The sole question involved is whether the commission rightfully refused to take

jurisdiction and consider an application for an award based on alleged new and further disability when the application therefor was filed within the 245-week period of limitation, but at a time when, in its opinion, there was no opportunity to give reasonable notice of, and to hold a hearing on the application within the 245-week period.

In support of its action, the commission relies on Larsen v. Industrial Acc. Comm., 125 Cal. App. 13, 13 P.(2d) 850, 851. The case is not in point. There an award was made by the commission. No application for a rehearing was filed and no further steps taken until the last day of the 245-week period when the commission, of its own motion, purported to make an order amending and modifying its previous award. In annulling the award, as amended, without notice to the insurance carrier, the court in the Larsen Case, supra, declared that section 20 (d) of the Workmen's Compensation Act (St. 1917, p. 850, § 20 (d) only authorizes the commission to rescind, alter, or amend its orders, decisions, or awards upon good cause and when "notice and * * * opportunity to be heard is given to the parties in interest," and within a period of 245 weeks from the date of the injury.

Petitioner assumes the position, and correctly so, that the Larsen Case is inapplicable. He contends, in substance, that he did not seek an amendment or modification of the original award but, on the contrary, instituted a new and independent proceeding, notwithstanding the form in which the same was presented, for an award based on new and further disability in the nature of permanent disability caused by the original injury and not theretofore compensated for. He urges that such a proceeding is within time if commenced within the 245-week period and cites in support thereof Hines v. Ind. Acc. Comm., 215 Cal. 177, 190, 8 P.(2d) 1021, and Cowell, etc., Co. v. Ind. Acc. Comm., 211 Cal. 154, 160, 294 P. 703, 705, 72 A. L. R. 1118. These cases support petitioner's contention. In the latter of the two cited cases it is declared: "It was held in the cases of Hutchinson Lumber Co. v. Ind. Acc. Comm., 77 Cal. App. 141, 246 P. 118; General Accident, etc., Corp. v. Ind. Acc. Comm., 77 Cal. App. 314, 246 P. 570; and Ocean A. & G. Corp., Ltd., v. Ind. Acc. Comm., 90 Cal. App. 725, 266 P. 556, that a permanent disability is a new and further disability within the provisions of the Workmen's Compensation Act. We are in full accord with this conclusion of the District Courts of Appeal. Many times the seriousness of the injury is not at first apparent, and from its very nature cannot be detected until considerable time has elapsed after its infliction. The clear intent of the statute in such cases is that the injured employee shall be entitled to compensation for his permanent disability notwithstanding the fact that he may in the early stages of his injury have been granted an award only for temporary disability, or may have been paid compensation voluntarily by his employer; provided, of course, that proceedings for the collection of such permanent disability shall have been commenced within two hundred and forty-five weeks after the date of the original injury. * * * In General Accident, etc., Corp. v. Ind. Acc. Comm., supra, the court stated the correct rule in the following language: 'However, in view of the language of section 11 (c) of the Workmen's Compensation, Insurance, and Safety Act (Stats. of 1917, p. 831, as variously amended), it would appear that, if the injuries received in the first accident "caused new and further disability," the question of the date when the permanent disability of Robinson was first determined would be immaterial, so long as the proceedings to have his claim adjusted were instituted within 245 weeks after the date when the first injury was sustained.' "

It would appear therefore that inasmuch as petitioner was not seeking an amendment or modification of the original award, but rather was asking an award based on a "new and further disability," in the nature of permanent disability, that the Larsen Case, supra, relied upon by the commission, is inapplicable, and the application for an award based on such new and further disability having been filed within the 245-week period, was within time under the authorities above cited and the commission therefore erred when it dismissed the petition for lack of jurisdiction.

The order of July 3, 1933, dismissing the petition for an award based on new and further disability is annulled and the proceeding is remanded to the respondent commission for such further proceedings as may be proper in accordance with this decision.

138 Cal.App. 769

WILSON et al. v. GENERAL WATER HEATER CORPORATION et al.

Civ. 9305.

District Court of Appeal, First District, Division 2, California.

May 29, 1934.

1. Trial ⇐404(2).

Finding that corporation was obligated to pay royalties to certain person and that, at time of and as one of conditions of merger with another company, it agreed to pay plaintiff percentage of such royalty, *held* not error as conclusion of law and not finding of ultimate fact, where all ultimate facts necessary to support such finding were conceded.

2. Corporations ⇐426(10).

Corporation having power to contract, and having accepted benefits of contract made by its president and controlling stockholder relating to payment of royalties as condition of merger, is estopped from denying its contract.

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action by John Wilson and another against General Water Heater Corporation and another. From an adverse judgment, named defendant appeals.

Affirmed.

G. C. DeGarmo and W. M. Crane, both of Los Angeles, for appellant.

Gibson, Dunn & Crutcher, of Los Angeles (H. F. Prince, A. E. Pennekamp, and Robert F. Schwarz, all of Los Angeles, of counsel), for respondents.

NOURSE, Presiding Justice.

In the year 1919, one Bastian entered into a written contract with the defendant Hinckley and three others for the formation of a corporation to manufacture and sell a patented combination water heater. Bastian, as owner of the patents, transferred his interest to the corporation in consideration for specific amounts of common and preferred stock and a royalty of 2 per cent. of the sale price of the products of the corporation. In further consideration Bastian was also employed as manager and continued as such until April, 1921, when he sold all his preferred stock and the greater portion of his common stock to one Smith. Some time prior to the year 1927 the defendant Hinckley acquired from Smith all his interest in both the common and preferred stock of the corporation. The plaintiffs each owned one-third of the stock of a rival corporation, in which the defendant Hinckley owned the remaining one-third. In 1927, these three entered into a writing agreeing that the second corporation should be dissolved and that the plaintiffs should be given in exchange for their shares in the rival corporation a specified number of shares in the defendant corporation. The business of the two concerns was thereupon merged in the defendant corporation. At that time the defendant Hinckley either owned or controlled 1,800 of the 1,825 shares of the outstanding common stock of the defendant corporation. Prior to this merger he had received from the corporation quarterly payments on account of the royalty agreed to be paid to Bastian apportionate to his holding of the capital stock of the corporation presumably on the basis of having acquired the royalty rights of Bastian through the purchase from Smith. Evidence was offered that prior to the execution of the written agreement heretofore referred to, the defendant Hinckley promised on behalf of the defendant corporation that the latter would pay to each plaintiff such proportion of this 2 per cent. royalty as their holdings in the defendant corporation bore to the outstanding common stock of the corporation. After the merger was completed and the transfers of stock had been made, the defendant corporation paid to each plaintiff three quarterly dividends on account of such royalty. Payments were then discontinued, the corporation taking the position that the oral contract of Hinckley with the plaintiffs was not binding upon the corporation. This action was thereupon instituted by the plaintiffs against the corporation and Hinckley to recover portions of the unpaid royalty and to have a determination made covering the rights of the plaintiffs to participate therein in the future. Judgment went for the plaintiffs in accordance with the terms of the contract against the corporation alone and the corporation prosecutes this appeal.

[1] We will confine our discussion to the statement of questions involved found in appellant's opening brief assuming, as the parties seem to have assumed throughout the litigation, that the contract of the corporation to pay a percentage of the royalty to some of its stockholders was a valid contract. Appellant makes a general attack upon the findings as being insufficient to support the judgment because they find that the appellant was

obligated to pay the royalty to Bastian and that at the time of and as one of the conditions of the merger it agreed to pay the plaintiffs a percentage of such royalty. This, it is said, is but a conclusion of law and not a finding of any ultimate fact. But all the ultimate facts necessary to support this finding were conceded. That is to say, the appellant did not question the making of the contract by its codefendant Hinckley, but it contended that the evidence of the oral negotiations was inadmissible and that the contract was a contract of Hinckley and not of the corporation.

Secondly, the question is asked whether, if a corporation issues stock to an owner of patents and agrees to pay him a royalty on sales of his products in consideration of the transfer of his patents and his services as general manager, is the royalty right pertinent to the stock or is it a personal right which does not pass to the transferee of the stock? The answer to the question does not determine any issue involved. Assuming that the royalty right is personal and does not pass to the transferee of the stock the corporation may nevertheless have acquired the patentee's rights in the royalty and may thereafter have agreed to pay the royalty to another. Putting it in another way, the question of the patentee's rights in the royalty is one between the patentee and the corporation and is beside the issues here involved, which are based upon a contract between the corporation and the plaintiffs wholly independent of the rights of the original patentee. Further, the plaintiff asks in this statement of the questions involved whether the royalty ceases upon the termination of the services of the patentee as manager. The answer to this question is likewise outside the issues involved, because whether the corporation is still obligated to pay the royalty to the patentee is immaterial to a question of the liability of the corporation under its contract with the plaintiffs.

[2] The third question stated by the appellants is as follows: "If two corporations are merged, is evidence of negotiations and oral understandings admissible, when a subsequently executed written agreement between them appears to contain the terms and conditions of the merger?" Here again an answer to the question would not serve to cover any issue involved in the appeal because the statement does not conform with the undisputed evidence in the record. The written agreement referred to by the appellant was one executed by the plaintiffs and the defendant Hinckley alone as owners of all the stock of the corporation which was subsequently merged with the appellant. This merger was effected by an oral agreement which was made independently of the written agreement referred to. In the written agreement between these stockholders none of the undertakings involved in this litigation was covered. The case is therefore merely one based upon an oral contract made by the holder of the majority of the issued stock of the appellant corporation who was at the time in full control of the business of the corporation. His authority to make the contract is not questioned in the evidence, but if question were to be raised it would be answered by the undisputed evidence that the corporation ratified and affirmed the contract. Hence the only issue involved is whether a corporation, having accepted the benefits of a contract made by its president and controlling stockholder, is estopped from denying its contract, no question being raised as to the power of the corporation to contract with the parties concerning the subject-matter involved. The liability of a corporation under such circumstances cannot be doubted. 6a Cal. Jur. § 676.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



138 Cal.App. 706

MARSHALL v. MARSHALL.

Civ. 8950.

District Court of Appeal, First District, Division 1, California.

May 28, 1934.

1. Divorce ⇐253.

In action for divorce, where parties put in issue title of property held by them, superior court had jurisdiction to adjudicate as to separate character of property; action being dual in character.

2. Appeal and error ⇐907(3).

Where appeal is taken on judgment roll alone, appellate court would presume that evidence was introduced on contested issue and that findings and judgment are supported thereby.

3. Divorce ⇐254.

In action by wife for divorce, where complaint alleged her ownership of real estate as her separate property and prayed that court decree that husband had no interest therein, and answer alleged that real estate was community property and prayed that it be decreed such, superior court had jurisdiction to render judgment that wife owned property as separate estate.

Appeal from Superior Court, Los Angeles County; Dailey S. Stafford, Judge.

Action by Lena E. Marshall against Edmund A. Marshall. From an adverse judgment, defendant appeals.

Affirmed.

Walter L. Mann, of Los Angeles, for appellant.

Arthur C. Webb, of Los Angeles (James MacIntosh, of Los Angeles, of counsel), for respondent.

KNIGHT, Justice.

This appeal was taken on the judgment roll alone. The sole question presented is whether the trial court, after having denied plaintiff a divorce, exceeded its jurisdiction, as defendant contends, in decreeing, in accordance with the allegations of the complaint, that plaintiff was the sole and separate owner of a lot described therein.

[1] An analogous situation was before the Supreme Court in the case of Allen v. Allen, 159 Cal. 197, 113 P. 160, 162, in an appeal from a judgment rendered in an action to set aside a deed, and it was held that the trial court did not exceed its jurisdiction. There, as here, the wife had sued for divorce and claimed certain real property as her separate property. She was denied a divorce. It was awarded to the husband on his cross-complaint. Nevertheless the trial court found and gave judgment that the wife was sole and separate owner of said real property. In sustaining the trial court's action in so doing, the Supreme Court said: "* * * it is no doubt true, as urged by respondent, that as a general rule the superior court in a divorce proceeding has no jurisdiction to deal with the separate property of the spouses. But the superior court in which the action for divorce must be brought is also vested with general jurisdiction to determine title to real property, whether based on legal or equitable claims, and if the parties in a divorce proceeding see fit to make the character of property held by them—whether separate or community—an issue in the proceeding, as the court is vested with jurisdiction to determine that question as fully as if the title were put in issue in a direct action brought for that purpose, the same effect must be given to its judgment as if such an action had in fact been brought." The same doctrine was restated and applied in Carr v. Carr Co., 39 Cal. App. 53, 177 P. 856, 857, wherein the court said: "Conceding that in an ordinary proceeding for divorce the court is not authorized to dispose of the separate property of either party, that rule does not apply in a case where the action is dual in its character, seeking not only a divorce but an adjudication as to the separate character of certain described property and a decree in effect quieting plaintiff's title thereto. The issue as to the property having been fairly made and by both parties submitted to the court for determination, the court had jurisdiction to determine the question involved as to the character of the property, and to quiet the title of the rightful owner thereto. Glass v. Glass, 4 Cal. App. 604, 88 P. 734; Allen v. Allen, 159 Cal. 197, 113 P. 160." Another case holding to the same effect is Barrow v. Barrow, 42 Cal. App. 51, 183 P. 364.

[2, 3] In the present case the wife sought the divorce upon the ground of cruelty. There were no children, and as to the property rights, she alleged in paragraph IV of the complaint: "That the parties hereto have acquired no community property since the consummation of this marriage, but that plaintiff previous to this marriage had and owned the following described property in the County of Los Angeles, State of California, more particularly described as follows: Lot 8, Block 11 of Floristan Heights Tract as shown in the records of the office of the County Recorder of said County in Book of Maps 16 at page 106, and that said property is the sole and separate property of the plaintiff herein and that if defendant claims any interest thereto, that he set forth his interest and this Court may decree that the said defendant has no interest in said property." And besides asking for the divorce, alimony, and attorney's fees, she prayed that "defendant be required to set forth any and all claims he may have to the property set forth in this complaint as the separate property of the plaintiff and that this Court determine, decide and decree that the defendant herein has no right, title, claim or interest in or to said property, and for such other and further relief as to this Court may seem just." In his

answer defendant denied the charges of cruelty and with respect to paragraph IV of the complaint denied "that said parties have acquired no community property * * *." He then set forth the specific items thereof, consisting entirely of personal property, mostly household goods; and continuing, he denied that "said real property described in said paragraph IV is the sole and separate property of plaintiff; but to the contrary alleges that said property is community property and that defendant has a community interest in same." And among the relief prayed he asked "that the Court adjudicate and determine the rights of the respective parties in and to said property." On the issues thus framed and submitted for determination, the trial court after denying plaintiff a divorce found that the parties had acquired community property but held that no disposition would be made thereof; and then with respect to the real property found as alleged in the complaint, "That plaintiff herein is the owner of the following described property located in the County of Los Angeles, California, as her sole and separate property [here followed the description]; the Court further finds that the defendant herein has no right, title, claim or interest in or to said real property." The conclusions of law and the judgment conformed to the findings.

The appeal having been taken on the judgment roll alone, it must be presumed, of course, that evidence was introduced on the contested issue relating to the title to the real property and that the findings and judgment are supported thereby. Therefore, since it affirmatively appears that plaintiff's action was dual in its character, in that she sought not only a divorce but an adjudication as to the character of the real property described therein and a decree quieting her title thereto, and that defendant joined in asking the trial court to adjudicate that issue, it must be held here, in conformity with the rule of the cases cited, that the trial court did not exceed its jurisdiction in determining the issue.

We find nothing in the numerous California cases cited by appellant at variance with the rule established and adhered to by the cases above cited. In one of them, West v. West, 206 Cal. 706, 276 P. 100, 102, the action eventually was one for separate maintenance; and the determination there of the question of the title to the property defendant asserted was his separate property obviously was in no way essential to a disposal of plaintiff's case. As pointed out by the court, the wife asked "for no further relief than that out of the proceeds thereof she be awarded separate maintenance in the form of permanent alimony," and it was held, therefore, that whether it was separate or community property was entirely immaterial, because in any event recourse could be had thereto under sections 137, 140, and 141 of the Civil Code, to enforce whatever orders the trial court might choose to make regarding permanent alimony. Many of the cases appellant cites from foreign jurisdictions are based on local statutes; but if there be any rule stated in any of them which holds contrary to the doctrine adhered to in this state, it cannot, of course, be followed here.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.



138 Cal.App. 695

MANICA v. SMITH et al.

Civ. 4619.

District Court of Appeal, Third District, California.

May 25, 1934.

Hearing Denied by Supreme Court July 23, 1934.

1. Automobiles ⇐240(3).

Where guest alleged that host operated automobile with such gross negligence that it overturned, there was no variance between complaint and evidence that host, angry with guest, drove in reckless and grossly negligent manner to frighten guest, since host's conduct included "gross negligence" and "willful misconduct" (St. 1929, p. 1580, § 141¾).

[Ed. Note.—For other definitions of "Gross Negligence" and "Willful Misconduct," see Words & Phrases.]

2. Negligence ⇐108(1).

Negligence may be alleged in general terms.

3. Automobiles ⇐181(1).

"Gross negligence" within guest statute means lack of slight diligence, while "willful misconduct" involves deliberate, intentional, or wanton conduct in doing or omitting to perform acts with knowledge or appreciation of fact that they are likely to result in injury to another, and willful misconduct may include gross negligence (St. 1929, p. 1580, § 141¾).

4. Automobiles ⊂=6.

Statutory liability of automobile owner who, for hire, permitted car to be operated by another through whose gross negligence guest was injured *held* not abated by amendment of guest statute before judgment, which amendment eliminated liability for gross negligence and permitted recovery only for intoxication or willful misconduct (Civ. Code, § 1714¼; St. 1929, p. 1580, § 141¾; St. 1931, p. 1693, § 141¾).

Liability of owner, even if based solely on Civ. Code, § 1714¼, which renders owner liable, within certain limits, for death or injury resulting from negligence in operation of motor vehicle by any person with permission of owner, regardless of relation of master and servant or principal and agent, did not abate by reason of St. 1931, p. 1693, § 141¾, which amended the guest statute (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580) by eliminating liability for gross negligence, since the cause of action had accrued before the amendment and the amendment merely changed the degree of proof necessary to establish liability, and since Civ. Code, § 1714¼ remains in force.

5. Automobiles ⊂=6.

Statute making automobile owner liable, even in absence of relation of master and servant or principal and agent, for injuries resulting from negligence by another operating car with owner's permission *held* constitutional (Civ. Code, § 1714¼).

6. Statutes ⊂=225.

Statute making automobile owner liable for negligence of another driving car with owner's permission, and statute, taking effect at same time, limiting liability to guest to cases of intoxication, willful misconduct, or gross negligence, must be construed together in determining owner's liability (Civ. Code, § 1714¼; St. 1929, p. 1580, § 141¾).

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

On rehearing.

Judgment affirmed.

Prior opinion, 18 P.(2d) 347.

Herbert Choynski, of San Francisco, and Anson Morgan, of Sacramento, for appellant.

Sheridan Downey and Price & Price, all of Sacramento, for respondent.

PER CURIAM.

A rehearing was granted in this case to give further consideration to the question regarding the statutory liability of the owner of an automobile who, for hire, permits it to be used and operated by another person through whose gross negligence a guest is injured.

The appellant was engaged at Sacramento in the business of renting automobiles to be operated by other persons. The company owned the machine which is involved in this appeal. For a consideration it was rented to and operated by the defendant Smith on April 28, 1930. The plaintiff was riding in the machine as a guest at the time of the accident. Smith drove the car out Freeport road beyond the city limit at a rapid rate of speed and in such a grossly negligent manner that it swerved to the wrong side of the highway, narrowly escaping a collision with an approaching machine. He then directed it straight towards a concrete parapet which stood at the opposite side of the road, which he barely missed. Immediately thereafter he drove the machine directly towards another approaching automobile which was forced into the ditch to avoid a collision. Smith's car then swerved back to its proper side of the highway where it ran into the ditch and overturned. The plaintiff was thrown out and sustained a broken arm and other injuries. There is no evidence of defective steering gear or other mechanical flaws in the car. There is no evidence that Smith was intoxicated, or that he had been drinking liquor. He was angry with the plaintiff. She testified that he drove the machine in the reckless and grossly negligent manner above related to frighten her.

The complaint alleges that the appellant is the owner of the automobile and that it was rented to the defendant Smith who was driving it at the time of the accident; that he "operated said automobile with such gross negligence" that it overturned, causing the injuries which were sustained by the plaintiff who was riding with him as a guest.

[1-3] The cause was tried by the court sitting without a jury. Findings were adopted by the court favorable to the plaintiff on all the material issues. A judgment was rendered against both defendants jointly for damages in the sum of $1,607.90. From that judgment, the owner of the machine alone has appealed. The appellant contends its liability, which was created by section 1714¼ of the Civil Code, was annulled by the subsequent adoption of an amendment to section 141¾ of the California Vehicle Act (St. 1923, p. 517 as added by St. 1929, p. 1580) before the judgment was rendered in this case. The

amendment of 1931 (St. 1931, p. 1693) eliminated from the guest law liability for injuries sustained as a result of gross negligence. It is also asserted there is a fatal variance between the allegations of the complaint to the effect that the plaintiff's injuries were sustained as a result of the manner in which the automobile was operated, amounting to gross negligence on the part of Smith, and the evidence which was adduced at the trial which clearly shows that he was guilty of willful misconduct.

We are of the opinion the conduct of the defendant Smith in recklessly driving the automobile in the manner above related amounts to gross negligence, and that it also constitutes willful misconduct.

There is no variance between the allegations of the complaint that the manner in which the defendant Smith drove the car amounted to gross negligence, and the proof which was adduced at the trial indicating that he was also guilty of willful misconduct. The only negligence which is alleged was that he operated the machine in such a grossly negligent manner that the accident occurred. Negligence may be alleged in general terms. It is immaterial that he characterized the conduct of the driver as gross negligence, if in fact it was more aggravated so as to constitute willful misconduct. In truth, it included both. The court found that the allegations of the complaint were true.

Gross negligence is defined as a lack of slight diligence. Malone v. Clemow, 111 Cal. App. 13, 295 P. 70; Walters v. Du Four, 132 Cal. App. 72, 22 P.(2d) 259; Kastel v. Stieber, 215 Cal. 37, 8 P.(2d) 474. Willful misconduct depends upon the facts of a particular case. It involves deliberate, intentional, or wanton conduct in doing or omitting to perform acts with knowledge or appreciation of the fact that they are likely to result in injury to another person. Helme v. Great Western Milling Co., 43 Cal. App. 416, 185 P. 510, 512; Walker v. Bacon, 132 Cal. App. 625, 23 P.(2d) 520; Olson v. Gay (Cal. App.) 27 P.(2d) 922; Howard v. Howard, 132 Cal. App. 124, 22 P.(2d) 279; Norton v. Puter (Cal. App.) 32 P.(2d) 172. In Helme v. Great Western Milling Co., supra, it is said:

"'Willful misconduct' means something different from and more than negligence, however gross. The term 'serious and willful misconduct' is described by the Supreme Judicial Court of Massachusetts as being something 'much more than mere negligence, or even gross or culpable negligence,' and as involving 'conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its possible consequences.' In re Burns, 218 Mass. 8, 105 N. E. 601, Ann. Cas. 1916A, 787. The mere failure to perform a statutory duty is not, alone, willful misconduct. It amounts only to simple negligence. To constitute 'willful misconduct' there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury. Smith v. Central, etc., Ry. Co., 165 Ala. 407, 51 So. 792."

From the foregoing definitions it is evident that acts or conduct which merely amount to gross negligence may not be aggravated enough to also characterize them as willful misconduct. Upon the contrary, acts which do amount to willful misconduct may also include gross negligence. In the present case, while the conduct of Smith does amount to willful misconduct, we are satisfied that it also constitutes gross negligence.

[4] It is contended that since section 141¾ of the California Vehicle Act was amended before the judgment in this case was rendered so as to eliminate therefrom liability for damages to a guest for gross negligence of the driver of an automobile, leaving only drunkenness and willful misconduct as the bases of such liability, this cause of action abated. It is insisted the amended vehicle act is retroactive in that respect. In support of this assertion the appellant cites Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A. L. R. 1327, and other authorities wherein the established rule of law is stated that when a right of action does not exist at common law, but is created solely by a statute which contains no saving clause, the repeal of the act prior to the recovery of judgment has the effect of destroying the cause of action. Conceding that the liability of the appellant in the present case depends solely upon section 1714¼ of the Civil Code, and that it did not exist at common law, we are still of the opinion that it did not abate by the amendment of section 141¾ of the guest law, for the reason that the amendment of the last-mentioned section merely changed the degree of proof necessary to establish liability and section 1714¼ of the Civil Code remains in force.

[5] A limited liability of the owner of an automobile is created by the provisions of section 1714¼, which became effective August

14, 1929 (St. 1929, p. 566), for damages resulting from injuries sustained by one through the negligent operation of a car to whom it is rented or by whom it is permitted to be used with or without hire. This liability accrues on the theory of imputed negligence whether the machine is used in the business of the owner or not and independently of the existence of a relationship between him and the operator of master and servant or principal and agent. This liability was apparently created because of the nature of the dangerous instrumentality of an automobile which is evidenced by the alarming number of deaths and injuries resulting from automobile casualties. This section is constitutional. Heron v. Riley, 209 Cal. 507, 289 P. 160; Barrett v. Harman, 115 Cal. App. 283, 1 P.(2d) 458. The last-mentioned section provides in part: "Every owner of a motor vehicle shall be liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner provided that the liability of an owner for imputed negligence imposed by this section and not arising through the relationship of principal and agent or master and servant shall be limited to the amounts of five thousand dollars for the death of or injury to one person in any one accident. * * *"

[6] At the same time the foregoing section of the Civil Code was enacted, section 141¾ of the California Vehicle Act was also adopted. Both sections became effective at the same time. They must, therefore, be construed together in determining the liability of the appellant in this case.

It has been definitely determined on principle that the amendment of section 141¾ of the California Vehicle Act is not retroactive in its effect upon statutory liability for the death or injury of a guest so as to destroy a vested right of action which had accrued prior to the amendment so long as the statute which creates the liability remains in force. Stotts v. Blickle (Cal. Sup.) 30 P.(2d) 392, 393; Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A. L. R. 1327; Walters v. Du Four, 132 Cal. App. 72, 78, 22 P.(2d) 259. In the case of Stotts v. Blickle, supra, it is said:

"The theory [of the appellant] is that a cause of action dependent upon statute, such as an action for wrongful death abates upon the repeal of the statute without a saving clause; and that the action for wrongful death is governed by this rule.

"This theory, and its application to the 'guest law,' received full consideration by this court in the case of Krause v. Rarity, 210 Cal. 646, 293 P. 62, 77 A. L. R. 1327, and the principles therein discussed are determinative of the instant case. We there dealt with the original guest law, as enacted in 1929, which took away the right to recover for ordinary negligence, and permitted recovery only for gross negligence, intoxication, or willful misconduct. This court held that the statute could not be retroactively applied to defeat a cause of action for ordinary negligence which accrued before its enactment. It was pointed out that the right of action for wrongful death remained, but required different evidence to maintain it. 'In other words, there has not been a moment of time since the enactment of section 377 [Code of Civ. Proc.] to the present time when an action would not lie on behalf of the heirs on account of the death of the guest. The only change brought about by the new law was in the nature and character of the proof required in each case. There was no abolishment of the right or cause of action.' * * * The matter is still one of the nature of proof required to establish the culpability of the defendant. The right of action against a host for wrongful death of a guest is no more destroyed by the 1931 amendment than by the 1929 statute."

The principle which is determined in the Krause Case with relation to the abatement of a cause of action because of the amendment of section 141¾ of the guest law is applicable to the present case. In that case suit for damages for the death of William Krause, which occurred in 1927, before the guest law was enacted, was brought by his heirs on the ground of ordinary negligence. He was riding as a guest in the automobile of the defendant when he was killed. There was no common-law right of the heirs to maintain the action. It was instituted solely by authority of section 377 of the Code of Civil Procedure. At that time a statutory liability for the death of a guest as a result of ordinary negligence existed. After the accident occurred, but prior to the rendering of judgment in that case, section 141¾ of the vehicle act was enacted, restricting the liability to proof of death as a result of intoxication, gross negligence, or willful misconduct of the operator of the machine. The defendant in that case contended just as the appellant contends in this case, that the adoption of the guest law before the rendering of judgment destroyed the cause of action for the reason that the law was retroactive. The Supreme Court held that it was not retroactive so as

to destroy the cause of action based upon ordinary negligence, which had already accrued. Upon exactly the same principle the Stotts Case was decided, in which it was held that the elimination of the right to maintain an action for the death of a guest as the result of gross negligence was not destroyed by the amendment of the vehicle act prior to the rendering of judgment. We are satisfied the cause of action against the appellant in this case did not abate by reason of the amendment of the guest law before the judgment was rendered.

The judgment is affirmed.



139 Cal.App. 30

HARLAN v. TAYLOR.

Civ. 8844.

District Court of Appeal, First District, Division 2, California.

May 31, 1934.

1. Appeal and error ⇐181.

Where error occurs, or is about to occur, in trial of action, party who would claim error on appeal must first call matter to attention of trial court.

2. Appeal and error ⇐217.

Where jury requested additional instructions, but court at time was engaged in trial of another case and offered to comply with request as soon as convenient, and jury, without receiving additional instructions, returned verdict, plaintiff, not having raised point regarding additional instructions when verdict was returned, *held* to have waived irregularity, if any.

3. Appeal and error ⇐1060(1).
Trial ⇐127.

In action for death of guest in automobile accident, excluding question put to representative of insurance company who interviewed material witness for defendant, inquiring by whom he was employed, *held* error, but error was not prejudicial.

4. Automobiles ⇐246(60).

In action for death of guest in automobile accident, wherein plaintiff alleged gross negligence and willful misconduct in operation of automobile, plaintiff's instruction purporting to define doctrine of res ipsa loquitur *held* properly refused.

5. Automobiles ⇐246(60).

In action for death of guest when automobile left highway, ran across ditch and overturned, instruction, in substance, that mere happening of accident, or mere bringing of action, raised no presumption or inference of negligence, *held* not erroneous.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Addie Harlan against Alice E. Taylor. From a judgment in favor of the defendant, the plaintiff appeals.

Affirmed.

Elmer P. Delany, of San Francisco, for appellant.

Kirke La Shelle, Jr., of San Francisco, for respondent.

STURTEVANT, Justice.

The plaintiff, as the surviving mother of Jessie Slone, commenced an action against the defendant to recover damages for the injury and death of her daughter while riding in an automobile owned by the defendant. The jury returned a verdict in favor of the defendant, and from the judgment entered thereon the plaintiff has appealed.

On the 8th day of September, 1930, Jessie Slone and the defendant Alice Taylor left Oakland in a Ford coupé intending to go by Dublin pass to Modesto. At a point between Livermore and Dublin the automobile left the highway, ran across a ditch and turned over. As a result of the accident Jessie Slone was killed. The plaintiff alleged that her daughter was riding as the guest of the defendant, and that the defendant by gross negligence and willful misconduct so operated the automobile that the accident occurred. The defendant in her answer denied the allegations about the operation of the automobile by her and affirmatively alleged that at the time of the accident Jessie Slone was doing the driving and that the defendant had no control over the automobile. During the trial the respective parties introduced evidence on the issues so framed.

[1, 2] After the jury had retired to deliberate upon its verdict the trial court took up the trial of another action. In about an hour the jury called the bailiff and directed him to notify the trial court that the jury desired additional instructions. The court sent word back that it was engaged in the trial of another case and would comply with the jury's request as soon as convenient. In a few

minutes the bailiff returned, stating that the jury had reached a verdict. Soon thereafter the jury was called in. Neither the court nor counsel adverted to the request for additional instructions, but the court proceeded in the usual manner to receive and have recorded the verdict of the jury. In her first point the plaintiff calls attention to the foregoing proceedings and predicates thereon prejudicial error. We think that the point has no merit. When the jury was brought in and before it announced its verdict, if the plaintiff considered that additional instructions should be given the plaintiff should have made the point at that time. It could then have been ascertained whether the jury still desired the additional instructions or had abandoned its request therefor. In that manner the trial court could have cleared the record of any possible claim of error. Under the facts we think the irregularity, if any, was waived by both parties. Murphy v. Zwieg, 100 Cal. App. 266, 279 P. 1062. But the plaintiff says that case involved misconduct in the argument of counsel. That is true, but the principle involved in that case is the same as in this case—if error occurs, or is about to occur, in the trial of an action, he who would claim error on appeal must first call the matter to the attention of the trial court.

[3] As stated above, the parties proceeded on conflicting theories as to who was operating the automobile at the time of the accident. In presenting her case the plaintiff called Mr. Ferrari as one of her witnesses. On the day of the accident Mr. Ferrari was driving a truck in the opposite direction and passed the automobile in which the two young women were riding. The defendant is a brunette; Jessie Slone was a blond. After the accident Arthur Hoertel, the representative of the insurance company, accompanied by Mr. Rosher, called at the residence of Mr. Ferrari and propounded many questions to him and wrote down his answers. The writing was then read to him and, furthermore, he read it himself. However, he did not sign the document. At the time of the trial Mr. Ferrari was called as a witness. He testified that when he passed the Ford coupé he did not notice the color of the hair of the girl who was driving, but it was light hair. The color of the hair of the other girl was dark. On cross-examination the witness stated that the plaintiff called on him and at that time he said to her: "I think the blond was driving." Later during the cross-examination he stated that he had been interviewed by two men, but did not know them by name. Continuing, he told about his statement being written down, etc. Thereupon the attorney for the plaintiff offered to stipulate that the writing be admitted in evidence. Without objection thereafter it was read. Among others it contains this sentence: "There were two young women in it, one was a blond and the other a brunette and I believe the blond girl was driving but I am not absolutely sure of this." During the cross-examination the witness was asked if either of the men who had interviewed him was in the courtroom. He walked around the courtroom and then resumed the stand and testified that he did not see either of them. When the defendant was presenting her case in chief she called Mr. Hoertel to the stand. He testified that he was the one who took the written statement from Mr. Ferrari and, furthermore, that he was in the courtroom when Mr. Ferrari walked around the courtroom to see if he could recognize the individual who took down the written statement. Furthermore, he testified as to the appearance of Mr. Rosher. On cross-examination he was asked by whom he was employed. To that question an objection was made and the objection was sustained. The plaintiff claims the ruling was error. We think it was. However, we are equally of the opinion that the error was not prejudicial to the plaintiff.

[4] The plaintiff requested and the trial court refused to give an instruction purporting to define the doctrine of res ipsa loquitur. As the plaintiff's case rested on gross negligence and willful misconduct on the part of the defendant the trial court did not err in refusing to give the instruction. Lincoln v. Quick, 133 Cal. App. 433, 24 P.(2d) 245, hearing denied by Supreme Court September 22, 1933.

[5] The trial court gave an instruction as follows: "The mere happening of the accident upon which this action is based, raised no presumption or inference that this defendant was in any way negligent nor does the bringing of this action raise any such presumption or inference." The plaintiff contends that because this was a passenger case it was error to give that instruction. We think the point may not be sustained. The instruction does not purport to deal with the doctrine of res ipsa loquitur, furthermore it has been approved many times.

We find no prejudicial error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

139 Cal.App. 10

GALLATIN v. MARKOWITZ et al.

Civ. 4909.

District Court of Appeal, Third District, California.

May 29, 1934.

Rehearing Denied June 28, 1934.

Hearing Denied by Supreme Court July 26, 1934.

1. Evidence ⇐450(8).

Contract that purchasers should make own arrangements with subtenants, that vendor should not be responsible for nonperformance of leases, and that if subtenants brought action to enforce lease purchasers should pay all expenses, *held* not so unambiguous as to require exclusion of parol evidence to explain its meaning where before making contract vendor had dismantled building which had been condemned by city.

2. Appeal and error ⇐907(3).

On appeal on judgment roll alone, presumption is that evidence sustained findings of trial court.

3. Appeal and error ⇐842(2).

Meaning of doubtful word in a contract is question of fact upon which finding of trial court is binding on appeal.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Malvena Gallatin against Max Markowitz and another. From a judgment for plaintiff, defendants appeal.

Affirmed.

Busick & Busick, of Sacramento, for appellants.

Albert Monaco and Heller, Ehrman, White & McAuliffe, all of San Francisco, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Malvena Gallatin, the plaintiff and respondent herein, was the owner of a lot in the city of Sacramento, on which was situated an old brick building consisting of the ground floor and two or three upper stories. The entire building was leased to George Manoles until May 31, 1923, who had subleased to Ned Licht a store on the ground floor for a term also ending May 31, 1923. In February, 1921, the upper stories of the building were condemned by the city of Sacramento. That thereafter Malvena Gallatin demolished the entire building, forcing Licht to vacate about March 16, 1921, and thereafter neither Manoles nor Licht were tenants of or in possession of any part of said premises.

On May 26, 1921, Malvena Gallatin entered into an agreement to sell the property to Max and Deborah Markowitz. Inasmuch as this appeal is concerned with this agreement the material portions are here set forth as follows:

"This agreement made this 26th day of May, 1921, by and between Malvena Gallatin, hereinafter known as the seller, and Max Markowitz and Deborah Markowitz, hereinafter known as the purchasers, witnesseth: * * *

"It is understood that the property herein described has heretofore been leased to one George Manoles and that said George Manoles has sub-let the same to sundry persons and that there was formerly a building on said property, part of which was three stories and part two stories, and that the said building was condemned by the city authorities of the city of Sacramento; that in conformity with said condemnation proceedings, part of the building has been demolished and there is a question as to whether the leases covering on said property could be enforced by the lessees. The purchasers hereof agree to make their own arrangements with the subtenants of said George Manoles and agree not to hold the seller responsible in any manner whatsoever for failure or non-performance of said leases or for any claims which may be made by said lessees under said leases. It being understood, however, that in the event that said George Manoles should bring any action to enforce his lease, the seller is to defend such action and is to pay all expenses connected therewith. * * *

"In the event that any of the tenants in the said property other than George Manoles bring action to enforce their lease, the purchasers shall defend such action and are to pay all expenses connected therewith. * * *"

On June 30, 1921, Markowitz accepted title to the property and commenced the erection of a building thereon. Ned Licht, one of the former tenants of plaintiff in the old building, was at all times ready, able, and willing to perform the terms of his lease and so notified all parties concerned, but Markowitz refused to provide for him in the new structure except in a small store at an increased rate over his former rental. This arrangement Licht refused to accept and commenced an action against Malvena Gallatin as lessor, for damages. Malvena Gallatin immediately no-

tified Markowitz of the commencement of the suit and that the action was one under the terms of their contract. Thereupon Markowitz and Gallatin jointly employed counsel, who undertook the defense of the action, each contributing toward the costs and expenses of the defense thereof. At the conclusion of the trial a jury found for Licht and awarded him damages in the sum of $3,500. Upon rendition of this judgment Malvena Gallatin demanded of Max and Deborah Markowitz that they assume and pay or otherwise satisfy said judgment and reimburse her for her costs and expenses paid out or incurred in the defense of the action. Then, for the first time, Markowitz denied any liability to satisfy the judgment or to pay any of the costs or disbursements of the action. Thereafter Malvena Gallatin arranged with Licht for the payment of $3,183.50 in satisfaction of the judgment and notified Markowitz of such arrangements and demanded that he arrange to pay that amount or proceed with an appeal. Markowitz declined to pay the judgment or assume any obligation with respect to the litigation and Mrs. Gallatin thereupon paid the amount in satisfaction of the judgment, together with certain items of costs and counsel fees. The present action is for the recovery of the sum thus paid.

Judgment was rendered in favor of plaintiff, from which Markowitz appeals upon the judgment roll alone, claiming the evidence is insufficient to support the findings and conclusions of law. We are thus limited in our examination to the judgment roll, which contains a copy of the agreement entered into between the parties and the findings and conclusions of law based thereon.

The first question is whether the agreement thus presented appears upon its face to be ambiguous or uncertain in its terms.

[1, 2] Plaintiff in her complaint sets forth an interpretation of the contract in accordance with her understanding thereof to the effect that it was therein agreed that defendants would make their own arrangements with the subtenants and would not hold plaintiff responsible in any manner for failure or nonperformance of said leases, or for any claim that might be made by the lessees, and would indemnify and hold the seller harmless for any failure or nonperformance of the said leases, and in the event any of the subtenants would bring action to enforce his lease defendants would defend such action and would pay any judgment and all expenses connected therewith. Defendants denied that by the terms of the contract they agreed in writing or at all, to indemnify the seller but admitted that "In the event any of the tenants in the said property other than George Manoles, brings action to enforce their contract the purchaser shall defend such action and are to pay all costs connected therewith." Upon the issues thus presented the trial court found in accordance with the allegations of the complaint. We are in accord with the trial court that the agreement was not so plain and unambiguous as to speak for itself unaided by extrinsic evidence, and this appeal being on the judgment roll alone we must presume the evidence presented fully supported the findings of the court and were competent to establish the allegations of the complaint. Brett v. Vanomar Producers, 45 Cal. App. 286, 187 P. 758; Crowther v. Metalite Manufacturing Co., 133 Cal. App. 452, 24 P.(2d) 551; Klopputh v. McCord, 211 Cal. 734, 296 P. 882; Euless v. Westphal, 71 Cal. App. 611, 235 P. 742.

[3] Whenever the meaning of a word in a contract is doubtful a finding of the trial court as to what the parties intended thereby and what the word means, is a pure finding of fact and binding on this court. First National Bank v. Bowers, 141 Cal. 253, 74 P. 856; Slama Tire Protector Co. v. Ritchie, 31 Cal. App. 555, 161 P. 25.

Appellants cite many authorities in opposition to the conclusions of the court but they are all based upon the fact that in the absence of ambiguity in a written instrument parol evidence is not admissible, but it is apparent that ambiguity did exist in the agreement before the court. In view of the fact that the building had been demolished at the time of the execution of the agreement it was necessary to ascertain what the parties meant by "tenant," what was contemplated by the use of the word "arrangements," and the scope of the word "expenses"; also appellants claim the language "to enforce their lease" means to specifically enforce the same while it is pointed out by respondent the only action that would lie against respondent would be an action for damages, she being out of possession and the premises demolished at the time of the execution of the contract, and the only action that could be maintained against appellants would be an action for possession, in which case the agreement need not have provided that appellants would defend the same.

It is quite apparent that "to enforce their lease" was not intended to mean "specifically enforce their lease." Neither party to this agreement could limit a tenant to an action

for specific performance rather than to an action for damages.

The obvious purport of the agreement was that appellants should make such arrangements as they deemed advisable with the tenants, either in the way of giving possession of part of the premises in the new building or by payment of money damages in lieu thereof. The entire management and control of the property and all negotiations with the tenants after the transfer of the property rested entirely with appellants and the burden rested upon them to satisfy the tenants if possible, and were, in default thereof, to defend any action for damages which might result and to pay all the costs and expenses for damages resulting therefrom.

We find no error in the action of the trial court, and the judgment is therefore affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.



138 Cal.App. 702

PARIGIAN v. PHILLIPS.

Civ. 8954.

District Court of Appeal, First District, Division 1, California.

May 28, 1934.

1. Appeal and error ⇐907(3).

On appeal taken on judgment roll alone, presumption is that findings against appellant on issues tendered by him are supported by evidence.

2. Partnership ⇐83.

Executed oral agreement that managing partner should be entitled to certain salary would be valid even though written partnership agreement did not expressly provide for salary (Civ. Code, § 1698).

3. Appeal and error ⇐907(3).

On appeal taken on judgment roll alone, presumption is that trial court did not violate any of the rules of evidence or procedure in hearing and determining the issues tendered.

Appeal from Superior Court, Los Angeles County; E. N. Rector, Judge.

Action by Dick Parigian against N. G. Phillips. From a judgment for defendant, plaintiff appeals.

Affirmed.

Y. B. Arsen, of Los Angeles, for appellant.

Dwight V. Maurice, of Los Angeles, for respondent.

KNIGHT, Justice.

The plaintiff and the defendant entered into a partnership to operate a meat market, and about a year afterwards plaintiff brought this action for its dissolution. He asked also for the appointment of a receiver, an accounting, and attorney's fees. The defendant died during the pendency of the action, and the cause was afterwards tried and determined on the issues raised by the complaint, the answer filed by defendant and a supplemental answer filed by the administrator of defendant's estate, who was substituted as party defendant. In the settlement of the accounts, the trial court found, among other things, that the defendant was entitled to retain the sum of $2,100 theretofore paid to himself as salary out of the partnership property, and that there was due from plaintiff to the partnership the sum of $1,000, with which plaintiff should be charged. The judgment so decreed; and from those two provisions of the judgment plaintiff prosecutes this appeal, which was taken upon the judgment roll alone, it being contended that the findings and judgment as to both items are contrary to the express terms of the partnership agreement, a copy of which is attached to the complaint.

[1] An examination of the record shows the appeal is utterly without merit. With respect to the first item, the agreement provided that defendant should devote all of his time to the operation of the business, and that plaintiff should not be required to devote any part of his time thereto, and it contained no express provision as to the payment of salaries. But the issue as to payment of wages was brought in by plaintiff himself. In this regard he alleged in his complaint "that it was further understood and agreed by and between the parties * * * that neither of the parties thereto shall receive any wages, salaries, compensations or any other remuneration whatever, from said partnership undertaking or otherwise"; also that during the operation of the business defendant wrongfully and unlawfully appropriated and converted to his own use the sum of $2,100 from the partnership profits and assets, which he refused to repay. Defendant's an-

swer denied the foregoing allegations, and alleged "that it was expressly understood and agreed by and between plaintiff and defendant that commencing from the opening of the partnership business and until otherwise agreed defendant should receive and draw $40.00 per week wages and charge the same to the expense of said business. That defendant did pay himself out of the gross proceeds of said business said weekly wages from February 18, 1929, the opening day of said business, to September 3, 1929. That on or about September 3, 1929, it was agreed by and between plaintiff and defendant that thereafter defendant should draw the sum of $45.00 per week wages. That commencing September 3, 1929, to the commencement of the above-entitled action defendant paid to himself out of the gross proceeds of said business a weekly salary of $45.00. That said weekly wages were paid to defendant with the knowledge, consent and approval of plaintiff, and that part of said wages were paid by partnership checks signed by plaintiff." It was in pursuance of the issues thus tendered by plaintiff, therefore, that the court found against him and in favor of defendant; and since the appeal was taken on the judgment roll alone it will be presumed in determining the appeal that the evidence is sufficient to support such findings.

[2] Plaintiff makes the further point that, inasmuch as the partnership agreement contained no provision as to wages, the finding of the trial court on this subject amounts to an attempt to vary the terms of a written agreement by a subsequent oral agreement. It was affirmatively alleged in the answer, however, and found true by the court, that the agreement as to the payment of wages was made not subsequent to but at the time of the commencement of the partnership; and nothing appears from the judgment roll to justify plaintiff's assertion that it was oral. But, even assuming it to have been oral, it was nevertheless valid because it appears to have been an executed agreement. Civ. Code, § 1698.

[3] As to the second item, the agreement provided that plaintiff "has actually invested in said business * * * the total sum of $1,750.00 and which * * * shall hereafter be referred to as first party's capital, and said first party further agrees to put the actual sum of $400.00, in cash into said proposed partnership business, thereby making his total capital in the sum of $2,150.00. That second party [defendant] promises and agrees to invest in said business the sum of $400.00, in cash, and a further sum of $1,750.00 in fixtures and other materials," etc. In his complaint plaintiff alleged that "he did actually invest the sum of $2,150.00 as the working capital of said business, * * *" but the court found otherwise, its finding being "that plaintiff did not invest more than the sum of $1,150.00, evidenced by $400.00 cash, scale, cash register and fixtures including electric lights, as working capital or otherwise in said business, although plaintiff agreed to actually invest the sum of $2,150.00 as his share of the working capital of said business, and that there is now due, owing and unpaid from plaintiff to said partnership the sum of $1,000.00, being the difference between said $2,150.00 and said $1,150.00." And as before stated, inasmuch as the appeal was taken on the judgment roll alone, it will be presumed that the evidence supports said finding; moreover, all intendments being taken in support of the judgment, it will be presumed also, as to both items, in the absence of a transcript of the trial court's proceedings, that the trial court did not violate any of the rules of evidence or procedure in hearing and determining the issues mentioned.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.



139 Cal.App. 116

DE L'EAU v. WILLIAMS et al.

Civ. 7755.

District Court of Appeal, Second District, Division 1, California.

June 5, 1934.

Rehearing Denied July 3, 1934.

Hearing Denied by Supreme Court Aug. 2, 1934.

1. Pleading ⇐236(2).

Refusal to permit defendant during trial of action for purchase price of oil lease to file amended answer asserting fraud of plaintiff as agent *held* not abuse of discretion where agency was not alleged in pleadings, five years had elapsed from date of commencement of action, and delay in discovering defense was not excused.

2. Pleading ⇐238(2).

No error could be predicated upon ruling refusing permission to file amended answer where no such pleading was actually presented or tendered.

3. Limitation of actions ⇐127(2).

Amendment of complaint after expiration of limitation period by adding detailed third cause of action *held* not barred where first and third causes of action were based on same obligation and sought recovery of same amount (Code Civ. Proc. § 337, subd. 1).

HOUSER, J., dissenting.

Appeal from Superior Court, Los Angeles County; Wm. Frederickson, Judge.

Action by J. P. de l'Eau against D. C. Williams and Russell L. Williams, in which defendants last named filed a cross-complaint. From a judgment in plaintiff's favor and denying recovery on the cross-complaint, defendant last named appeals.

Affirmed.

McAdoo, Neblett & Clagett, John G. Sobieski, and Birney Donnell, all of Los Angeles, for appellant.

Clyde C. Shoemaker, of Los Angeles, for respondent.

YORK, Justice.

Appeal from a judgment recovered by plaintiff against defendant Russell L. Williams for the sum of $5,000 with interest thereon from June 10, 1923, and also from that part of the judgment wherein it is ordered that defendant take nothing against said plaintiff on his cross-complaint on file herein.

It appears that respondent and his wife were the owners of a certain oil lease called the Severy lease, and that on or about June 10, 1923, they entered into an agreement with appellant Russell L. Williams, whereby said respondent and wife transferred and assigned said lease to appellant in consideration of payment to them by him of the sum of $5,000, or the value thereof in stock of the Russell Oil Company as soon as that company was organized. Because of failure of appellant to carry out the terms of the agreement, plaintiff brought action and recovered judgment, as above stated. The action was commenced by complaint filed December 26, 1924. The amendment adding the third count to the complaint was filed April 18, 1929.

The appellant makes the following assignments of error: (1) The court abused its discretion in refusing to allow defendant to amend his answer and show the fraud of plaintiff in procuring the contract on which he was suing. (2) The evidence does not support the findings. (3) The findings do not support the judgment. (4) The finding that the amendment to the complaint is not barred by the statute of limitations is against the law.

During the course of the trial, the attorney for appellant made the statement: "We have just been informed this morning that the agreement upon which the plaintiff is now suing for a commission of $5,000 was obtained from Mr. Severy; that he collected a commission from the other side; he collected commissions from both sides without informing the defendant. I am going to ask leave to file an amended answer and an amended cross-complaint to set up these facts, to set up the fraud of the plaintiff in that transaction, and that we did not know it until this morning; and we will no doubt have Mr. Severy here to testify to the facts." The motion when made was denied by the court. No such pleading was actually presented to the court nor was the exact wording of such proposed pleading stated to the court.

[1, 2] As a matter of fact, the action here was commenced on December 26, 1924, and it was not until April 16, 1930, during the trial of the action, that the above statement was made, claiming that appellant had collected commissions from both sides and that it was fraudulent. The basis of the fraudulent acts complained of by appellant was a purported agency relationship which appellant claims existed between him and respondent. There was no mention made of such relationship in any of the pleadings in this case, and no finding was made to that effect. We think that in the absence of an allegation in the pleadings of the existence of such relationship between the parties, taken together with the lapse of over five years from the date of commencement of the action to the trial, and the insufficiency of the statement made concerning defendant's failure to make an earlier discovery of the facts relating to the proposed new defense, that there was no abuse of discretion on the part of the trial court in refusing permission to appellant to file an amended answer. "But, aside from this, no error can be predicated upon this ruling, for the reason that the defendants never prepared or tendered for filing any proposed amendment." Neher v. Kauffman, 197 Cal. 674, 686, 242 P. 713, 718.

The findings are amply supported by the evidence and the findings support the judgment of the trial court.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

[3] Appellant's fourth point, to the effect that the court erred in his finding that the amendment to the complaint is not barred by subdivision 1, section 337, Code of Civil Procedure, is without merit. The first cause of action was for the sum of $5,000 and the third cause of action, set up by the amended complaint, goes into detail as to the transaction entered into by the parties, and prays for the sum of $5,000. The first cause of action and the third cause of action are based upon the same obligation, and the amended complaint is not barred by the statute of limitations.

The judgment appealed from is affirmed.

I concur: CONREY, P. J.

HOUSER, Justice (dissenting).

I dissent. Considering the entire record pertinent to the denial by the trial court of the request made by the defendants for leave to file an amended answer and an amended cross-complaint, I am of the opinion that the trial court committed error prejudicial to the substantial rights of the defendants.

With reference to the manner in which discretion of the trial court should be exercised, in the case of Bailey v. Taaffe, 29 Cal. 422, 424, it was said: "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice. In a plain case, this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates. If it be doubted whether the excuse offered is sufficient or not, or whether the defence set up is with or without merit in foro legis, when examined under those rules of law by which Judges are guided to a conclusion, the judgment of the Court below will not be disturbed. If, on the contrary, we are satisfied beyond a reasonable doubt that the Court below has come to an erroneous conclusion, the party complaining of the error is as much entitled to a reversal in a case like the present as in any other."

And the language used by the Supreme Court in the case of Guidery v. Green, 95 Cal. 630, 633, 30 P. 786, 787, is indicative of the conclusion that in the instant case the "discretion" of the trial court became a bounden duty in favor of making its order by which the defendants would be permitted to file their proposed amendment. It was there said: "If the defendant could establish the facts presented by these amendments to his answer, they would constitute a defense to the plaintiff's demand (Farmers' N. G. Bank v. Stover, 60 Cal. 387); and for that reason, if for no other, the court should have allowed the amendments. Stringer v. Davis, 30 Cal. 321. If, by reason of such amendments, the court was satisfied that the plaintiff was taken by surprise, and required further time in which to make suitable preparations for meeting such defense, it could have continued the case or postponed the further hearing until the plaintiff should have reasonable time to make such preparation, and at the same time would impose upon the defendant such terms as would compensate the plaintiff for the expense and delay caused thereby. It can very rarely happen that a court will be justified in refusing a party leave to amend his pleading so that he may properly present his case, and obviate any objection that the facts which constitute his cause of action or his defense are not embraced within the issues, or properly presented by his pleading." To the same effect, see Crosby v. Clark, 132 Cal. 1, 63 P. 1022; Marr v. Rhodes, 131 Cal. 267, 63 P. 364.

Likewise, in the case of Burns v. Scooffy, 98 Cal. 271, 276, 33 P. 86, 87, where a similar question was before the Supreme Court, it was said: "Experience shows that in the attainment of justice by resort to judicial tribunals amendments to pleadings are of ever recurring necessity; and the tendency of judicial decisions should be, and is, towards liberality in permitting, where it can be done without working great delay, such amendments as facilitate the production of all the facts bearing upon the questions involved.

"Our Code looks to liberality in this matter, and the action of our courts tends in the same direction. To strike out a pleading, which is susceptible of being amended by a statement of facts known to exist, and which constitute a cause of action or defense to an action, is a harsh proceeding, and should only be resorted to in extreme cases. To refuse permission to answer, with a valid defense in hand, can only be justified in the face of facts showing willful neglect, inexcusable carelessness, or irreparable injury to plaintiff.

"The drift of opinion in this court from an early date has favored a broad liberality, rather than severely technical tendencies, on

this subject." (Citing many authorities.) And see generally, 21 California Jurisprudence 183 et seq., and authorities there cited.



139 Cal.App. 143

McELLIGOTT v. FREELAND et al.
Civ. 1270.

District Court of Appeal, Fourth District, California.
June 7, 1934.

Rehearing Denied July 5, 1934.
Hearing Denied by Supreme Court Aug. 6, 1934.

1. Action ⇐27(5).

Allegations of complaint, court's findings, and judgment, *held* to show that action for recovery of purchase price paid for stock to broker was action for rescission for fraud, not for damages for fraud.

Amended complaint alleged that plaintiff, on discovery of fraud, had given defendant broker timely notice of election to rescind and had offered to restore stock and everything of value received and demanded repayment of purchase price, and complaint sought judgment for exact amount paid for stock and a declaration that contract was duly rescinded and that plaintiff was not stockholder; and trial court made finding that plaintiff had given notice of election to rescind and had offered to return stock and dividend received and demanded repayment; and judgment was for exact amount demanded by prayer of amended complaint.

2. Appeal and error ⇐842(3).

In action for rescission of stock purchase for fraud, whether seller's statement was mere expression of opinion or positive declaration of fact depends on circumstances of case and is question for trial court.

3. Brokers ⇐102.

In action against broker for rescission of stock purchase for fraud, broker's statement that corporation had made certain profits during specified period and had set aside surplus of certain sum *held* fact statement material to financial condition of corporation and value of stock.

4. Brokers ⇐102.

In action against broker to rescind stock purchase for fraud, statement that stock had certain book value and a market value in excess of book value *held* statement of fact, not opinion, in view of defendant's subtle suggestion that he was part of organization of corporation.

5. Brokers ⇐102.

Broker's suggestion to prospective stock purchaser, effect of which was to create belief that broker was closely connected with the corporation while in fact he had no such close connection, *held* fraudulent as respects purchaser's right to rescind purchase (Civ. Code, § 1572, subd. 1).

6. Brokers ⇐102.

Broker's incorrect statements, not warranted by information in his possession, that corporation had made certain profit during certain period and that stock had certain book value and larger market value, *held* fraudulent, even though broker himself believed them, as respects stock purchaser's right to rescind purchase (Civ. Code, § 1572, subd. 2).

7. Brokers ⇐102.

Broker's statement to prospective stock purchaser that corporation would derive funds for business expansion from additional stock sales, natural inference of which was that purchase price would go into treasury of corporation which issued stock while in fact it went to investment corporation, *held* material fact statement, not expression of opinion, as respects stock purchaser's right to rescind.

8. Appeal and error ⇐1071(1).

In action to rescind stock purchase for fraud, if any of misrepresentations which trial court found were made by defendant constituted fact statements, reviewing court will not reverse, though trial court erroneously found that other statements, which were properly expressions of opinion, were representations of fact.

9. Fraud ⇐13(2).

To warrant recovery for fraudulent representations, it must appear that defendant knew statements were false.

10. Brokers ⇐106.

In action against broker to rescind stock purchase for fraud, trial court, in determining whether defendant knew that his representations respecting success of corporation and respecting profits made and value of stock were false, could consider fact that, during negotiations with plaintiff, defendant occupied office, rent free, in building of the corporation.

11. Evidence ⇐555.

Generally, expert witness may not give opinion based on information gained from statements of others outside courtroom.

12. Evidence ⇐555.

Witness called to testify respecting value of property should, so far as practicable, detail facts forming basis of his conclusion or

judgment, though such facts would be incompetent to affect value in particular case and even though such facts may have been derived from inquiries made of others outside courtroom or from correspondence.

13. Appeal and error ⇐1053(6).

Admitting accountant's testimony that investigation disclosing that maker of note had no assets had been made through accountant's New York office *held* not reversibly erroneous as admission of hearsay evidence, where testimony was admitted solely to show what investigation accountant had made.

14. Brokers ⇐106.

In action against broker to rescind stock purchase for fraudulent representations respecting corporation's condition, value of unsecured note listed by corporation as asset *held* material to issues, and evidence showing that note had no value was admissible.

15. Evidence ⇐543(4).

Certified public accountant who had been employed to make audit of corporation's books and had directed and supervised making of audit *held* qualified to testify that note listed by corporation as asset had no value.

16. Contracts ⇐264.

Notice of rescission and offer of restoration are, with certain exceptions, conditions precedent to bringing of action for rescission of contract for fraud (Civ. Code, § 1691).

17. Brokers ⇐106.

Where stock purchased was worthless, failure to return stock or offer to return it *held* not condition precedent to purchaser's action against broker to rescind purchase for fraud (Civ. Code, § 1691).

18. Trial ⇐397(5).

In action against broker to rescind stock purchase for fraud, where court found that stock was always worthless, court *held* not required to make specific finding that offer of restoration before suit was unnecessary because of worthlessness of stock (Civ. Code, § 1691).

19. Appeal and error ⇐931(4).

In action against broker to rescind stock purchase for fraud, where trial court did not provide in judgment that plaintiff should return dividend received, but there was evidence that dividend was illegally declared, appellate court could assume in support of judgment for plaintiff that trial court concluded that plaintiff might be compelled by corporation's creditors to return such dividend irregularly and illegally declared.

Appeal from Superior Court, Fresno County; J. A. Smith, Judge.

Action by Lucius Powers against Herbert R. Freeland, individually and doing business as the Herbert R. Freeland Company, and the Metropolitan Casualty Insurance Company of New York and another. From a judgment for plaintiff against named defendants, they appeal, and, on plaintiff's death pending the appeal, M. T. McElligott, as executor of plaintiff's last will and testament, is substituted in his place.

Affirmed.

Everts, Ewing, Wild & Everts, Dan F. Conway, and L. N. Barber, all of Fresno, for appellants.

Lucius Powers, Jr., and Conley, Conley & Conley, all of Fresno, for respondent.

JENNINGS, Justice.

The defendants Herbert R. Freeland and the Metropolitan Casualty Insurance Company of New York appeal from a judgment of the trial court in favor of Lucius Powers, who was the original plaintiff in the action. Pending this appeal Lucius Powers died and M. T. McElligott, as executor of his last will and testament, was duly substituted in the place of said deceased as respondent in this appeal.

The amended complaint filed in the action sought the receovery of the sum of $10,116.67 which was alleged to have been paid by the plaintiff to the defendant H. R. Freeland as the purchase price of 2,020 shares of class A common capital stock of the Hollywood Dry Corporation. The complaint alleged that the plaintiff was induced to purchase the stock and to pay the above-mentioned amount therefor by reason of certain false and fraudulent representations respecting the value of the stock and the financial condition of the aforesaid corporation which were made to him by the defendant Freeland and by the defendant George T. Hadley, who was alleged to have been Freeland's agent in the negotiations which culminated in the sale of the stock by Freeland and its purchase by the plaintiff. Recovery was sought from the defendant Metropolitan Casualty Insurance Company of New York as the surety of Freeland in an undertaking which was filed by him as a broker licensed by the state commissioner of corporations to engage in the business of buying and selling stocks and other corporate securities within the state of California. The judgment from which this appeal is taken provided that the plaintiff Lucius Powers should recover from the defendant

Freeland the aforesaid sum of $10,166.67, together with interest thereon, and that said plaintiff should recover from the surety company the sum of $5,000, which was included as a part of the judgment against Freeland. Recovery of any amount was denied from the defendant George T. Hadley.

[1] Because of a certain contention of appellants to which consideration will hereafter be given, it will be proper first to determine whether this action was one that was instituted for the purpose of accomplishing a rescission of the purchase of stock or whether it was an action that was brought for the purpose of recovering compensation for the damage occasioned to the plaintiff through the fraud which was alleged to have been practiced upon him by the defendant Freeland and his agent, Hadley.

It is our opinion that the action was one for rescission. The amended complaint contained an appropriate allegation that the plaintiff upon discovery of the fraud had given to the defendant Freeland timely notice of his election to rescind the purchase, that he had offered to restore to Freeland the stock and everything else of value which he had received and had demanded that Freeland repay to him the sum of money which plaintiff had paid for the stock. The prayer of the complaint was for a judgment against the defendants for the exact amount which plaintiff had paid for the stock and "that the court decree that the contract for the purchase of said stock was duly and regularly rescinded, and that plaintiff Lucius Powers has not been, and is not now, a stockholder of the Hollywood Dry Corporation." The trial court made a finding that the plaintiff, immediately upon discovery of the falsity of the representations which had been made to him, mailed to the defendant Freeland a letter in which plaintiff stated that he elected to rescind the contract for the purchase of the stock on the ground of fraud, offered to return the stock and a dividend thereon which plaintiff had received, and demanded repayment of the sum of money paid to Freeland by the plaintiff, but that the letter thus mailed was not received by Freeland until after the commencement of the action. The judgment of the court was for the exact amount demanded by the prayer of the amended complaint. It seems clear, therefore, that the complaint was framed on the theory that the cause of action therein alleged was one for rescission. The above-mentioned finding indicates that the action was tried on the assumption that it was an action for rescission. The judgment which was rendered for the exact amount which was alleged to have been paid for the stock also indicates that the trial court tried the case on the theory that the action was one for rescission.

The trial court found that the defendant Freeland, both individually and through his employee, Hadley, made seven specific representations to the plaintiff relative to the stock and to the sale of said stock; that each of such representations were false, fraudulent, and untrue, and were known to be such by Freeland; that they were made by Freeland with the intention that plaintiff should rely upon them; that plaintiff believed the representations and acted upon them to his detriment; and that Freeland, at all times material to the cause of action alleged in the complaint, knew that plaintiff was acting under the belief that the false, fraudulent, and untrue statements made to him by Freeland were true.

The seven representations which the court found were false and fraudulent may be epitomized as follows: (1) That the Hollywood Dry Corporation, immediately prior to August 20, 1929, and for many months prior thereto, had made large profits through the manufacture and sale of its products and that during the year 1929 the said corporation had made substantial profits from the operation of its business. (2) That the sale of class A common capital stock to plaintiff was authorized and directed by the corporation for the purpose of increasing the working capital of said corporation and the proceeds derived from the sale of the stock would be used by the corporation to perfect its program of expansion and that all of the net proceeds derived from the sale of stock to plaintiff would go into the treasury of the corporation to be used for the expansion of the business of the corporation. (3) That the stock of the corporation had been placed on a permanent dividend basis, that a legally declared quarterly dividend would be paid to stockholders of record on January 10, 1930, and a dividend in the same amount would be paid quarterly thereafter and such dividends would permanently continue, that an extra dividend would soon be declared by the directors of the corporation in addition to the above-mentioned quarterly dividends. (4) That on October 30, 1929, the corporation had set aside as unappropriated surplus the sum of $137,644.77, after having appropriated for the payment of the quarterly dividend to be paid on January 10, 1930, the sum of $25,000,

and that all of said surplus represented the earnings of the corporation from the operation of its business during the year 1929 up to October 30th of said year. (5) That the corporation was in an excellent and unimpeachable financial condition. (6) That the 2,020 shares of class A common capital stock which plaintiff was solicited to purchase had been legally issued and that said stock had a book value of $6.50 per share on October 30, 1929, and the said stock was constantly increasing in book value. (7) That Freeland, because of his relationship with the corporation, had special information and knowledge regarding the internal affairs of the corporation and additional confidential information relative to the future plans of the corporation with respect to the sale of its products and the promotion of its affairs to the end that within a few months the said stock would have a market value at least two times the price for which it was offered for sale to the plaintiff.

The above-described findings are attacked on the familiar ground that they are lacking in evidentiary support. Those representations which relate to the book value of the stock at the time the contract of sale was made and to its future value and with respect to the business of the corporation at the time of the negotiations for the sale of stock and its prospect for enjoying good business in the future and with respect to the declaration of future dividends are said to be mere matters of opinion and not statements of fact. The falsity of the representations with respect to the financial condition of the corporation and the existence of an unappropriated surplus of $137,644.77 on October 30, 1929, is said to depend on the admission of certain evidence erroneously received by the trial court. The court's finding that the various representations were made by Freeland with the knowledge that they were false is particularly attacked on the ground that the record contains no evidence to support it.

[2] In entering upon a consideration of the above-specified contentions, it may be conceded that a statement of mere opinion, although false, may not form the basis of an action by which the recovery of damages or the remedy of rescission on the ground of fraud is sought. However, whether a statement amounts merely to an expression of opinion or whether it shall be deemed to be a positive declaration of fact depends, in the final analysis, on the circumstances of the case and is a question for the trial court to determine. French v. Freeman, 191 Cal. 579, 585, 217 P. 515; Stockton v. Hind, 51 Cal. App. 131, 136, 196 P. 122. It is evident that the trial court determined that the above-described representations which were found to have been made by Freeland and his employee were statements of fact. Unless, therefore, the record shows that the whole circumstantial background of the case is such that we must declare that the representations of Freeland and his employee were not statements of fact, but were mere expressions of opinion, we are not justified in disturbing those findings of the trial court which are obviously based on the assumption that the representations were positive statements of fact. For a proper determination of this problem, some consideration of the circumstances which surrounded the making of the various representations as they are disclosed by the record is required.

The record shows that evidence which established the following facts was produced during the trial: Freeland began his negotiations for the sale of stock with the plaintiff, Lucius Powers, during the month of April, 1929. At this time he stated that he considered that the stock was a very high-grade stock and that the company was going to make a lot of money. He said that the company was making money "right from the start" and would require additional funds for the purpose of expanding its business. He stated that the additional money required for expansion purposes would be derived from the sale of stock. On a number of occasions during the summer and autumn of 1929, either Freeland or his agent Hadley talked with plaintiff regarding the financial condition of the Hollywood Dry Corporation and showed him financial statements which were put out by the corporation which indicated that the corporation was enjoying good business and was making money. One of these statements showed that the Hollywood Dry Corporation had set aside the sum of $162,000 after appropriating the sum of $25,000 for the purpose of paying a dividend of 12½ cents per share which would be declared in the month of January, 1930. On one occasion Hadley stated to the plaintiff that the book value of the stock was $6.50 per share and that its market value was considerably greater. On another occasion Freeland made the statement that the directors of the corporation had put the company on a permanent dividend basis and that quarterly dividends would be declared. Hadley told the plaintiff that the corporation was making money so fast that it was contemplated that

a special dividend would be declared. In numerous letters and telegrams which were addressed to the plaintiff by Freeland during the months of October, November, and December, 1929, the writer advised plaintiff that he had reserved 4,040 shares of class A common stock of the Hollywood Dry Corporation and besought plaintiff to purchase all or one-half of the allotment at a price of $4.95 per share. In a letter sent by Freeland to plaintiff on December 27, 1929, the writer stated that he had learned that practically all of the class A common stock, which was held for pool purposes, had been taken up and that the date set for closing the pool was December 31, 1929, after which date the minimum ruling price of the pooled issue would be $10 per share. In two letters that were sent by Freeland to plaintiff during the above-mentioned period the writer referred to confidential information "regarding our proposition" which he had and which he desired to communicate to the plaintiff. During all of the time when the negotiations for the sale of stock to the plaintiff were under way, Freeland occupied an office in the Hollywood Dry building in the city of Los Angeles for which he paid no rent and his efforts during this period were entirely devoted to the sale of stock of the Hollywood Dry Corporation. As a result of these negotiations plaintiff, on December 28, 1929, agreed to purchase 2,020 shares of class A common stock of the corporation at the rate of $4.95 per share and in payment therefor he gave his note to Freeland for the sum of $10,000. Plaintiff's note was payable 60 days after the date of its execution on January 4, 1930, and bore interest at the rate of 7 per cent. per annum. It was paid on or about its due date. A certificate for 2,020 shares of class A common stock of the Hollywood Dry Corporation was duly delivered to plaintiff by Freeland. The certificate contained on its reverse side a statement that as part of the consideration for the stock represented by the certificate, it was agreed that the stock would not be offered for sale and was not transferable on or before January 4, 1931, except upon the expressed permission of Consolidated Investment Corporation. It developed that the stock which plaintiff purchased was owned either by the Consolidated Investment Corporation or by Freeland himself and that the money which plaintiff paid for the stock went to the last-named corporation and not into the treasury of the Hollywood Dry Corporation. It also developed that Freeland was a stock broker employed not by the Hollywood Dry Corporation but by the Consolidated Investment Corporation. On October 15, 1929, the Hollywood Dry Corporation declared a dividend at the rate of 12½ cents per share on its class A common stock, payable on January 15, 1930, and plaintiff received therefrom the sum of $252.50. In the month of May, 1930, the Hollywood Dry Corporation became insolvent.

[3-8] It is our opinion that, taking into consideration the above-mentioned facts and circumstances, we are not warranted in sustaining the contention of appellant that all of the various representations which were made by appellant Freeland and by his employee were purely opinion statements. Undoubtedly, it must be conceded that among them are some which may properly be so characterized. General statements respecting the success of the company, that it was making money and prospering, have the sound of seller's talk. The more specific declaration that the company had derived profits from its business amounting to a definite sum of money during a specified period and had set aside a surplus of a certain sum has the sound of a positive statement of fact very material to the financial condition of the company and the value of its stock. The statement that the stock had a book value of a definite amount per share and a market value which was in excess of its book value was under the circumstances a statement not of opinion but of fact. These definite statements respecting the value of the stock and the amount of surplus which remained after the requirements for the dividend which was to be paid in January, 1930, are to be considered in the light of Freeland's subtle suggestion that he was a part of the organization of the corporation. When he wrote Lucius Powers on October 17, 1929, to urge that, if Powers felt he did not have available the funds required for the purchase of the full allotment of 4,040 shares, he should in any event subscribe for one-half of the allotment, he called attention to the fact that a man well known in the community where Powers resided had been elected to the board of directors of the Hollywood Dry Corporation and concluded the letter with the following language: "Anticipating the pleasure of having you join *us* (italics ours) in this business, which is making very rapid gains." We think that the natural effect of the above-quoted language was to create upon the mind of the person to whom the statement was made an impression that the writer was a part of the organization of the corporation and therefore in a position to speak intelligently and knowingly of its affairs.

Again, when Freeland on two different occasions wrote Powers that he was in possession of confidential information which he desired to transmit to Powers the same suggestion that Freeland was in a position to know and did know the inner workings of the corporation was subtly communicated to Powers. These very suggestions, whose effect was to create a belief that Freeland was closely connected with the Hollywood Dry Corporation when as a matter of fact he had no such close connection, were themselves fraudulent under the definition of actual fraud as contained in subdivision 1 of section 1572 of the Civil Code. The positive assertions that the Hollywood Dry Corporation had made a profit of a definite amount in the first six months of the year 1929 and that the stock had a book value of $6.50 per share and a market value larger than its book value were not warranted by the information which Freeland possessed if his reiterated statements appearing in his testimony that he depended entirely on the financial statements issued by the corporation are to be believed. They were false statements and were therefore fraudulent even though Freeland himself believed them (subdivision 2, § 1572, Civ. Code). Finally, the statement that the corporation would derive the funds which it required for the expansion of its business from additional sales of stock the natural inference of which was that the purchase price to be paid by Powers would go into the treasury of the corporation to be used in its expansion program was clearly a positive statement of a very material fact. It was a false statement and it was undoubtedly known to be false by Freeland, who knew that he was proposing to sell to Powers stock that was not the property of the Hollywood Dry Corporation but was the property either of himself or of the Consolidated Investment Corporation and that the money which Powers would pay therefor would go not to the Hollywood Dry Corporation but to the Consolidated Investment Corporation. No citation of authorities is required in support of the familiar principle that, if any one of the various misrepresentations which the trial court has found were made by the appellant Freeland constituted a statement of fact as opposed to an expression of opinion, a reviewing court is not justified in reversing the judgment although the trial court erroneously found that other statements which were properly expressions of opinion were representations of fact.

[9, 10] Appellants further contend that, if it be assumed that the various representations specified in the findings were made and that they were false statements of fact, nevertheless the evidence wholly fails to support the trial court's finding that they were made knowingly. In other words, it is contended that proof of scienter was wholly lacking. It is a primary rule of the law of fraud that to warrant recovery for fraudulent representations it must appear that the party sought to be charged knew that the statements which he made were false. Throughout the testimony of the appellant Freeland we find him taking the position that he was merely a stock salesman who had no knowledge of the internal affairs of the Hollywood Dry Corporation and who did not pretend to have such knowledge. This position is supported to some extent by the testimony of Powers, who admitted that Freeland exhibited to him financial statements prepared and put out by the officers of the Hollywood Dry Corporation. However, among the various representations which were attributed to Freeland, there was at least one that did not depend on any financial statement or literature published by the Hollywood Dry Corporation. This was the representation that the Hollywood Dry Corporation would secure the funds for its much-needed expansion program from the sale of additional stock and that the money derived from such sales would go into the treasury of the corporation and would be used for the expansion of its business. Obviously appellant Freeland knew that the money which Powers paid him for the 2,020 shares of stock would not go into the treasury of the Hollywood Dry Corporation. Furthermore, it is to be remembered that Freeland admitted that, during the whole of the period when he was endeavoring to sell stock to Powers, he occupied an office rent free in the building of the Hollywood Dry Corporation in Los Angeles. This was a circumstance which the trial court was entitled to consider and which may well have moved the court to disbelieve his statement that he did not know that his representations respecting the success of the company and of the profits it had made and the value of its stock were false statements.

Appellants strenuously maintain that the trial court erroneously admitted certain evidence which was wholly incompetent and which was highly prejudicial to them. During the course of the trial evidence was produced which showed that the Hollywood Dry Corporation listed among its assets a certain unsecured promissory note executed by an eastern corporation known as the Hollywood Dry Eastern Corporation. The evidence showed that this note was given to the California corporation as consideration for the

extension by the California corporation of the time within which the Eastern corporation should perform a contract which it had made with the California corporation whereby the Eastern corporation agreed to take and to sell a very large quantity of the products manufactured by the California corporation. The listing of this note as an asset of the California corporation and the unusual method which the officers and directors of the Hollywood Dry Corporation employed with reference to it was a most prominent feature of this action. It appeared that each month during the year 1929 a portion of the amount for which the note was given was set up in the books of the California corporation as profit earned during that month. In many months the amount thus taken was $20,000. This peculiar treatment of the note was reflected quite naturally in the financial statements published by the Hollywood Dry Corporation and it was thereby enabled to show a consistent profit in its business. It quite satisfactorily appeared that except for the above-described treatment of the note of the Eastern corporation the Hollywood Dry Corporation would not only have been unable to show that it was operating its business at a profit but that it was actually losing money. The unhappy conclusion of the story of this note was that it was never paid so that the paper profits of the Hollywood Dry Corporation which depended on it vanished into the exceedingly rare atmosphere from which it was created. The treatment of the note by the Hollywood Dry Corporation became an exceedingly controversial subject during the trial of this action. It was defended as good business practice by appellants and vehemently attacked by respondent's testate. The latter produced a certified public accountant who testified that he had been employed by the board of directors of the Hollywood Dry Corporation to make an audit of the financial condition of that corporation at some time between December 1, 1929, and February 1, 1930; that the audit was made under his supervision and direction, although he did not perform all of the detail work required thereby; that the books of the corporation, although in good condition from the purely clerical viewpoint, did not reflect the true condition of the corporation; that after completing the audit he prepared a financial statement which showed the condition of the corporation as he found it. The attention of the witness was particularly directed to the note of the Hollywood Dry Eastern Corporation for $200,000 and he was interrogated in regard to it. During the course of the examination the following inquiry was propounded to the witness by counsel for respondent: "Did you investigate the financial responsibility of the Hollywood Dry Eastern Corporation to know whether or not that note was worth anything or could be collected?" The trial court, over the objections of appellants, permitted the question to be answered. The following response was given to the question: "Yes, sir. We made an investigation through our New York office and ascertained at that time that the Hollywood Dry Eastern Corporation was, in effect, nothing but a shell, the company having no assets and no liabilities other than this note, which was a liability; that the company had been formed and the directors chosen, but it had never operated or acquired any assets." It was objected that the answer showed that the information regarding the condition of the Eastern corporation was rank hearsay and that the answer was a statement of plain facts and not of the opinion of the witness. The trial court allowed the answer to stand with the express limitation that it was admitted for the purpose of showing what investigation the accountant had made. The witness later testified that it was his opinion that the note had no value at any time.

[11-15] The principal complaint which is here raised to the admission of the above-mentioned evidence is that it was pure hearsay testimony not within any exception to the hearsay rule and that it formed the basis for the opinion of the witness that the note had no value. It must, we think, be conceded that, as a general rule, an expert witness is not permitted to give an opinion which is based upon information gained from the statements of other persons outside the courtroom for the obvious reason that the opinion of the witness thus depends entirely upon purely hearsay declarations. Jones on Evidence, § 376; Nelson v. Painless Parker, 104 Cal. App. 770, 778, 286 P. 1078. However, it is established that a witness who is called to testify regarding the value of property should, so far as is practicable, detail the facts upon which his conclusion or judgment is based even though the facts upon which he relies would be incompetent to affect value in the particular case and even though the facts which form the basis of his conclusion may have been derived from inquiries made of others or from correspondence. 22 C. J., p. 575. This principle is exemplified in cases where an expert is permitted to give an opinion as to value which is based entirely on knowledge gained from inadmissible sources. Betts v. Southern Cal., etc., Exchange, 144 Cal. 402, 409, 77 P. 993; Hammond L. Co. v.

County of Los Angeles, 104 Cal. App. 235, 248, 285 P. 896; Glantz v. Freedman, 100 Cal. App. 611, 614, 280 P. 704. As was remarked by Holmes, C. J., in National Bank v. New Bedford, 175 Mass. 257, 56 N. E. 288, 290: "An expert may testify to value, although his knowledge of details is chiefly derived from inadmissible sources, because he gives the sanction of his general experience." It is to be remembered that the testimony of the witness wherein he related the result of the investigation which he had made was given in response to a question which was preliminary to the matter upon which he was called to give his opinion. It is obvious that this witness was called to testify as to the value of the note for $200,000 executed by the Hollywood Dry Eastern Corporation and carried on the books of the Hollywood Dry Corporation as an asset having a value equivalent to the face of the note. The preliminary statement of the witness wherein he related what he had discovered by inquiry in New York as to the structure and financial condition of the Eastern corporation was received by the trial court with the limitation that it was admitted only for the purpose of showing what investigation the witness had made. It is our opinion that we are not justified in declaring that the trial court committed reversible error in receiving the evidence with the express limitation suggested by the court as herein noted. It is also objected that the trial court erred in permitting the witness to testify that the note was valueless at any time. It is our opinion that the trial court did not err in so doing. It appeared that the witness was a certified accountant who had been employed to make an audit of the books of the Hollywood Dry Corporation and that he had directed and supervised the making of such an audit. We think that, under the circumstances disclosed by the record, the value of the note was a matter material to the issues of the action; that it was a subject upon which a properly qualified expert witness might be called upon to give an opinion; and that the witness was shown to possess the necessary qualifications for the expression of an opinion.

[16-19] Appellants make the further point that the trial court found that the notice by which Lucius Powers communicated to Freeland his election to rescind the contract of purchase and to return to Freeland the stock certificate and everything of value which he had received in connection with the purchase of stock was sent to Freeland by mail and that it was received by the addressee after this action was commenced. It is urged that this finding of fact, which is amply supported by the evidence, conclusively shows that the action was prematurely brought and that the judgment permitting Powers to recover the money which he had paid for the stock is incorrect particularly since it does not require respondent to surrender the stock certificate and the dividend of $252.50 admittedly received by Powers during his lifetime.

We have heretofore indicated our opinion that this action was one that was brought for the purpose of accomplishing the rescission of the transaction whereby Powers purchased from Freeland 2,020 shares of stock of the Hollywood Dry Corporation. We recognize the general rule which is applicable to one who desires to rescind a contract. It is fully stated in section 1691 of the Civil Code. We understand that a person desiring to rescind must do so promptly upon discovery of the facts which he claims entitle him to rescind and that he must restore or offer to restore to the other party everything of value which he has received under the contract. It must be conceded that notice of rescission and offer of restoration is a condition precedent to the bringing of an action to accomplish rescission save in exceptional cases, where, by reason of the circumstances, restoration or offer of restoration is not essential. California, etc., Co. v. Schiappa-Pietra, 151 Cal. 732, 739, 91 P. 593. It is our opinion that this is one of the exceptional cases. The trial court found that the stock which Powers purchased from Freeland "did not at any time or at all have a book value of $6.50 per share but that said stock was in truth and in fact wholly worthless." We think this finding was supported by the evidence. Since, therefore, the court properly found that the stock which plaintiff received had no value, it necessarily follows that appellant Freeland could not have been injured by the failure of Powers to restore the stock. Kelley v. Owens, 120 Cal. 502, 47 P. 369, 52 P. 797. Appellants point to the fact that the trial court's finding relative to the failure of Powers to give notice of rescission and offer of restoration until after this action was begun contains no reference to the value of the stock. This seems to us to be unimportant. The court had made a specific finding that the stock was always worthless, and we think that it was not required that the court make a specific finding that offer of restoration prior to suit was unnecessary because of the worthlessness of the stock. With respect to the failure of the trial court to provide in its judgment that respondent should return the dividend of $252.50 received by Lucius Pow-

ers, it is sufficient to observe that evidence was submitted to the trial court which tended to show that this dividend was illegally declared. This being true, we may assume in support of the judgment that the trial court concluded that respondent might be compelled by the creditors of the Hollywood Dry Corporation to return this dividend irregularly and illegally declared.

The final contention of appellants on this appeal is that the judgment against the surety company on Freeland's bond permitted recovery from the surety company for the sum of $5,000, the amount of the bond "with interest thereon from March 16, 1930, to the entry of judgment." It is urged that the provision of the judgment permitting the recovery of interest on the amount of the bond prior to the entry of judgment is erroneous, since it exceeds by the amount of interest allowed the full amount for which the surety became obligated. A most casual reading of the judgment demonstrates that appellants are entirely mistaken in this contention and that the judgment against the appellant Metropolitan Casualty Company of New York does not include the allowance of any interest on the amount of the bond prior to the entry of judgment.

For the reasons stated herein the judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.



139 Cal.App. 75

ROSEBROCK v. SAN DIEGO TRUST & SAVINGS BANK.

Civ. 1124.

District Court of Appeal, Fourth District, California.

June 2, 1934.

Hearing Denied by Supreme Court July 30, 1934.

1. Executors and administrators ⇐221(9).

Claim against estate of claimant's husband, based on writing in decedent's hand found among his personal effects: "Due Mary my wife $1,373.56," signed by decedent without additional evidence of origin or status of obligation claimed, *held* properly rejected (Code Civ. Proc. § 1961, and § 1963, subds. 9, 32).

2. Executors and administrators ⇐221(1).

Claimant against estate of claimant's husband *held* not entitled to any additional presumptions because barred from testifying by statute (Code Civ. Proc. § 1880, subd. 3).

3. Husband and wife ⇐266.

Husband's receipt of wife's money presumptively makes husband wife's debtor and imposes upon husband legal duty of returning money to wife.

4. Executors and administrators ⇐221(9).

Finding of writing signed by husband of claimant against husband's estate, to effect that stated sum was due wife, among husband's effects, justified inference that wife had delivered writing up to husband in his lifetime (Code Civ. Proc. § 1961, and § 1963, subds. 9, 32).

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Mary Rosebrock against the San Diego Trust & Savings Bank, as executor of the last will and testament of Hermann H. Rosebrock, alias, deceased. From an adverse judgment, plaintiff appeals.

Affirmed.

O'Brien, Dibert & Acton and A. S. Hutchinson, all of San Francisco, for appellant.

John A. Hewicker, of San Diego, for respondent.

HAINES, Justice pro tem.

[1-4] Hermann Rosebrock died on November 21, 1932, and was at that time in his late seventies. His widow, the plaintiff and appellant, is of approximately the same age and had been decedent's wife fifteen years. Rosebrock's will was admitted to probate and defendant and respondent San Diego Trust & Savings Bank was appointed his executor. Thereupon appellant presented to it her claim against his estate based on a writing in decedent's hand found among his personal effects as follows: "Due Mary my wife, $1,373.56. H. H. Rosebrock."

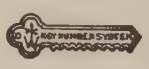
The claim was rejected by the respondent and action brought upon it, and upon the trial the case was submitted upon a stipulation which is, in substance, that the facts above recited are undisputed and that "the date of the occurrence of the obligation is unknown." No other evidence was offered of the origin or status of the obligation mentioned in the above-quoted writing. Thereupon the trial court gave judgment against the claimant. The judgment must, in our

opinion, be sustained. Appellant labors, of course, under the handicap of being barred from testifying by the provisions of section 1880, subd. 3, of the Code of Civil Procedure, but that circumstance affords her the right to rely upon no presumptions to which she would not otherwise be entitled. It is all very true, as argued for appellant, that the relations between a husband and wife are highly confidential and, as stated in McKay v. McKay, 184 Cal. 742, 746, 195 P. 385, 386, are "controlled by the rule applicable to transactions between trustees and beneficiaries" and that it is "the settled rule that the fact of the receipt by the husband of his wife's money presumptively makes him her debtor and imposes upon him the legal duty of returning it to her." The writing here under discussion is, moreover, incapable of any other construction than that the wife's right to receive from her husband the $1,373.56 there mentioned, for whatever reason the same may have been owed to her, was her separate property, and under section 1963, subd. 32 of the Code of Civil Procedure there is a disputable presumption that "a thing once proved to exist continues as long as is usual with things of that nature." We are of the opinion, however, that the circumstance that the writing on which appellant relies and must rely to establish her case was not produced from her own possession but found among her husband's effects was enough to justify the trial court in inferring that it had been delivered up by Mrs. Rosebrock to her husband in his lifetime (Black v. Meyer, 204 Cal. 504, 507, 269 P. 173, 174), in which case the presumption declared in section 1963, subd. 9, would apply, that "an obligation delivered up to the debtor has been paid," and it would become the duty of the court under section 1961 of the Code of Civil Procedure to find according to the presumption. It need hardly be pointed out that a relation of confidence is one thing and a misuse of this confidence quite another. Certainly there is nothing in the situation that could justify a court in inferring or presuming the malversation by the decedent of any trust. Nor is McKay v. McKay, supra, authority for any such proposition as that relied on in appellant's brief, that the written memorandum "must have been repossessed by decedent from appellant without consideration and under undue influence."

It is indeed suggested in appellant's behalf that the existence of the writing among decedent's effects does not exclude the idea that it was there accessible to both husband and wife. Suffice it to say that there is no proof that the wife had any access to it. It is further suggested that the writing was in the nature of a bookkeeping entry by the decedent not of the character which would be expected to be in the possession of the obligee even if the debt were still alive. But we think that it was more in the nature of a duebill and that the trial court was justified in believing that if the debt were still alive and unsatisfied the writing would have been found in the possession of the obligee rather than that of the obligor.

The judgment is affirmed.

We concur: MARKS, Acting P. J.; JENNINGS, J.



139 Cal.App. 100

GALLAHER v. IOWA OIL CO.

Civ. 1302.

District Court of Appeal, Fourth District, California.

June 4, 1934.

1. Corporations ⇐109.

In action to require corporation to replace stock certificates allegedly burned, evidence authorized finding that plaintiff owned 4,500 shares and that his certificates were destroyed by fire (Civ. Code, § 330.18).

2. Equity ⇐67.

"Laches" is such neglect or omission to assert a right as, taken in conjunction with lapse of time, more or less great, and other circumstances causing prejudice to adverse party, operates as bar in court of equity.

[Ed. Note.—For other definitions of "Laches," see Words & Phrases.]

3. Equity ⇐72(1).

Mere delay in asserting right, unaccompanied by any showing of prejudice to adverse party, is not alone sufficient to sustain defense of "laches."

4. Corporations ⇐109.

In action to require corporation to replace stock certificates allegedly burned, failure to find on issue of laches in waiting approximately 28 years to bring action *held* not reversible error, in view of presumption that corporation was primarily interested in determining true owner of stock, and supported findings showing plaintiff was entitled to relief sought, and requirement made of plaintiff

for bond protecting corporation, removing possibility of prejudice to corporation (Civ. Code, § 330.18).

5. Corporations ⇐109.

In action to require corporation to replace stock certificates allegedly burned, general finding that allegation of complaint that, according to plaintiff's best information and belief, certificates were destroyed by fire, was true, *held* sufficient finding that certificates were destroyed by fire, where allegation referred to was sole allegation respecting burning and evidence amply authorized finding that certificates were burned (Civ. Code, § 330.18).

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by W. C. Gallaher against the Iowa Oil Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

James T. Barstow, of Fresno, for appellant.

John F. Pryor and J. L. C. Irwin, both of Hanford, for respondent.

JENNINGS, Justice.

This action was instituted by plaintiff for the purpose of obtaining a decree directing defendant to issue new certificates representing shares of stock of the defendant corporation. The relief for which plaintiff prayed is that which is provided by section 330.18 of the Civil Code. This statute provides that, whenever a certificate for shares of stock issued by a domestic corporation or by a foreign corporation which maintains an office or agency for the transfer of such shares in this state has been lost or destroyed, the owner thereof may bring an action against such corporation and all known claimants for the purpose of obtaining a new certificate.

The complaint, which was filed on January 8, 1932, alleged in brief that during the months of February and March of the year 1901 plaintiff subscribed for 4,500 shares of the capital stock of the defendant corporation and paid the corporation therefor, and that thereupon the corporation issued three certificates of stock representing a total of 4,500 shares; that said stock certificates remained in plaintiff's possession for several years thereafter until, according to plaintiff's best information and belief, they were destroyed by a fire in which the building wherein the certificates were kept was burned; that plaintiff had not assigned, indorsed, transferred, hypothecated, or in any way disposed of said certificates, and knew of no one who claimed an interest in them; that plaintiff had notified the defendant corporation of the loss of said certificates, and demanded of said defendant that it issue new certificates in lieu of those which had been destroyed as aforesaid, but that defendant refused to comply with plaintiff's demand. The prayer of the complaint was for the entry of a decree ordering and directing defendant to issue new certificates in place of those which had been destroyed. The defendant filed an answer which contained specific denials of the various allegations of plaintiff's complaint, and, in addition, as a separate defense to the complaint, alleged affirmatively that plaintiff had been guilty of laches and unreasonable delay in bringing the action.

The cause was tried on the issues framed by the pleadings, and upon the conclusion of the trial the court rendered a judgment in plaintiff's favor, whereby it was adjudged and decreed that the defendant issue new certificates representing a total of 4,500 shares of stock of the defendant upon the express condition that plaintiff should deposit security or deliver to the court a bond to be approved by the court in the amount of $2 for each share of stock evidenced by "each of said certificates so lost or destroyed." From the judgment thus rendered, defendant has appealed.

[1] Appellant's first contention on this appeal is that the trial court's finding that the certificates had been destroyed is lacking in evidentiary support. This contention is untenable. The respondent testified that he purchased 4,500 shares of capital stock of the Iowa Oil Company during the months of February and March of the year 1901; that he paid ten cents a share for the stock; that three certificates were thereafter issued to him representing a total of 4,500 shares of stock; that to the best of his recollection the certificates thus issued were destroyed in a fire which consumed the building in which the certificates were kept. Respondent's testimony to the above effect was corroborated by the testimony of the witness J. E. Viney, who testified that he was a stockholder and an original director of the appellant corporation; that in February or March of the year 1901 he sold respondent 2,000 shares of stock of the Iowa Oil Company, and that he later sold to respondent an additional 2,500 shares of stock of said corporation, and that certificates representing the stock were issued by the corporation to respondent. The only evidence which in any way tended to discredit

the above-described evidence produced by respondent consisted of the testimony of Louis Decker, who testified that he was a director and the secretary of the appellant corporation and had charge of its books until they were destroyed by a fire which occurred about 10 years prior to the date of trial; that 150,750 shares of the original capital stock had been issued and were outstanding at the time of trial; and that a total of 145,818 shares had been presented to the corporation for verification, leaving a total of only 4,932 shares still outstanding which had not been verified by the appellant corporation. Since respondent only claimed that he was the owner of 4,500 shares, it is obvious that the testimony of the witness Decker did not impeach or in the least discredit the testimony of respondent and that of the witness Viney, which so fully corroborated it. However, another similar action, wherein the plaintiff sought to compel the issuance of certificates representing 2,150 shares of stock of the appellant corporation, was pending in the same court, and the two actions were consolidated for trial and were tried together. The total number of shares demanded by the two actions was therefore 6,650, and, since Decker testified positively that only 4,932 shares were outstanding and unverified, it is urged that either the respondent herein or the plaintiff in the other action must have been mistaken in the number of shares for which he claimed to be entitled to the issuance of certificates. However, this argument, based purely on inference, did not conflict with the positive, corroborated testimony of respondent, and, even if it may be assumed that the effect of Decker's testimony was to question respondent's claim to the ownership of 4,500 shares, the most that can be said is that the trial court was presented with conflicting evidence and that it resolved the conflict in respondent's favor, which forecloses a reviewing court from disturbing the finding that respondent was the owner of the number of shares of stock for which he demanded the issuance of certificates in accordance with the provisions of the above-mentioned statute.

Appellant's second and principal contention advanced on this appeal is that the trial court failed to make a finding on the issue of laches which, as heretofore noted, was affirmatively pleaded as a separate defense in appellant's answer. Appellant concedes that it is the rule that, if the record indicates that a finding of fact which was not made by a trial court would, if it had been made, necessarily have been favorable to a respondent and adverse to an appellant, the latter may not successfully complain of the trial court's failure to make the finding. It is, however, here urged that, if a finding on the issue of laches favorable to appellant had been made by the trial court, it would have had substantial evidentiary support, which it is contended sufficiently demonstrates that the trial court erred in failing to make the finding. A consideration of the contention thus presented requires at least a brief inquiry as to the correct definition of the term laches.

[2-5] Laches is defined in 18 Am. & Eng. Ency. of Law (2d Ed.) p. 97, as: "Such neglect or omission to assert a right, as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity." This language is quoted with approval in Cahill v. Superior Court, 145 Cal. 42, 46, 78 P. 467, and we think that it must be conceded that it comprises a correct definition of the term. It is apparent therefrom that there are three elements which are fundamental to laches. These are, first, an omission to assert a right; second, a delay in the assertion of the right for some appreciable period of time; and, third, the presence of circumstances which would cause prejudice to an adverse party if assertion of the right is upheld. We think that it must be conceded that mere delay in asserting a right, unaccompanied by any showing of prejudice to an adverse party, is not alone sufficient to sustain the defense of laches. Cortelyou v. Imperial Land Co., 156 Cal. 373, 379, 104 P. 695. It is here urged that respondent's complaint showed on its face that a period of approximately 28 years intervened between the time that respondent alleged the certificates were destroyed and the commencement of this action to obtain the relief provided by section 330.18 of the Civil Code, and that the inevitable effect produced by this unexcused delay was to render it impossible for appellant to produce evidence negativing respondent's claim of ownership of the stock represented by the certificates which were alleged to have been destroyed. However, we must assume that appellant is primarily interested in determining the true owners of shares of stock. Certainly, we cannot assume that appellant, under the circumstances presented by the record, is taking the position of an adversary seeking to bar a true owner of stock, who has had the misfortune to have the evidence of his ownership destroyed, from asserting his right of ownership and from obtaining the relief afforded by the statute.

The trial court found that respondent purchased the stock; that certificates evidencing

his ownership of the shares of stock were issued by the corporation and delivered to him; that he had never indorsed, assigned, transferred, or hypothecated these certificates; and that, while the certificates were in his possession, they were destroyed by fire. The finding that the certificates were destroyed, although it is not a specific finding to this effect, being merely a general finding that the allegation of respondent's complaint setting forth "according to the best information and belief of plaintiff" that the certificates were destroyed by fire is true, is, we think, a sufficient finding that the certificates were destroyed by fire when it is borne in mind that the only allegation respecting the loss or destruction of the certificates which is contained in the complaint is as above described, and the evidence amply supports a finding that the certificates were destroyed by fire. Since the trial court has made a finding having ample evidentiary support that the certificates were destroyed, how can it be argued that there is any evidence which tends to show that appellant will suffer any prejudice by granting to respondent the relief which is here sought? Obviously, since it has been satisfactorily established that respondent is the true owner of the stock and that the certificates which evidenced his ownership are no longer in existence, appellant cannot successfully contend that at some future time some other person may come forward and make the claim that he is the owner of these same certificates. Furthermore, in this connection, it must be observed that the decree which granted to respondent the relief for which he prayed expressly provided that as a condition of the judgment respondent was required to "deposit security or deliver to the court a bond to be approved by the court in the amount of $2.00 for each share of stock evidenced by each of said certificates so lost or destroyed." This provision was inserted in the judgment in conformity with the provisions of section 330.18 of the Civil Code, which requires that the court "shall order, as a condition of the judgment, that the plaintiff shall deposit adequate security, or deliver to the court such bond, approved by the court, as will be sufficient to protect and indemnify the corporation, its transfer agents and registrars, and also any person having any rights under the certificate alleged to be lost or destroyed, against loss, expense or liability." Another provision of the statute specifies that the sole remedy against the corporation of any person claiming rights under the old certificate canceled by decree of the court shall be a claim for damage for conversion as of the date of the issue of the new certificate, "and in an amount not greater than the amount of any such bond or security." The requirement as a condition of the judgment that respondent deposit security or a bond in the amount of $2 per share of stock, which the evidence indicated was the market value of the stock at the time of trial, furnishes adequate protection to appellant and demonstrates that the corporation will suffer no prejudice from granting to respondent the relief for which he prayed in his complaint. It is therefore our opinion that the failure of the trial court to make a finding on the issue of laches was not, under the circumstances presented by the record, reversible error.

The judgment from which this appeal has been prosecuted is therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.



139 Cal.App. 137

BARKER et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 9667.

District Court of Appeal, Second District, Division 2, California.

June 7, 1934.

Hearing Denied by Supreme Court Aug. 6, 1934.

Prohibition ⇐10(2).

Prohibition will not issue to restrain trial of action for cancellation of assignment of permit to prospect for oil and gas and to quiet title to land embraced in permit, where court had jurisdiction of subject-matter and parties merely because permit had been contested by third party, and contest was pending in Department of Interior.

Petition by Clarence A. Barker and others for a writ of prohibition directed to the Superior Court of the State of California in and for the County of Los Angeles, the Honorable Frank C. Collier, Presiding Judge thereof, the Honorable Thomas C. Gould, Judge thereof, and the Honorable Marshall F. McComb, Judge thereof.

Alternative writ discharged, and peremptory writ denied.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Samuel W. Blum, M. Seaton Cohen, and Maurice Saeta, all of Los Angeles, for petitioners.

O'Connor & Divet and Milton Bryan, all of Los Angeles, for respondents.

STEPHENS, Presiding Justice.

Our alternative writ of prohibition issued and herein such writ is discharged and the prayer for the peremptory writ of prohibition is denied.

Although the pleadings are rather lengthy but a very abbreviated statement of the case need be made to present the issues here involved.

The plaintiffs are husband and wife and claim the property involved in this proceeding as community property. Plaintiff Effie V. Bonebrake secured a permit from the Department of the Interior of the federal government to prospect for oil and gas and if either be found to produce and market the same. She entered into a contract with defendant Samuel W. Blum to exercise her rights under the permit and assigned such permit to him. The other defendants have some interest in such contract and assignment of permit derived through Blum. Plaintiffs claim that she was induced to assign such permit through certain fraudulent statements of the defendants, and that the contract has been breached by defendant Samuel W. Blum by reason of failure to commence to drill for oil within the stipulated time. Plaintiffs ask that their title be quieted to the land embraced within such permit, under the terms of the permit against any claim of defendants and for the cancellation of the contract, and that a judgment be awarded them for the sum of money stipulated to be paid by the terms of the contract for each month in which drilling was not commenced subsequent to a certain date and for damages for holding possession of the premises after the notice of cancellation of the contract by forfeiture.

There is no claim but that the subject-matter and the parties are within the jurisdiction of the superior court, but defendants allege that the permit has been contested by a third party and that this contest is pending in the Department of the Interior of the federal government, and that such proceeding deprives the superior court of this state of jurisdiction.

We do not think such a claim can be supported. The permit issued is a property right which can be protected by its owner in the courts, and such right to protect the property right cannot be affected by a third person's asserted claim against its validity. If this were not true a property right could be entirely destroyed through repeated but unfounded claims of third parties. Relative questions are treated and many cases cited in Lightner Mining Company v. Superior Court, etc., 14 Cal. App. 642, 112 P. 909, and Graham v. Superior Court, etc., 131 Cal. App. 579, 21 P.(2d) 621.

It would seem that some of the matters set up in the petition would be proper matters of defense in the trial sought to be prohibited. It may be that the trial court in its discretion will determine that certain issues should be suspended until the United States government has acted, but we think the facts as presented to us do not justify the issuance of any restraining writ against the trial court.

The alternative writ is discharged, and the peremptory writ is denied.

We concur: DESMOND, J.; ARCHBALD, Justice pro tem.



138 Cal.App. 685

RAMEY v. HOPKINS et al.

Civ. 5098.

District Court of Appeal, Third District, California.

May 25, 1934.

1. Indemnity ⇐11.

Right of action on bond indemnifying against loss or damage accrues only, and at time when indemnitee suffers actual loss by being compelled to pay, and actual payment of damages.

2. Principal and surety ⇐82(2).

Under contractor's bond indemnifying obligee against loss or damage caused by contractor's failure to faithfully perform building contract, obligee *held* not entitled to sue surety on bond where no payment of alleged loss or damage was made by obligee but liability only existed on his part for contractor's failure to perform (Civ. Code, § 2772; § 2778, subd. 2).

Appeal from Superior Court, Los Angeles County; Robert B. Lambert, Judge.

Action by Henry Ramey against Frank Hopkins and the Central Surety & Insurance Corporation. From a judgment, defendants and plaintiff appeal.

Judgment as against first named defendant affirmed, portion of the judgment appealed from by plaintiff affirmed, and judgment as against second named defendant reversed.

Mathes & Sheppard, James C. Sheppard and Winthrop O. Gordon, all of Los Angeles, for appellants.

Henry Ramey and J. D. Bauer, both of Los Angeles, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff had judgment in the sum of $1,021.03 against the defendants for and on account of the alleged failure to comply with the terms of a certain building contract entered into between the plaintiff and the defendant Frank Hopkins and a certain indemnity bond executed and delivered by the Central Surety & Insurance Corporation, a corporation. From this judgment, the defendants appeal.

Upon this appeal three questions are tendered for our consideration, only one of which needs to be answered, to wit: May an obligee upon an indemnity against loss or damages, recover against the indemnitor without proving payment of the alleged loss or damage for which redress is sought? Paragraph 6 of the plaintiff's complaint is in the following words: "That on said contract plaintiff paid, or caused to be paid, credited and advanced to the said defendant, Frank Hopkins, the sum of nineteen hundred ninety-seven and 04/100 dollars ($1,997.04) and further paid to complete the said contract on account of labor and materials the sum of one hundred twenty-one and 50/100 dollars ($121.50), and that plaintiff has become obligated to pay for and on account of labor and materials furnished to said job by said Frank Hopkins the sum of one thousand twenty-nine and 43/100 dollars ($1,029.43), and has become obligated to pay on account of labor and materials in addition to the aforementioned sum of one hundred twenty-one dollars and 50 cents ($121.50), the sum of three hundred forty-five and 70/100 dollars ($345.70), all as required to complete the said job after the abandonment thereof by the defendant, Frank Hopkins; that by reason of the excess of the amount actually paid by plaintiff and obligated to be paid by plaintiff above the amount due said contractor on account of said job, the plaintiff has been damaged in the sum of seventeen hundred eighty and 14/100 dollars ($1,780.14)."

Paragraph No. XI of the findings of fact is as follows: "That by reason of the facts and circumstances hereinbefore set forth, the total cost of the performance of said contract, in accordance with its terms, amounted to twenty-seven hundred and twenty-two dollars and six cents ($2,722.06), all of which cost has been borne by the plaintiff, Henry Ramey, either in expenditures of money, or in becoming personally responsible, or his property being subjected to mechanic's liens for said amount. That under the contract the plaintiff, Henry Ramey, was only required to pay seventeen hundred and one dollars and three cents ($1,701.03). That by reason of the facts aforesaid plaintiff, Henry Ramey, has been damaged in the sum of ten hundred and twenty-one dollars and three cents ($1,021.03) and is entitled to judgment therefor."

The agreement entered into between the plaintiff and the defendant Hopkins provided for the doing of certain work, payment of all claims, furnishing materials, etc., and to faithfully perform, all and singular, the terms of the agreement entered into between said parties.

The bond executed by the defendant surety company is conditioned as follows: "Whereas, the principal has entered into a written contract, dated 24th August, 1929, with the obligee, for altering, repairing, painting, and putting in finished condition satisfactory to owner, the dwelling house and outbuildings and premises known and described No. 1178 Albany Street, Altadena, the real property being described as Lot 12, tract 1627, as per Maps Book 21, page 200, records of Los Angeles county, a copy of which is hereto annexed, and which contract is made a part hereof, as fully as if recited at length herein: Now, Therefore, the condition of this obligation is such, that if the principal shall indemnify the obligee against any loss or damage directly arising by reason of the failure of the principal to faithfully perform said contract, then this obligation shall be void; otherwise, to remain in full force and effect."

On the part of the appellants it is contended that the obligation on the bond which we have recited makes it an indemnity contract against loss or damage, and is not an insurance against liability or against any failure on the part of the contractor to fully complete the building agreed to be repaired, etc.

The contention of the respondent and the

decision of the trial court is to the effect that the undertaking executed by the defendant insurance corporation went farther than an indemnity against loss, and guaranteed the faithful performance of all the terms and conditions of the contract entered into between the plaintiff and the defendant Hopkins. The unambiguous language of the bond, however, seems to controvert the view taken by the respondent and also of the trial court.

Section 2772 of the Civil Code, defining "indemnity," reads: "Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person." And section 2778 of the same Code, setting forth rules for interpreting an agreement of indemnity, contains the following in subdivision 2: "Upon an indemnity against claims, or demands, or damages, or costs, expressly, or in other equivalent terms, the person indemnified is not entitled to recover without payment thereof."

The complaint in this action does not allege payment, nor does the finding of the court from which its conclusions of law are drawn and predicated, show payment of the sum for which judgment was entered. Both the complaint and the finding which we have set forth establish the fact that liability only existed on the part of the plaintiff.

[1] In 13 California Jurisprudence 987, the distinction between a bond against liability and an indemnity contract against loss or damages is clearly enunciated. We quote therefrom: "The distinction between an undertaking against 'liability' and the strict contract of indemnity against 'loss' is that between contracting that an event shall not happen, and contracting to indemnify against the consequences of the event if it should happen. A liability is not a damage, according to the signification of that term as employed in contracts of indemnity, and it has been said that courts have no authority to insert the term 'liability' in a contract, and then proceed to enforce the contract as they —but not the parties—have made it. A bond indemnifying a person against loss and liability takes effect from its delivery, and its legality is to be determined by reference to the state of things then existing." And then, on page 991 of the same volume, section 12, the rule is clearly stated that the right of action upon a bond indemnifying against loss or damage accrues only, and at the time when the indemnitee suffers actual loss by being compelled to pay, and the actual payment of damages. The authorities cited in the footnotes so fully support the text which we have quoted that further attempts to distinguish between a bond insuring against liability and one insuring against loss or damages is unnecessary. Nor is it necessary to cite further authorities that before an action can be begun upon a contract of indemnity insuring against loss or damages the damages must have been paid as required by subdivision 2 of section 2778 of the Civil Code.

As against the authorities which we have cited the respondent calls our attention to several cases which, however, have had to do with undertakings containing conditions entirely different from the obligation set forth in the undertaking involved in the instant case. The condition in the bond executed by the appellant surety corporation obligates the corporation only to indemnify the obligee against loss or damage arising from the failure of the principal to faithfully perform the contract. It does not specify that the bond insures against any liability whatsoever; nor does it insure that the contractor shall faithfully perform or fulfill all the terms and obligations of his contract, but that if he fails to do so, and the plaintiff suffers loss or damage, then and in that case the duty becomes incumbent upon the surety to make compensation to the plaintiff.

In the case of Ryan v. Shannahan et al., 209 Cal. 98, 285 P. 1045, 1046, relied upon by the respondent, the undertaking executed by the surety corporation contained the following provisions: "The condition of the above obligation is such, that whereas the above principal has entered into a written contract with the above named obligee, dated January 23, 1925 [to do and perform certain work on the branch line of the Union Pacific Railway Company, located in Clarke County, Nevada]. Now, therefore, if the said principal shall well and truly keep and perform all of the terms, covenants and conditions of the said contract, to be by him completed and performed and shall pay in full, claims of all persons performing labor upon or furnishing material to be used in such construction work, then this obligation shall be null and void, otherwise to remain in full force and effect." Here the obligation clearly insures not against loss, but against failure to do certain work, or failure to pay claims in full, and immediately upon the failure to complete the contract, or pay the claims, etc., either for material or labor. The obligation became effective and placed upon the surety corpora-

tion the duty of making payment according to the terms of its contract.

In W. P. Fuller & Co. v. Alturas School District, 28 Cal. App. 609, 153 P. 743, 744, the condition of the undertaking is for the completion of the work contracted to be performed, and not against loss or damages. The condition of the bond reads as follows: "The condition of the above bond is such that, if the said above bounden, A. E. Pearson, his heirs, executors and legal representatives, shall in all things stand true and abide by and well and truly keep and perform the covenants, conditions and agreements in that certain contract this day made and entered into by and between the said A. E. Pearson and the said Alturas school district, for the construction and completion of the Alturas public school building, as described therein, which the said A. E. Pearson, by said contract has agreed to do and perform, and shall in all respects fully carry out and perform his part of said contract, as therein stipulated, then the above obligation shall be void; otherwise to remain in full force and effect."

In the case of Eva v. Andersen, 166 Cal. 420, 137 P. 16, the undertaking is of insurance against liability, and not against loss or damage.

The case of Roberts v. Security T. & S. Bank, 196 Cal. 557, 238 P. 673, insured the faithful performance of the work, and also insured against all loss or damage arising from the failure of the contractor to fully comply with the terms and conditions of his contract.

The distinction between an obligation insuring the faithful performance of contract, and one of indemnity only against loss, is clearly pointed out in the case of Terry v. Southwestern Building Co., 43 Cal. App. 366–371, 185 P. 212, and supports what we have said herein.

[2] The conclusion, from what we have stated, seems unavoidable that no right of action upon the part of the plaintiff against the appellant surety corporation existed either at the time of the filing of the plaintiff's complaint, or the entering of judgment herein. This also disposes of the appeal taken by the plaintiff from the disallowance by the court of a certain item representing a credit instead of a payment in cash, allowed by the plaintiff to the defendant Hopkins.

The condition of the undertaking shows that it is clearly one of indemnity against loss or damages, and subdivision 2 of section 2778 of the Civil Code requires that such damages must be paid before recourse can be had upon such an undertaking. So far as the defendant Hopkins is concerned, his liability is clearly established, and no reason is suggested in any of the briefs on file as to why the judgment against him should be disturbed.

It is therefore ordered that the judgment against the defendant Frank Hopkins be, and the same is, hereby affirmed; also, the portion of the judgment appealed from by the plaintiff is affirmed; and the judgment against the defendant Central Surety & Insurance Corporation, a corporation, be, and the same is, hereby reversed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.



139 Cal.App. 93

TILTON v. IOWA OIL CO.

Civ. 1301.

District Court of Appeal, Fourth District, California.

June 4, 1934.

1. Appeal and error ⇐1010(1).

Whether stock certificates were issued to claimants and subsequently destroyed or lost, as alleged by complaint in action to compel issuance of new certificates, were fact questions for trial court, whose findings for plaintiff cannot be disturbed by reviewing court, where only positive evidence in record supports them (Civ. Code, § 330.18).

2. Corporations ⇐109.

Intentional destruction of stock certificates by owners does not deprive latter of statutory right to compel issuance of new certificates by corporation (Civ. Code, § 330.18).

3. Evidence ⇐78, 87.

Generally, every presumption is against intentional despoiler of documentary evidence, but such presumption is not conclusive.

4. Corporations ⇐109.

Though evidence of issuance of stock certificates to, and their destruction by, persons claiming ownership thereof must be clear, satisfactory, and convincing in action to compel issuance of new certificates, quality and sufficiency of such evidence were questions for trial court (Civ. Code, § 330.18).

5. Appeal and error ⇐1010(1).

Trial court's findings, supported by substantial evidence, must be regarded as conclusive on appeal.

6. Corporations ⇐109.

Statutory requirement that complaint of owners of lost or destroyed stock certificates in action to compel issuance of new certificates allege nonassignment of original certificates *held* inapplicable in action by owners' assignee (Civ. Code, § 330.18).

Complaint alleged and evidence showed that certificates issued to plaintiff's assignors were lost or destroyed while in latter's possession and had not been assigned or transferred by them.

7. Corporations ⇐109.

Statute authorizing owner of lost or destroyed stock certificates to bring action to obtain new certificates *held* not to limit such right of action to original owners of certificates (Civ. Code, § 330.18).

8. Corporations ⇐109.

Generally, choses in action, such as rights of action for issuance of new stock certificates to owners of lost or destroyed certificates, are assignable (Civ. Code, § 330.18).

9. Corporations ⇐109.

Court's failure to require bond signed by assignors of right of action to compel issuance of new stock certificates by corporation as condition of judgment granting such relief *held* not error, in absence of contention that bond signed by assignee only would not afford corporation adequate protection (Civ. Code, § 330.18).

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by F. E. Tilton against the Iowa Oil Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

James T. Barstow, of Fresno, for appellant.

John F. Pryor and J. L. C. Irwin, both of Hanford, for respondent.

JENNINGS, Justice.

The plaintiff instituted this action on January 5, 1932, to compel the defendant corporation to issue new certificates representing shares of stock of said corporation. The action was brought in accordance with the provisions of section 330.18 of the Civil Code. The complaint contained five counts. In the first count plaintiff alleged that during the month of November of the year 1899 he had purchased and paid for 1,000 shares of stock of the defendant corporation and that a certificate representing this number of shares was issued to him by said corporation; that the certificate remained in his possession until the year 1925, when it was lost and destroyed; that plaintiff had not assigned, indorsed, transferred, or hypothecated said certificate; that plaintiff notified the defendant corporation of the loss of the aforesaid certificate and demanded that the corporation issue to him a new certificate for the aforesaid stock, but that defendant refused to comply with the demand. In the remaining four counts plaintiff alleged that on December 28, 1931, certain named stockholders of the defendant corporation had assigned to him certificates of stock of the defendant corporation which had originally been issued to them by the defendant corporation and which certificates had been lost or destroyed and had assigned to him their causes of action thereon and that plaintiff had thereby become the owner thereof and entitled to the issuance of new certificates in lieu of said lost or destroyed certificates. These counts also contained allegations of demand made upon the defendant corporation for the issuance of certificates and a refusal by the corporation to comply with the demand. The prayer of the complaint was for a judgment ordering the defendant to issue five certificates representing a total of 2,150 shares of the defendant corporation. The defendant filed an answer specifically denying the material allegations of the complaint and the action proceeded to trial. Upon the conclusion of the trial the court rendered judgment in plaintiff's favor ordering and directing the defendant to issue five certificates representing a total of 2,150 shares of stock upon the express condition that plaintiff should deposit as security or deliver to the court a bond to be approved by the court in the amount of $2 for each share of stock evidenced by each certificate, which the court in its findings of fact had found was lost or destroyed. From the judgment thus rendered the defendant presents this appeal.

Upon this appeal the appellant advances three contentions which it maintains sufficiently demonstrate that the trial court committed errors requiring a reversal of the judgment. These are, first, that the evidence fails to support the court's findings that the various certificates were lost or destroyed; second, that the evidence showed that certain of the original certificates were intentionally de-

stroyed and that the statute under which this action was brought does not contemplate an enforced reissuance of certificates which have been intentionally destroyed; third, that respondent is not entitled to maintain this action as assignee of the original owners of stock. The third contention concededly applies only to that part of the judgment which directed the issuance of new certificates to respondent in lieu of those originally issued to individuals who had assigned their claims to respondent.

[1] Examination of the record impels the conclusion that the first of the above-mentioned contentions is not sustainable. Evidence which tended to show that the five certificates mentioned in the complaint were issued by appellant during the year 1899 to the various persons designated in the pleading and that each of these certificates had been lost or destroyed was produced by respondent during the trial of the action. Appellant presented no evidence which controverted these facts. It must, in fairness to appellant, be observed that, under the circumstances which were made to appear, such evidence was practically impossible of production. The original active existence of the appellant corporation was short lived. It was organized in 1899 and for a few years thereafter its stock was sold to people who resided in Kings county. The corporation was organized for the purpose of drilling for oil on certain land owned by the corporation. So far as appears, whatever drilling operations were commenced by the corporation were unsuccessful and after a few years it defaulted in the payment of taxes on the land and in the payment of its corporate license tax to the state. The charter of the corporation was forfeited and the land was sold to the state for delinquent taxes. Capital stock of the corporation was originally issued to some 136 persons. In 1922 or thereabouts all of the original records of the corporation were destroyed by fire. In the year 1928 a producing oil well was drilled on land near that which had been owned by the appellant. Interest in the appellant corporation was then revived and the delinquent taxes were thereupon paid and the land redeemed by the appellant. Under these circumstances the practical impossibility of any officer of the appellant being able to deny positively that the various individuals mentioned in the complaint were owners of stock in the corporation and that certificates representing such stock had been issued to them is obvious. The impossibility of any officer of appellant being able to deny that the various certificates had been lost or destroyed is likewise obvious. Nevertheless these were facts which were to be discovered by the trier of facts and the responsibility for their proper determination rested with the trial court. A reviewing court cannot from the cold record declare that the trial court incorrectly found that the certificates were originally issued to the various claimants and that these certificates had been destroyed or were lost when the only positive evidence which the record discloses is to this effect.

[2-5] Appellant's second contention is likewise untenable. In the final analysis it is also a contention of evidentiary insufficiency. There is nothing in the language of the statute which declares that one who has intentionally destroyed certificates is not entitled to the remedy of reissuance. The wording of the statute is "Whenever a certificate * * * has been lost or destroyed." There is no expressed limitation with respect to the manner of destruction. It may be conceded that it is the general rule that every presumption is against the despoiler of documentary evidence. This is true because the inference which arises from proof of intentional destruction is that the truth which would have conclusively appeared from the production of such evidence would have operated against the despoiler. Nevertheless, we know of no authority which declares that the presumption is conclusive. Although evidence of the issuance of the certificates to the persons who claimed the ownership of them and of their destruction by these individuals must necessarily have been clear, satisfactory, and convincing, the question of its quality and of whether it successfully measured up to this rigorous test was one that the trial court had to answer. We cannot declare that there was not substantial evidence supporting the findings of the court and its determination must therefore be regarded as conclusive upon this appeal.

[6] Appellant's third contention is that this action is not maintainable by respondent as to those certificates which the complaint admits were originally issued to persons other than respondent and which it is alleged were assigned to respondent. The basis of this contention appears to be that, since the remedial statute by virtue of whose provisions this action is brought states that the "owner" of lost or destroyed certificates may bring an action to compel the issuance of new certificates and since the statute further specifies that the verified complaint of such owner must show that he had not "assigned, indorsed, transferred, hypothecated, or in any way disposed

of such certificates except to a party defendant," the legislative intention to restrict an action of this character to original owners of certificates is apparent. We think that the provision requiring the presence of an allegation of nonassignment in the complaint is obviously one that is demanded for the purpose of affording a maximum of protection to the corporation named as the defendant in the action. It is our opinion that it does not apply to a situation of the character which is here presented. Appellant is advised by the allegations of the verified complaint that the original owner's right of action has been assigned to respondent and that no assignment, hypothecation, or transfer of the certificates themselves had been made by the person to whom they were originally issued. Since it satisfactorily appears from the allegations of the complaint and from the evidence that the certificates originally issued to persons other than respondent had been lost or destroyed while they were in the possession of such persons and that no assignment or transfer of such certificates had been made prior to their loss or destruction, it would seem to follow that what was assigned to respondent was not the certificates but the right of action of the original owners to enforce the issuance of new certificates.

[7, 8] Appellant's argument that a right of action to compel the issuance of new certificates is limited to the original owners of lost or destroyed certificates is likewise unconvincing. It must, however, be conceded that the language of the statute lends support to such an argument. The phraseology of the statute is: "Whenever a certificate * * * has been lost or destroyed, the owner thereof may bring an action * * * for the purpose of obtaining a new certificate." Strict construction of this language alone would lead to the conclusion that it was the intention of the Legislature to limit the rights of action for the issuance of new certificates to the original owners of such certificates. However, when the statute as a whole and its obvious purpose are considered we think that the strict construction contended for by appellant is not demanded. Furthermore, if strict construction of the statute is demanded it must be observed that the statute nowhere declares that the right of action which is conferred upon an original owner may not be assigned and we are entitled to rely upon the familiar and general rule that choses in action are assignable. We are the more impelled to reject appellant's contention because of the very obvious hardship that would thereby result to small shareholders. In this very action, if appellant's contention must be sustained, five different actions with the attendant expense and difficulty would be required to accomplish what is here accomplished by a single action.

[9] Appellant presents a final objection to the judgment which provides as a condition thereof that respondent must deposit security or a bond to be approved by the court in the amount of $2 for each share of stock represented by the lost or destroyed certificates. It appears that a bond in which respondent alone is principal in the amount thus required has been filed by respondent and has been approved by the trial court. It is urged that appellant is entitled to the security afforded by the financial responsibility of those persons who had assigned their claims to respondent. In other words, appellant contends that the court should have required as a condition of the judgment that a bond signed not only by respondent but also by his assignors as principals should be given. The contention is wholly untenable. The statute provides that "the court shall order, as a condition of the judgment, that the plaintiff shall deposit adequate security, or deliver to the court such bond, approved by the court, as will be sufficient to protect and indemnify the corporation * * * against loss, expense, or liability." It is not contended that the bond which has been filed and approved will fail to afford to appellant full and adequate protection. The bond required as a condition of the judgment is in strict conformity with the above-quoted language of the statute and appellant has no valid cause of complaint.

For the reasons stated herein, the judgment from which this appeal has been taken is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

138 Cal.App. 757

GRIGSBY v. ROSS et al.

Civ. 8952.

District Court of Appeal, First District, Division 1, California.

May 29, 1934.

Hearing Denied by Supreme Court July 26, 1934.

1. Mechanics' liens ⇐113(2).

Stop-notice, filed pursuant to act securing payment of claims of persons employed by contractors on public works, serves as "equitable garnishment," a form of equitable subrogation regulated by statute, which gives right to recover money garnisheed (St. 1919, p. 487, § 2, as amended by St. 1925, p. 538, and St. 1927, p. 282).

[Ed. Note.—For other definitions of "Equitable Garnishment," see Words & Phrases.]

2. Courts ⇐472(6).

Superior court was without jurisdiction of action for payment of less than $2,000, due laborer employed by subcontractor, from fund held by county officers in county treasury within city for payment of county road contractor; municipal court of such city having exclusive jurisdiction, though labor was performed outside city (St. 1919, p. 487, as amended by St. 1925, p. 538, and St. 1927, p. 282; Code Civ. Proc. §§ 1184a–1184c; St. 1929, p. 838, § 29, subd. 3).

3. Mechanics' liens ⇐13.

No lien can be created against public property, such as county highway, by filing of verified claim for amount due for work performed thereon and stop-notice under act securing payment of claims of persons employed by contractors on public works (St. 1919, p. 487, § 2, as amended by St. 1925, p. 538, and St. 1927, p. 282; Code Civ. Proc. § 1184).

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by J. H. Grigsby against M. S. Ross and others. From a judgment of dismissal, plaintiff appeals.

Affirmed.

H. E. Gleason and John F. Poole, both of Los Angeles, for appellant.

Stick, Moerdyke & Gibson, Everett W. Mattoon, Co. Counsel, and J. H. O'Connor, Asst. Co. Counsel, all of Los Angeles, for respondents.

KNIGHT, Justice.

Plaintiff appeals from a judgment of dismissal entered pursuant to an order sustaining defendants' demurrer to the complaint without leave to amend. The action was instituted in the superior court in and for Los Angeles county, and it is contended by defendants, in support of the trial court's order, that exclusive jurisdiction to hear and determine the action was in the municipal court of the city of Los Angeles. We are of the opinion that the trial court was correct in so holding.

It appears from the complaint that the county of Los Angeles let a contract to the defendant Ross to clear a right of way and construct a road outside of the municipal limits of the city of Los Angeles, and that Ross sublet the portion of the contract calling for the clearing of the right of way to the Santa Fe Construction Company. As required by the provisions of a statute governing such matters (St. 1919, p. 487, as amended in 1925 and 1927, see St. 1925, p. 538, and 1927, p. 282), entitled "An act to secure the payment of the claims of persons employed by contractors upon public works. * * *" Ross furnished the county with a bond in a sum not less than 50 per cent. of the contract price which in terms inured to the benefit of materialmen, laborers, etc. Plaintiff was employed on the job as a laborer by the Santa Fe Construction Company, which became indebted to him in the sum of $736. He was not paid, and consequently in accordance with the provisions of said statute and within the time allowed thereby, he filed with the auditor and the treasurer of the county of Los Angeles, in the city of Los Angeles, a verified claim together with a "stop-notice," covering the amount due him; and thereafter in due time he filed the present action in the superior court against the auditor and the treasurer of the county, and the contractor, asking that the auditor and the treasurer pay to him, out of the funds remaining in their hands for the payment of the contract, the amount covered by his verified claim, together with attorney's fees and costs.

[1] Section 2 of the act, as amended, pursuant to which the verified claim and stop-notice were filed provides that all actions brought thereunder against the disbursing officers for the enforcement of such claims shall be governed by the provisions of sections 1184a, 1184b, and 1184c of the Code of Civil Procedure, relating to the foreclosure of mechanics' liens; and subdivision 3 of section 29 of the act establishing municipal courts (St. 1925, p. 658, as amended by St. 1929, p. 838), in force at the time these transactions took place, pro-

vided that the municipal court shall have exclusive jurisdiction in "all actions to enforce and foreclose liens on personal property, where the amount of such liens is two thousand dollars or less." Furthermore, as held in L. W. Blinn Lumber Co. v. Pioneer Drainage Dist., 50 Cal. App. 364, 195 P. 750, a stop-notice filed pursuant to the act above mentioned serves as an equitable garnishment—a form of equitable subrogation regulated by statute, which gives a right of recovery of the money so garnisheed.

[2] Here admittedly the fund against which the equitable garnishment lien existed, and against which foreclosure was sought, was held by said county officers in the county treasury in the city of Los Angeles; and as pointed out, under the provisions of the Municipal Corporation Act above cited, the municipal court of that city is given exclusive jurisdiction of such lien foreclosure actions, where the amount involved is $2,000 or less. It follows, therefore, that the present action should have been instituted in the municipal court and that the superior court was without jurisdiction to hear and determine the same.

[3] Plaintiff's contention that the superior court was vested with jurisdiction is based fundamentally on the theory that the situs of his lien for labor was where the labor was performed, which admittedly was outside of the city of Los Angeles. But in order to sustain such theory, it would be necessary to hold that the lien resulting from the equitable garnishment was not against the unpaid fund remaining in the hands of the disbursing officers in the city of Los Angeles, but that the effect of the filing of said verified claim and "stop-notice" was to create a lien against the public improvement on which he performed the work. Obviously it cannot be so held, because it is well settled that, unlike cases of privately owned property, no such lien can be created against public property (Slayden v. O'Dea, 182 Cal. 500, 189 P. 1066), it being expressly held in this regard that the cumulative remedy provided by section 1184 of the Code of Civil Procedure, for the enforcement of an equitable garnishment, grants no right to sell public property under execution and forced sale (Bates v. Santa Barbara County, 90 Cal. 543, 27 P. 438).

The Blinn Case, supra, cited by plaintiff and upon which he strongly relies in support of his contention as to jurisdiction, is not helpful to him. It was decided long prior to the enactment of the statute creating municipal courts; and an examination of the decision therein will demonstrate that the reasons which impelled the reviewing court there to hold that the superior court in the exercise of its equitable jurisdiction did not err in retaining and deciding the controversy before it, are not available here. Nor are the cases of Johnston Gas Furnace Corp. v. Superior Court, 106 Cal. App. 166, 288 P. 808, and Scott v. Superior Court, 108 Cal. App. 764, 292 P. 290, in point because in each of them the lien for materials and labor existed against privately owned property situate outside of the city of Los Angeles; and it was held, therefore, that since the situs of the liens sought to be foreclosed was outside of the territorial limits of the municipal court of that city, the jurisdiction of said court did not extend thereover.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.



139 Cal.App. 84

YAGER v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 9752.

District Court of Appeal, Second District, Division 2, California.

June 4, 1934.

1. Building and loan associations ⇐46(12).

California building and loan commissioner may take possession of business and assets of insolvent foreign association licensed in California, but not of the association itself; such right being only in commissioner of state of its incorporation (St. 1931, p. 540 et seq., § 13.13 et seq., as amended).

2. Building and loan associations ⇐46(12).

Statute authorizing reorganization of building and loan association not in "custody" of commissioner *held* not to prohibit commissioner, who had commenced liquidation of allegedly insolvent foreign association licensed in California, from taking cognizance of reorganization and proceeding under statutory reorganization provisions (St. 1933, p. 1119, § 13.20).

[Ed. Note.—For other definitions of "Custody," see Words & Phrases.]

3. Statutes ⇐205.

All sections of Building and Loan Association Act must be construed together (St. 1931, p. 483, as amended).

4. Building and loan associations ⇐43.

Statute *held* not to prohibit interruption of commissioner's liquidation of insolvent building and loan associations by reorganization proceeding (St. 1931, p. 540 et seq., § 13.-13 et seq., as amended; St. 1933, p. 1119, § 13.20).

5. Prohibition ⇐5(3).

Shareholder, contending superior court had no power to hear application for approval of reorganization plan of allegedly insolvent building and loan association in process of liquidation, *held* not entitled to prohibition, even if correct in contention, since statutory reorganization provisions protected nonconsenting shareholders (St. 1931, p. 540 et seq., § 13.13 et seq., as amended; St. 1933, p. 1119, § 13.20).

6. Prohibition ⇐1.

Prohibition will not issue unless injury is shown.

7. Prohibition ⇐1.

Generally, prohibition will issue only in cases of special emergency to prevent great impending present injury or extraordinary hardship.

Prohibition proceeding by Harry Yager against the Superior Court in and for Los Angeles County, and Henry M. Willis, as judge thereof, in which proceeding an alternative writ of prohibition was issued.

Writ discharged.

Edward A. Adams and H. L. Carnahan, both of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and Fred M. Cross, Deputy Co. Counsel, both of Los Angeles, J. C. Hughes, of Oakland, Thomas M. Gannon, of San Francisco, Clock, McWhinney & Clock, of Long Beach, and James C. Ingebretsen, of Los Angeles, for respondents.

CRAIG, Acting Presiding Justice.

In this proceeding an alternative writ of prohibition was issued; a return was made by demurrer and also by answer.

The petitioner alleges that he is a shareholder of the Western Loan & Building Company, a Utah corporation; that the banking commissioner of the state of Utah, prior to August 17, 1933, placed a custodian in charge of the affairs of the association in that state; that prior to said date the association was licensed to carry on the general business of a building and loan association in the state of California; and that at that time it had assets located in this state amounting to $19,500,060 and liabilities owing to residents of California in the sum of $3,450,000; that the banking commissioner of Utah and the building and loan commissioner of California on the date above mentioned determined that the association was insolvent, and that the future conduct of its business would be hazardous to the investing public, and thereupon said building and loan commissioner of California took charge of the assets of the association in this state, and on the 26th day of September, 1933, filed a formal notice in the superior court of his determination to liquidate its assets and has since been engaged in so liquidating the same in California; also that the California commissioner has mailed out notices and written communications indicating that he intends to submit a plan of reorganization of the association, and that the said plan of reorganization contemplates ignoring the provisions of the laws of the state of California in certain particulars and especially in the disposition of the assets of the association and its deposit of $350,000 with the state treasurer, placed there as a condition precedent to its carrying on business in California. Other allegations contained in the petition which were regarded as sufficient in addition to the foregoing to warrant issuing an alternative writ need not be stated here.

Petitioner seeks a peremptory writ prohibiting respondent court from exercising jurisdiction in the matter of taking any steps or making any order affecting a reorganization of the Western Loan & Building Company; it being represented that said court has heretofore made an order setting the date for hearing an application which it has directed the building and loan commissioner to file praying for the approval of said reorganization plan of the association.

[1, 2] The theory of petitioner is that the Building and Loan Association Act of the state of California (St. 1931, p. 483, as amended) is the sole authority of the commissioner to do any act involved in this controversy; that under the provisions of this statute, when the commissioner has once elected to liquidate an association, he must proceed to complete such liquidation, and that thereafter he has no jurisdiction to take any part in any reorganization plans or to take cognizance of such a plan even to the extent of calling it to the attention of the superior court. Therefore, it is asserted, the superior court has no jurisdiction to entertain a petition of any character recognizing such reor-

ganized corporation, if the same has been completed or permitting the transfer of any assets of the association in liquidation under any conditions. It is claimed that section 13.20 of the act, which provides the plan for the reorganization of insolvent associations, expressly excepts from its operation an association which has been taken into the possession of the commissioner for the purposes of liquidation because the section by its own terms applies only to an association "not in the custody of the commissioner." We cannot agree with this construction of the law. Such an interpretation would make the act quite meaningless. The association is a legal entity. The commissioner of Utah, the state of its incorporation, is the only commissioner who can have its custody. 14 Cor. Jur. 340, § 417; 14–A Cor. Jur. 1327. The California commissioner may take possession of the business and assets of a foreign association, but not of the association itself. Hence, when by section 13.20 of the act (as added by St. 1933, p. 1119, § 17) it is provided: "Whenever the holders of seventy-five per cent in value of the outstanding investment certificates of an association, which association is not in the custody of the commissioner," etc., in so far as this provision is concerned, there is no inhibition against the commissioner taking cognizance of a reorganized association and proceeding under the further provisions of said act. In the instant proceeding, it appears that the necessary steps have been taken, agreeable to section 13.20 of the act, to reorganize the association, that these have received the approval of the Utah commissioner, and that it is the plan thus put into effect which is to be submitted to the superior court for its approval. But it is further contended that section 13.13 et seq. (St. 1931, p. 540 et seq., as amended), which create the power of the commissioner to liquidate an association and the procedure which he should follow in making such liquidation, allow of no interruption of this proceeding when the commissioner has once determined to liquidate, and has thus entered upon that process; having put his hand to the plow, he cannot turn back or deviate.

[3, 4] It is true that there is no express provision among the sections having to do with liquidation for any interruptions through reorganization of the association or otherwise; neither is there any express inhibition of such interruption. The entire act must be construed as a whole. All of its sections must be construed together, and so, when section 13.20 declares "whenever," etc., as above quoted, this language has the force of injecting a plan and scheme for reorganization at any point in the handling of an association by the commissioner unless a prohibition appears, express or implied, against such an interpolation and such interruption of the conduct of its business in whatever stage it may be. We find no such prohibition.

[5-7] The conclusion just stated is aided by the fact that section 13.20 contains complete protection of the rights of shareholders in an insolvent association whose assets are in the possession and control of the commissioner if such shareholders refuse to consent to the reorganization. It is unnecessary to quote from the section these provisions in detail, but it contains requirements for notice to certificate holders and others, the retention of such assets of the association as are necessary to fully protect all nonconsenting certificate holders, shareholders, and stockholders and the preservation of all their rights, preferences, and priorities provided by the Building and Loan Association Act; also provisions for the right of such nonconsenting interest owners to have their rights safeguarded and further protected by an appeal to the superior court, provided they are not satisfied with the steps taken by the commissioner in their behalf. This enactment furnishes a second reason why this petitioner should be denied the relief herein stated; namely, that he does not show injury if the superior court is permitted to proceed, and even though its contemplated action might be erroneous or beyond its power. Unless such injury is shown, a writ of prohibition will not issue and the parties will be left to other appropriate remedies. 50 Cor. Jur. 662, § 15, and 701, § 107, also Supp.; Galbreath v. Hopkins, 159 Cal. 297, 113 P. 174; Lorenz v. Waldron, 96 Cal. 243, 31 P. 54; Keyes v. Little York Gold Washing & Water Co., 53 Cal. 724; 32 C. J. 42, § 22, and Supp. As a general rule, it will issue only in cases of special emergency, to prevent great impending present injury or extraordinary hardship. State v. Gleason, 187 Ind. 297, 119 N. E. 9; State v. Circuit Court, 184 Wis. 301, 199 N. W. 213; Ellison Ranching Co. v. Bartlett, 53 Nev. 420, 3 P.(2d) 151.

As we have stated, section 13.20, through appropriate action by the nonconsenting interest holder, compels full conservation and protection of his rights by the commissioner and the court.

The cases cited by petitioner in support of the claim that his rights or those of other interested holders in his own class may be prejudiced by any ruling of the superior

court which we are asked to restrain are distinguishable in point of fact from the instant proceeding, and hence are not in point. In consideration of our views as we have stated them, it will not be necessary to pass upon other contentions advanced by respondent.

The writ is discharged.

I concur: DESMOND, J.



139 Cal.App. 225

PAIGE et ux. v. REINECKE et al.

Civ. 5088.

District Court of Appeal, Third District, California.

June 12, 1934.

Brokers ⇨34.

Real estate brokers holding options from vendors to buy their land, which options were not used, and pretending to act as vendors' agents in selling land, *held* to be agents of vendors and were liable to them for amount received from buyer and not turned over to vendors.

Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Action by Frederick M. Paige and another against H. J. Reinecke and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Peter J. Youngdahl, of Los Angeles, for appellants.

W. D. Van Nostram, of Los Angeles, for respondents.

WEYAND, Justice pro tem., delivered the opinion of the court.

The plaintiffs and respondents are husband and wife, and prior to the occurrences hereinafter related were the owners of 160 acres of land in the Gila valley, in the state of Arizona, which land they desired to sell. Plaintiffs were laboring under great financial embarrassments, which fact they made known to the defendants Reinecke and Burger.

Defendant Reinecke was a licensed real estate dealer and held a license as such from the California real estate division, and had filed with that department the usual bond required by law, with the defendant Hartford Accident & Indemnity Company, as surety for his good conduct as such real estate agent.

The defendant Burger was a real estate operative, and, as far as herein revealed, worked with and through the real estate office of defendant Reinecke in Glendale, Cal. In the suit as originally brought, other defendants were named, but they were dismissed from the action.

The plaintiffs sued for moneys they claimed were fraudulently concealed and retained by Reinecke and Burger out of moneys paid for the Arizona lands owned by plaintiffs. They obtained a judgment in the trial court against the last-named defendants for the sum of $2,592, and as against the Hartford Accident & Indemnity Company for $2,000, on the said bond given by Reinecke to the real estate department.

Plaintiffs inserted an advertisement of their lands in a Los Angeles newspaper. A party not now connected with these transactions here involved made contact with the plaintiffs, and brought them to the office of Reinecke and Burger, where plaintiffs began negotiations with said last-named defendants. After several talks with these defendants, the plaintiffs gave the said defendants two separate options; one being for $10 per acre, and one being for the price of $22.50 per acre. According to plaintiffs' version, the $10 was given first, but a sale thereunder fell through, and then, according to plaintiffs, Reinecke and Burger suggested the giving of another option at the price of $22.50 per acre, and they suggested that plaintiffs would receive more for their land and the agents would get a larger commission. Reinecke and Burger at all times made it plain to plaintiffs that they had no money and could not buy the plaintiffs' lands.

After obtaining the $22.50 option, Reinecke and Burger, through another real estate dealer named Brown, obtained one E. F. Roof as a buyer for the lands at $22.50 per acre. This agent Brown had no interest, financial or otherwise, in the deal, but was acting gratuitously for Reinecke and Burger, and at the request of the latter.

On March 3, 1930, at about the hour of 1 o'clock p. m., said E. F. Roof was, through said agent Brown, induced to make his deposit of $22.50 per acre, or the full sum of $3,600 for the lands in question. This was accomplished through an escrow in the Bank of Italy in Glendale. Reinecke, Burger, and Brown were present at the time of the said

escrow and deposit, and all were aware of the amount of the deposit made by Roof.

Thereafter, and on that same day, Reinecke and Burger sent for the plaintiffs, and told plaintiffs that they could not make a sale of the lands at $22.50 per acre, but that they could make a sale for $8 per acre; that $8 was the most the buyer would pay. Plaintiffs were further told that there was to be no profit in the transaction for Reinecke and Burger, and that the plaintiffs were lucky to get said sum of money in cash. These defendants told plaintiffs that the buyer wanted the deal closed, as he was to leave that very evening for Chicago.

Under these representations and under these conditions the plaintiffs were induced to close the deal. When defendants Reinecke and Burger and the plaintiffs arrived at the bank, plaintiffs asked to see the escrow papers deposited by the buyer, Roof. They were denied the right to see the escrow papers on the pretext that as the buyer, Roof, was not present, it was improper that plaintiffs should see the Roof escrow papers.

Plaintiffs then executed the deed of the premises to Roof, and received the sum of $1,280 out of the $3,600 deposited by Roof. A few days later the agent Brown turned over to Reinecke and Burger $2,320, the balance of the Roof deposit.

Appellants contend that, as the only papers or writings given by plaintiffs to them were the $10 and the $22.50 per acre options, Reinecke and Burger were not agents of plaintiffs, but that they were holders of agreements for the purchase and sale of real estate.

The testimony showed that Reinecke and Burger were not able to buy this land on their own account, and at no time did they pretend to act as buyers of the land, but on the contrary the testimony indicated clearly that at all times they were pretending to act as agents for the plaintiffs, and Reinecke and Burger knew that the Paiges so understood.

On the day when the sale was finally consummated, Reinecke and Burger did not proceed under either the $10 option, nor under the $22.50 option. They made sure that the deposit of $22.50 per acre, or the total sum of $3,600 had been made, and then they called up the plaintiffs, and on their arrival these defendants proceeded solely under a new oral agreement wherein and whereby they were obligated to turn over to plaintiffs the entire deposit made by the buyer, Roof. All the conversation indulged in at this time indicated most clearly that the defendants were pretending to act only in the capacity of agents for the plaintiffs.

We shall hold that the transactions as shown herein constituted the defendants Reinecke and Burger as agents for the plaintiffs in the sale of their lands, notwithstanding the fact that said defendants held the options referred to. These options they did not use in admeasuring any rights of plaintiffs. These defendants pretended to act as agents of plaintiffs, and while so pretending to act obtained possession of $2,320 that rightfully belonged to plaintiffs.

The judgment is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.



138 Cal.App. 760

WILSON et al. v. RIGALI & VESELICH et al.

Civ. 8949.

District Court of Appeal, First District, Division 1, California.

May 29, 1934.

Hearing Denied by Supreme Court July 26, 1934.

1. Fraud ⇐12.

Statements or predictions as to happening of future events are considered as mere expressions of opinion and not actionable fraud.

2. Vendor and purchaser ⇐37(1).

In purchasers' suit to rescind land contract for fraud, vendors' promises, without intention to perform, to resell and to install improvements were actionable misrepresentations (Civ. Code, § 1572, subd. 4).

3. Vendor and purchaser ⇐37(1).

In purchasers' suit to rescind land contract for fraud, in which vendors predicted future construction of movie studio nearby, false assertion of existing fact that studio had been planned was fraudulent.

4. Vendor and purchaser ⇐37(1).

Single fraudulent representation by vendor is sufficient to warrant rescission of land contract.

5. Vendor and purchaser ⇐44.

In purchasers' suit to rescind land contract for fraud, vendors' intention not to per-

form promise was matter of inference from facts proven, and subsequent conduct might be sufficient to show such intention.

6. Vendor and purchaser ⇐37(1).

In suit to rescind land contract for fraud, vendors cannot excuse failure to resell lots as promised on ground that purchasers were unwilling to sell until after market collapsed, where delay was due to vendors' advice.

7. Vendor and purchaser ⇐44.

Purchasers' purchase of second lot before resale of first, did not show that purchasers knew vendors' promise to resell was faithless, and that they did not rely upon it.

8. Vendor and purchaser ⇐44.

In purchasers' suit to rescind land contract for fraud, subsequent failure by vendors to perform promises warranted inference that they did not intend to perform.

9. Evidence ⇐434(11).

Vendor cannot escape liability for his own fraud or false representations by insertion in contract of provision providing vendor should not be responsible for any inducement, promise, representation, or agreement not embodied therein (Civ. Code § 1668).

10. Vendor and purchaser ⇐37(4).

While fraud not causing injury is not ground for rescission of land contract, injury need be only slight and buyer is entitled to full value of property as represented; price being immaterial.

11. Vendor and purchaser ⇐37(6).

Purchasers suing to rescind land contract for fraud *held* damaged in loss of profits promised on resale and in cost of street work which vendors agreed to pay, as against contention purchasers were not injured and therefore not entitled to rescission.

12. Vendor and purchaser ⇐119.

Where purchasers delayed 15 months in rescinding land contract for fraud, but during such time vendors reiterated promises to resell property, advising purchasers to hold it until improvements were installed, which vendors delayed doing, such conduct excuses delay and estops vendors from raising such defense.

13. Vendor and purchaser ⇐43(1).

Purchasers' request for permission to pay interest only, without payment on principal to vendors, *held* not waiver of vendors' fraud, and ratification of land contract.

14. Appeal and error ⇐1040(10).
Pleading ⇐52(2).

Where complaint in purchasers' suit to rescind land contract for fraud contained reference to two contracts in same count, which contracts were entered into at different times and related to different property, refusal to sustain demurrer on ground that counts contained several causes of action not separately stated was error, but not prejudicial, where vendors were fully advised of facts on which purchasers relied.

15. Vendor and purchaser ⇐123.

In purchasers' suit to rescind land contract for fraud, allegations were not deficient for failure to expressly allege that there was no intention by vendors to fulfill promises made, where such was effect of averments made.

16. Vendor and purchaser ⇐338.

Purchase price paid pursuant to void executory land contract being without consideration may be recovered in action for rescission or in action for money had and received.

17. Pleading ⇐369(2).

Where purchasers seeking to recover payments were entitled to prove either or both of theories urged, being theory of rescission, and that sale by reference to unrecorded map was void, it would be reversible error for court to compel election.

18. Appeal and error ⇐1071(6).

Where purchasers alleged right to rescission and right to recover payments in legal action, failure to find on vendors' plea that legal action and another for money had and received were barred by limitations did not require reversal, where there was no claim that action for rescission was so barred.

19. Vendor and purchaser ⇐116.

Where only muniments of title received by purchasers were contracts, cancellation thereof terminated purchasers' interest in property and they need not be required to execute quitclaim deed to secure rescission.

20. Vendor and purchaser ⇐341(5).

Where cancellation of land contract was decreed on theory of rescission, interest should have been allowed only from date of rescission.

21. Vendor and purchaser ⇐341(5).

In purchasers' suit to rescind land contract for fraud, in which they sought to recover payments made, allowance of total in excess of amount parties had stipulated had been paid on contract was erroneous.

Appeal from Superior Court, Los Angeles County; Henry B. Neville, Judge.

Action by Ethel B. Wilson and another

against Rigali & Veselich and others. Judgment for plaintiffs, and defendants appeal.

Modified and affirmed.

Howard F. Shepherd, of Los Angeles, for appellants.

Henry Brown, Loris V. Cady, and Margaret E. Faires, all of Los Angeles, for respondents.

GRAY, Justice pro tem.

[1-4] The vendors of two lots in the city of Burbank, each under a separate contract, appeal from a judgment canceling those contracts and awarding to the vendees the total, with interest, of the several installments paid upon those contracts. The court found that appellants induced respondents to purchase the first lot by falsely representing (1) that they would resell said lot within a short time of purchase at a handsome profit; (2) that certain movie studios would be built close to said lot, which would greatly increase its value; (3) that the Sterling movie studio, which would be located a few blocks from said lot, was already planned and construction thereof would start shortly; (4) that Riverside drive, intersecting or adjacent to the tract, in which the lot was located, would be fully completed, not only to the tract, but throughout its total length; (5) that a rapid transit tunnel would shortly be completed through the hills from Hollywood to the tract; (6) that Whitnal highway from the terminus at Bakersfield would be completed in a short time and would intersect with Riverside boulevard within a block of the lot; and (7) that water, electricity, and all street improvements in the tract would be commenced shortly and be completed in a short time. It further found that appellants induced respondents to purchase the second lot by a repetition of such representations, that the representations were made as positive assertions in a manner not warranted by appellants' information, and that the promises were made without any intention of performance. In addition the court found other facts, necessary to support a judgment of rescission for fraud, but, which being unquestioned, are not set forth. Each of the above representations were statements or predictions as to the happening of future events which, alone, are considered as mere expressions of opinion and, as such, nonactionable. Lawrence v. Gayetty, 78 Cal. 126, 20 P. 382, 12 Am. St. Rep. 29; Eade v. Reich, 120 Cal. App. 32, 7 P.(2d) 1043. However, the first and seventh involved promises by appellants, which being made, as found by the court, without any intention of performing the same, constituted fraud. Civ. Code, § 1572, subd. 4; Lawrence v. Gayetty, supra; Eade v. Reich, supra; Ayers v. Southern Pacific Railroad Co., 173 Cal. 74, 159 P. 144, L. R. A. 1917F, 949. The promise, without any intention of performing it, to resell (Boulevard Land Co. v. King, 125 Cal. App. 224, 13 P.(2d) 864) and to install improvements (see cases cited in 27 A. L. R. 345; 68 A. L. R. 640) each were actionable misrepresentations. The third, in addition to a prediction of the future construction of the Sterling studio, contained an assertion of an existing fact, to wit, that it had been planned, which, since false, was fraudulent. Russ, etc., Co. v. Muscupiabe, etc., Co., 120 Cal. 521, 52 P. 995, 65 Am. St. Rep. 186; California Credit, etc., Corp. v. Goodin, 76 Cal. App. 785, 246 P. 121; California C. & C. Corp. v. Carpenter, 77 Cal. App. 18, 246 P. 126. A single fraudulent representation is sufficient to support the judgment. Stewart v. Crowley, 213 Cal. 694, 3 P.(2d) 562; Harris v. Miller, 196 Cal. 8, 235 P. 981. The other four predictions as to future acts to be performed by others, may, for present purposes, be conceded to be mere expressions of opinion, and, as such, immaterial.

[5-8] The intention not to perform a promise is a matter of inference from the facts proven and subsequent conduct may be sufficient to show such intention. Snyder v. City Bond & Finance Co., 106 Cal. App. 745, 289 P. 859; Bouey v. Porterfield, 96 Cal. App. 674, 274 P. 766. Appellants attempt to excuse their unquestioned failure to resell the lots on the ground that respondents, wishing to get the full benefit of increase in prices, were unwilling to sell until after the collapse of the market. Since the delay was due to their frequently repeated advice to hold for a greater increase, respondents cannot complain if adherence to such advice made a resale difficult, if not impossible. Respondents' purchase of the second lot, before a resale of the first lot, evidences a credulity and trust in appellants' promise, unwarranted by subsequent events, but does not show that, at the time, respondents knew that such promise to resell was faithless and therefore did not rely upon it. The water and electricity were installed at appellants' expense, but the cost of street work, constructed by public authority, was charged against the lots. Without the consideration of other evidence, the subsequent failure to perform warrants the inference that appellants did not intend to perform when they promised.

[9] Each preliminary receipt and contract contained an express waiver of all promises,

understandings, or agreements not specified therein, and each final contract provided that each buyer purchased as the result of her own inspection and not of any representation, that she waived any representation not set forth, and that the seller should not be responsible for any inducement, promise, representation, or agreement not embodied therein. Appellants argue that respondents, because of these provisions, should have insisted upon the incorporation in the agreements of the agent's representations, and, having failed to do so, cannot recover therefor. They support this argument by citing Gridley v. Tilson, 202 Cal. 748, 262 P. 322. In considering similar provisions under similar circumstances, the Supreme Court, in Simmons v. Ratterree Land Co., 217 Cal. 201, 204, 17 P.(2d) 727, 728, said: "It is settled beyond doubt, manifestly on sound grounds of justice, that a seller cannot escape liability for his own fraud or false representations by the insertion of provisions such as are embodied in the contract of sale herein. [Citing authorities.] Section 1668, Civil Code, provides: 'All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.'" That case also states that the correct interpretation of Gridley v. Tilson, supra, is that in certain circumstances an honest principal may protect himself from his agent's fraud by inserting in the contract notice of the limitation of the agent's authority to make representations not therein embodied.

[10-13] Appellants argue that since there is no proof that the lots were not worth their price at time of sale, respondents were not injured by the failure to perform the promise to resell and to install, at appellants' cost, the street work. While fraud, unproductive of injury, is not ground for rescission, the injury need only be slight and the buyer is entitled to the full value of property, as represented; the price being immaterial. Spreckels v. Gorrill, 152 Cal. 383, 92 P. 1011. Respondents were clearly damaged in the cost of the street work, which appellants agreed to but did not pay, and in the loss of a profit promised on a resale. For over a year respondents paid all installments of interest and principal, and then, with appellants' consent, two installments of interest, and fifteen months later rescinded. At the time of sale the market for the lots was active but, when the payments ceased, had collapsed and appellants had withdrawn their selling organization. These facts, appellants argue, established an unreasonable delay in the discovery of the fraud and in rescission, and also changed circumstances which make rescission inequitable. But it also appears that, during the same time, appellants reiterated their promises to resell but advised respondents to hold until the improvements were installed, which appellants delayed doing. Such conduct not only excuses the delay, but estops appellants from raising the defense. Cooper v. Huntington, 178 Cal. 160, 172 P. 591; Bechtold v. Coney, 42 Cal. App. 563, 183 P. 841; Mabry v. Randolph, 7 Cal. App. 421, 94 P. 403. Nor did the request for permission to pay the interest only constitute a waiver of the fraud and a ratification of the contracts, for, although suspicious, respondents had not yet been convinced of the falsity of the promises. Conner v. Butler, 113 Cal. App. 502, 298 P. 546.

[14, 15] Appellants contend that the court erred in overruling their special demurrer to each of the four counts of the amended complaint upon the ground that each contained several causes of action which were not separately stated. The first count sought the rescission of the two contracts, entered into on different dates and affecting different lots, but induced by the misrepresentations, found by the court, successively repeated. Each succeeding count, by incorporation, realleged all the allegations of the first. In addition, the second alleged a failure of consideration as to each lot, because of the falsity of the representations, the third alleged a common count for money received to and for respondents' use, and the fourth alleged the first contract was void, because the first lot was sold by reference to an unrecorded map. Since each contract was entered into at a different time and related to different property it constituted a different transaction, although the misrepresentations were the same, and the demurrer should have been sustained. Lee v. Folcey, 110 Cal. App. 607, 294 P. 742. This error, however, did not prejudice appellants for they were fully advised of the facts upon which the respondents relied. Burd v. Downing, 60 Cal. App. 493, 213 P. 287; People v. Fidelity & Deposit Co., 106 Cal. App. 372, 289 P. 231. Nor are the first and succeeding causes of action deficient for failure to expressly allege that there was no intention to fulfill the promise, since such was the effect of the averments on the subject. Langley v. Rodriguez, 122 Cal. 580, 55 P. 406, 68 Am. St. Rep. 70.

[16-18] The fourth count sought to recover the payments on the first lot upon a theory of

rescission and also upon a theory that its sale by reference to an unrecorded map was void. The purchase price, paid pursuant to such void executory contract, being without consideration, may be recovered in an action for rescission. Krause v. Marine Trust & Sav. Bank, 93 Cal. App. 681, 270 P. 246. It may also be recovered in an action for money had and received. Harwell v. Reiniger, 123 Cal. App. 485, 11 P.(2d) 421. Since the findings are sufficient to support the judgment on the theory of rescission, it is really unnecessary to ascertain whether they support it on the other theory. Harwell v. Reiniger, supra. Ignoring the theory of rescission and fallaciously assuming that respondents had only a legal action to recover the payments, appellants criticize various rulings of the court, which, although moot, will be next considered. Since respondents were entitled to prove either or both theories, it would have been reversible error if the court, on appellants' motion, had compelled an election. Goldwater v. Oltman, 210 Cal. 408, 292 P. 624, 71 A. L. R. 871; Martinelli v. Luis, 213 Cal. 183, 1 P.(2d) 980. Conceding, for present purposes, that the municipal court had exclusive jurisdiction of the legal action, because of the amount involved, still the superior court had jurisdiction of the equitable action for rescission. The failure to find on appellants' plea that this legal action and another for money had and received, contained in the third count, was barred by the statute of limitations does not require a reversal, since there is no claim that the action for rescission was so barred.

[19-21] The judgment canceled the contracts and awarded to respondents the total of the installments, together with interest on each from date of payment. Since the only muniments of title respondents received were the contracts, the latter's cancellation terminated their interest in the properties, and therefore a requirement that they execute quitclaim deeds would have been superfluous. The cancellation having been decreed upon a theory of rescission, interest should have been allowed only from date of rescission. Hayt v. Bentel, 164 Cal. 680, 130 P. 432; Knight v. Bentel, 39 Cal. App. 502, 179 P. 406; Taber v. Piedmont Heights Bldg. Co., 25 Cal. App. 222, 143 P. 319. The allowance of a total, which was $95.74 in excess of the amount the parties had stipulated had been paid on the contract was also erroneous. Wilson v. Mattei, 84 Cal. App. 567, 258 P. 453.

The judgment is modified, with instruction to correct the same by deducting the sum of $95.74 from the principal and by allowing interest from date of rescission; and as thus modified it will stand affirmed; respondents to recover costs.

We concur: KNIGHT, Acting P. J.; CASHIN, J.



139 Cal.App. 91

Ex parte MESQUITA.

Cr. 268.

District Court of Appeal, Fourth District, California.

June 4, 1934.

1. Criminal law ⇐238.

One may be held to answer for an offense if the evidence adduced at preliminary hearing shows "reasonable or probable cause" that offense was committed by him.

"Reasonable or probable cause" means such a state of facts as would lead a man of ordinary caution and prudence to believe and conscientiously entertain a strong suspicion that the person accused is guilty and there must be a probability that a crime has been committed by the person named in the commitment.

[Ed. Note.—For other definitions of "Probable Cause" and "Reasonable Cause," see Words & Phrases.]

2. Habeas corpus ⇐92(1).

On application for release from custody on ground that evidence adduced at preliminary examination failed to show reasonable or probable cause that the crime had been committed by petitioner, court cannot weigh evidence nor assume that prosecution produced all evidence that it had.

Application by Arthur Labant Mesquita for a writ of habeas corpus, opposed by the sheriff of San Diego county.

Writ denied, and petitioner remanded to sheriff's custody.

Ben J. Howrey, of San Diego, for petitioner.

Thomas Whelan, Dist. Atty., and Victor C. Winnek and Frank P. Buckley, Deputy Dist. Attys., all of San Diego, for respondent.

MARKS, Justice.

This is an original application for a writ of habeas corpus brought in this court seeking the discharge of petitioner upon the ground that the evidence produced at his preliminary examination did not show reasonable or probable cause that a crime had been committed by him.

The petitioner was held to answer by the committing magistrate for the crime of burglary alleged to have been committed in the city of San Diego on the 6th day of August, 1933.

[1] Petitioner cites and relies upon numerous authorities which hold that mere possession of stolen property by the accused is not sufficient evidence that the property was stolen to support a conviction by a jury. These cases, while announcing a sound principle of law, are not authority here as we are not testing the sufficiency of the evidence to support a conviction, but the sufficiency of the evidence to support his being held for trial in the superior court, which only requires evidence showing reasonable or probable cause for his detention. In Ex parte Vice, 5 Cal. App. 153, 89 P. 983, 985, it is said: "Reasonable or probable cause means such a state of facts as would lead a man of ordinary caution and prudence to believe and conscientiously entertain a strong suspicion that the person accused is guilty. There must be a probability that a crime has been committed by the person named in the commitment."

[2] The rules governing us in this proceeding are laid down in Re Cordish, 94 Cal. App. 680, 271 P. 784, 785, as follows: "If, however, we pick up that evidence and examine it, we are unable to grant the application of the petitioners. Bearing in mind that this is an application for a writ of habeas corpus, an attack on the evidence taken before the committing magistrate does not authorize this court to weigh the evidence. That function will be exercised by a jury at the proper time. In re Leonardino, 9 Cal. App. 690, 693, 100 P. 708. In this proceeding the power of this court is to ascertain whether the petitioners were held to answer 'without reasonable or probable cause.' Pen. Code, § 1487, subd. 7. If there was either reasonable or probable cause, the petition should be denied. There are many reasons why it is unnecessary, and, indeed, improper, to recite and comment on the evidence taken before the committing magistrate. As stated above, our power is not to weigh that evidence. Furthermore, in this case, as in most cases, the prosecution produced some evidence, but we may not assume that it produced all of its evidence, and the defendants produced no evidence, and we may not assume that they had none to produce. Finally, if we knew that all of the plaintiff's evidence in the case had been produced, it would be improper for us to express our opinions when, as stated above, a jury will hereafter pass on the weight of the evidence."

We have examined the evidence taken before the committing magistrate and are satisfied that it was sufficient to show that there was reasonable or probable cause to believe that the petitioner committed the crime for which he was held to answer. The case of In re Taylor, 66 Cal. App. 252, 225 P. 865, cited by petitioner, is not authority to the contrary.

The writ is denied and the petitioner is remanded to the custody of the sheriff of San Diego county.

We concur: BARNARD, P. J.; JENNINGS, J.



138 Cal.App. 748

PEOPLE v. BROWN.

Cr. 1763.

District Court of Appeal, First District, Division 1, California.

May 29, 1934.

Hearing Denied by Supreme Court June 25, 1934.

1. Rape ⇐57(1).

Evidence *held* sufficient to go to jury on question of defendant's guilt of rape (Pen. Code, § 261).

2. Witnesses ⇐379(2).

Cross-examination of prosecutrix in rape trial as to whether she asked that charges against defendant be dismissed *held* proper.

3. Rape ⇐47.

In rape trial, jury may properly consider prosecutrix' conduct toward defendant after alleged commission of crime.

4. Criminal law ⇐1170½(5).

Exclusion of prosecutrix' testimony, on cross-examination in rape trial, as to whether she asked that charges against defendant be dismissed, *held* prejudicial error, requiring reversal of conviction.

KNIGHT, J., dissenting.

Appeal from Superior Court, Contra Costa County; Thomas D. Johnston, Judge.

Hugh S. G. Brown was convicted of rape, and he appeals.

Reversed and remanded.

Vincent W. Hallinan and William F. Herron, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

CASHIN, Justice.

Defendant was found guilty of the crime of rape, and has appealed from the judgment of conviction and an order denying his motion for a new trial.

As grounds for his appeal he contends that the evidence was insufficient to support the verdict, and that the trial court erred in refusing to permit certain questions to be asked on cross-examination.

The prosecuting witness, who resided in Oakland, testified that on the evening of April 13, 1933, she attended a dance at Neptune Beach in Alameda, where she met the defendant. At the conclusion of the dance defendant offered to take her to her home in his automobile, and she accepted the invitation. Instead of proceeding toward Oakland defendant drove in the opposite direction, stating that he wished to stop at the Oakland airport to see if his brother had arrived by plane. They left the airport, and defendant drove off the main highway and proceeded along a dirt road into Contra Costa county, where he stopped the car. He then made improper advances, whereupon the prosecutrix left the car and ran down the road. How far she went is not clear. According to her testimony they had crossed a bridge before she left the car, and in response to a question as to how far she proceeded she answered: "I don't know. Anywhere between the car and the bridge, and the bridge was about half a mile from the position of the car." It appears that the defendant also left the car and followed her. She testified that at no time did he strike or threaten her, but that he forced her to return to the car, where he renewed his advances. She again left, and he followed, forcing her to re-enter the car, where he accomplished an act of sexual intercourse. The point where the car stopped was about fifty yards from a farm house. The prosecutrix testified she did not scream, and on account of her physical position in the car she was unable to resist by kicking. In response to a question whether she scratched the defendant she replied: "No I did not scratch. I am not in the habit of scratching people." She was twenty-five years of age, weighed about 140 pounds, and had participated in athletics such as tennis and swimming. She testified that she feared the defendant and she did not consent to the act and that she resisted until she "lost all strength and control." With respect to what subsequently occurred she was asked: "Then after the offense was committed what did you do?" She replied: "He simply said to relax and he was tired out and he could not go on yet, and he stayed there for a few minutes, and I just hoped and prayed he would make up his mind to go home, and he finally said he did not have any gas in the car and said he would have to go after some." The defendant then left the car, and after a few minutes the prosecutrix followed and proceeded toward Oakland. She was met by a truck driver, to whom she complained and who took her to his home. The truck driver testified that the prosecutrix was weeping and asked him to protect her, and that the place where they met was several miles from Oakland. The sheriff of the county was notified, and she was taken to his office, where she repeated her story. A physician who examined her on the same day testified that he found a lacerated condition, which indicated sexual intercourse had taken place within the preceding twenty-four hours. He noticed no bruises on her body or limbs, but an officer testified that there were such on her knees and arms.

The defendant did not deny the fact of intercourse, but testified that while the prosecutrix did not expressly consent, she did not resist. He denied the use of force or intimidation, claiming that he persuaded her to submit to his advances. He contends that the prosecutrix' own testimony shows that she did not resist to the extent of her ability and that therefore the conviction cannot be sustained.

Under the Code, proof of resistance on the part of the female until overcome by force or violence is essential (Pen. Code, § 261; People v. Brown, 47 Cal. 447); and it has been said that she must exert every physical means or faculty within her power to resist the outrage. 52 Cor. Jur., Rape, § 29, p. 1019. It has been held, however, that the rule of "resistance to the uttermost" is not absolute; and with respect to the degree of resistance required it is necessary not that the prosecutrix should have made the utmost resistance, but that she made such resistance as she was capable of making at the time (People v. Cline, 117 Cal. App. 181, 3 P.(2d) 575; People v. Norrington, 55 Cal. App. 103, 202 P. 932; see, also,

52 Cor. Jur., Rape, § 29, and cases cited); and that the question whether her resistance was genuine and bona fide was one for the jury. People v. Norringer, supra.

[1] While there was sufficient evidence to go to the jury on the question of guilt, the circumstances disclose a case where a verdict for the defendant would have been fairly supported. As shown, the prosecutrix' account of the affair taken in connection with the physical circumstances contains much that is equivocal; and where the question of guilt or innocence is close, as here, any material error in the admission or rejection of testimony might readily have turned the scales against the defendant.

[2-4] The following question was asked the prosecutrix on cross-examination: "Well, Miss Miller, is it not a fact that you, immediately after preferring these charges against Mr. Brown, you asked that they be dismissed?" An objection that the question was "incompetent, irrelevant and immaterial, not within the province of this prosecutrix to dismiss any charges," was sustained.

This was proper cross-examination (Denton v. State, 46 Tex. Cr. R. 193, 79 S. W. 560; Conger v. State, 63 Tex. Cr. R. 312, 140 S. W. 1112; People v. Jones, 160 Cal. 359, 117 Cal. 176; People v. Webber, 26 Cal. App. 413, 147 P. 102; People v. Williams, 43 Cal. App. 60, 184 P. 498), as the jury may properly consider the conduct of a prosecutrix toward the defendant after the alleged commission of the crime. People v. Jaramillo (Cal. App.) 30 P. (2d) 427. The question was preliminary; and it has been held that the general objection is insufficient to raise the special point that, being an impeaching question, the foundation of time, place, and persons present was not laid. People v. Hart, 153 Cal. 261, 94 P. 1042. An affirmative answer would, unexplained, have been relevant evidence of her consciousness of defendant's innocence. It has frequently been said that in this class of prosecutions the defendant, owing to natural instincts and laudable sentiments on the part of the jury and the usual circumstances of isolation of the parties involved in the commission of the offense, is as a rule so disproportionately at the mercy of the prosecutrix' evidence that he should be allowed the widest latitude in cross-examination compatible with the rules of evidence. People v. Benson, 6 Cal. 221, 65 Am. Dec. 506; People v. Baldwin, 117 Cal. 244, 49 P. 186; People v. Degnen, 70 Cal. App. 567, 234 P. 129; People v. Biescar, 97 Cal. App. 205, 275 P. 851. And where, as here, there was evidence sufficient to support defendant's version of the affair we cannot say that an affirmative answer to the rejected question, taken with the flippant reply of the prosecutrix to the question whether she scratched the defendant, would not have convinced the jury that her story was untrue. In the circumstances the ruling was, we think, prejudicially erroneous and, as a reasonable probability, resulted in a miscarriage of justice.

The judgment and order are accordingly reversed, and the cause remanded for a new trial.

I concur: TYLER, P. J.

KNIGHT, Justice (dissenting).

As will be noted, the majority opinion concedes that the evidence is legally sufficient to sustain the verdict, but reverses the judgment of conviction upon a ruling of the trial court sustaining an objection to a general question propounded to the prosecutrix on cross-examination. In this regard the majority opinion states in substance that much of the prosecutrix' account of the affair is equivocal, that the question of appellant's guilt is close, and that therefore the ruling complained of was prejudicial and probably resulted in a miscarriage of justice. I am unable to agree with these conclusions.

As is usual in cases of this kind, the testimony given by the prosecutrix and the accused is conflicting as to the extent of force and violence used in accomplishing the act constituting the alleged crime; but admittedly under such circumstances it is the exclusive province of the jury, as the fact-finding body, to decide which of the parties has told the truth. In the present case the jury accepted as true the account given by the prosecutrix and acted upon the same in finding appellant guilty. It must be presumed on appeal, therefore, that her testimony is true; and in the light of such presumption it would seem that her account of the affair cannot be said to be equivocal. Moreover, her conduct immediately following the alleged assault, and the physical and mental condition in which she was found at that time, as established by the testimony of disinterested witnesses, strongly support her claim that she was assaulted wholly against her will and as a result of violence and the use of superior force coupled with a feeling of fear, brought about by a realization that at that late hour of the night she found herself alone in the foothills of a sparsely settled country that was entirely strange to her, with a man whom she had met for the first time only a few

hours before, and who had succeeded through trickery in bringing her there.

In this connection the evidence shows she had no relatives living in this state. She had resided in Oakland only about a year and a half, and in the state less than two years, and was entirely unfamiliar with the territory surrounding Oakland or the location or termination of the highways in those regions. Consequently, after having accepted appellant's invitation to drive her home in his car, she was not aware at first, so she stated, that he was proceeding in the opposite direction; but as soon as she became aware of the fact she called his attention to it, and was told by appellant that there were several ways of reaching Oakland, and besides that he wanted to go to the airport to see if his brother had arrived. Upon receiving information at the airport to the contrary, he purchased a small quantity of gasoline. It was then considerably past 1 o'clock in the morning, and instead of turning back toward Oakland he again started in the opposite direction and soon turned from the main highway onto a dirt road leading into the foothills, toward Contra Costa county. The prosecutrix, realizing they were not headed for Oakland, again protested; and appellant finally admitted they were not on the right road. About this time the car stopped. It had run out of gasoline, but as appellant admitted at the trial, he did not at that time disclose this fact to the prosecutrix. As soon as the car stopped he began making his advances. Repulsing him, she got out of the car and ran down the road. Appellant followed her and brought her back; she claimed she was forced or dragged back. Appellant claimed he "persuaded" her to come back, that he "certainly wasn't going to hurt her." The car was an Essex coach, and after the prosecutrix broke away the second time appellant threw the "jump" seat forward; and upon returning to the car the second time with the prosecutrix he picked her up bodily, so she testified, and shoved her into the car, on the floor, face downward. She testified that during the struggle which ensued she used all her strength "to keep him away, keep him at a distance * * * threw him back to the wheel of the car, tried to knock him out"; that she "resisted with every ounce of strength" she had; that she was powerless to kick him because her leg was caught in the front seat. Following the assault appellant informed her that the gasoline supply was exhausted, and he took a pail and proceeded to walk down the road to see if he could obtain gasoline from some farm house. It was then daylight; and after he disappeared down the road the prosecutrix got out of the car and ran back toward the main highway. After running a short distance she met a farmer named Cronin coming in the opposite direction, driving a truck. He was on his way to a field to get a load of hay. She hailed him, and told him what had happened. In this respect Cronin testified: "She was coming down the road and I was going up the road for a load of hay and she waved her hand and I stopped. She was crying. The first question she asked me, 'Where am I?' I didn't know what she meant and I said, 'What do you mean?' She said, 'How far am I from Oakland?' I said, 'You are about twenty-three miles.' Just then an Essex car drove up and a man was in it, and she said, 'Don't let that man get me', and I said 'What's wrong?' She said, 'He had me up in the hills here all night,' and I said, 'Then step in the truck here,' and the man drove by in the machine and I got out, but he didn't stop, he just drove down the road slow, and I could see from looking in the back mirror." Cronin further testified that when the prosecutrix hailed him "she was crying and seemed to be awfully excited and nervous." He took her on the truck, drove on a short distance, got his load of hay, and then drove back to his home in Dublin; and at the prosecutrix' request he phoned for an officer. Constable Vervais of Pleasanton responded, and in describing the prosecutrix' condition as he saw it upon his arrival there, Vervais testified that: "She was like she was all wore out. Her clothes were all mussed up;" she appeared "awful nervous" and was crying. He further stated that "she had a mark on her leg and one on her arm and a mark on her neck." Vervais conveyed her to the district attorney's office in Oakland, and it was ascertained that the alleged assault doubtless occurred in Contra Costa county, whereupon Vervais drove the prosecutrix back to the scene of the alleged assault, and then to Danville, Contra Costa county. There they met Constable Read of that county, and that afternoon the prosecutrix was taken before Dr. M. C. Bollender in Danville for an examination. Bruises were found on both knees and on her arms and there was a black and blue spot on the side of her face, near the throat, and the doctor testified that as a result of his examination he found her sexual parts lacerated, and "a virginal type of hymen," which in his opinion showed that intercourse had taken place for the first time within the previous twenty-four hours. Four or five days later appellant was located in Oakland, iden-

tified by the prosecutrix, and placed under arrest.

There is no intimation anywhere in the record that the prosecutrix was actuated by any motive to unjustly cause the arrest of appellant, whom as stated she had known less than half a day, and thereby expose herself to humiliation and notoriety which was bound to follow her appearance as a witness at a public trial in a case of this kind. And the answer to the argument that the prosecutrix did not scratch appellant, nor scream, may be found in language used in People v. Norrington, 55 Cal. App. 103, 202 P. 932, wherein the court says that the conclusion reached in some cases that unless a woman "kicks, bites, scratches and screams" to the "utmost of her power and ability" she will be deemed to have consented and indeed to have invited the familiarity is "neither justice, law, nor sound reason."

With respect to the question of the soundness of the ruling upon which the majority opinion bases the reversal, it may be conceded that on account of the nature of the charge, the trial court might well have allowed the question in dispute to be answered. But technically, from an analysis of that portion of the record, it would seem that its ruling sustaining the objection thereto was not erroneous. As held in the cases cited in the majority opinion, preliminarily, for the purpose of laying foundation for impeachment, or to show either friendliness or unfriendliness of a witness toward the accused, a general question is permissible. But it does not appear that the general question here propounded was asked for any of those purposes. At least if it was, such purpose is not manifest from the question itself, nor was it disclosed by counsel at the time of asking it. The record relating thereto is as follows:

"Q. Well, Miss Miller, isn't it a fact that you immediately after preferring these charges against Mr. Brown, you asked that they be dismissed?

"Mr. Collins [deputy district attorney]: Objected to as incompetent, irrelevant and immaterial, not within the province of this prosecuting witness to dismiss any charges.

"The Court: Objection sustained."

There the matter ended, no further reference being made thereto. Obviously, as stated by the district attorney in his objection, it is not within the province of a prosecuting witness in a case of this kind to dismiss the charge. If, therefore, the purpose of the general question was to elicit testimony leading to impeachment or to show the state of mind or conduct of the witness toward the accused, it would seem that it was incumbent on counsel for appellant so to state at the time, or to reframe the question, and having failed to do either, that it is too late to disclose the purpose for the first time on appeal.

For the reasons stated, I do not believe that sufficient legal grounds for reversal have been shown.



138 Cal.App. 710

DARBEE v. SUPERIOR COURT OF SAN MATEO COUNTY et al.

Civ. 9469.

District Court of Appeal, First District, Division 2, California.

May 28, 1934.

1. Eminent domain ⇐187.

In proceeding under Constitution to condemn right of way for highway, original orders that county have immediate possession of land could be amended ex parte (Code Civ. Proc. § 937; Const. art. 1, § 14).

2. Constitutional law ⇐46(3).

Where complaint showed that county in proceeding to condemn land for a highway was proceeding on its own behalf under Constitution and Code of Civil Procedure, and not under statute authorizing such proceedings by counties in behalf of joint highway districts, constitutionality of such statute could not be questioned (St. 1931, p. 2072, § 33; Code Civ. Proc. § 1237 et seq.; Const. art. 1, § 14).

Proceeding by Annie H. Darbee against the Superior Court of San Mateo County of the State of California, and others to annul an amended order for immediate possession made in a proceeding in eminent domain.

Amended order affirmed.

John E. Manders, Rowland R. King, and Charles A. Christin, all of San Francisco, for petitioner.

Wm. R. Lowery, of San Francisco, for respondents.

STURTEVANT, Justice.

The petitioner is here seeking annulment of an amended order for immediate possession

made in a proceeding in eminent domain. Heretofore "County of San Mateo, a political subdivision of the State of California," commenced an action in eminent domain against this petitioner and many others. Those parts of the complaint in that action material to a consideration in this action are as follows (after title of court and cause): "Complaint in eminent domain. Plaintiff above named brings this proceeding in eminent domain and for grounds of said proceeding alleges that:

"I.

"Plaintiff County of San Mateo is a county and political subdivision of the state of California, duly formed, organized, and existing under and by virtue of the laws of the state of California, and as such county and political subdivision of the state is in charge of constructing and maintaining highways within said county, and is by law vested with authority to exercise the power of eminent domain for the purpose of acquiring rights of way in the construction and maintenance of highways." Paragraphs II and III designate and describe certain defendants.

"IV.

"That prior to the commencement of this action and on the 4th day of December, 1933, the board of supervisors of the county of San Mateo of the state of California duly passed and adopted a resolution, determining and declaring that public interest and necessity required the acquisition by said county of San Mateo through eminent domain proceedings, of a right of way in and over the lands hereinafter described for purposes of a public highway to be constructed thereon by the county of San Mateo of the state of California. Said resolution was adopted by said board of supervisors of the county of San Mateo of the state of California and is in words and figures as follows, towit:

"Resolved, that public interest and necessity require the acquisition by the county of San Mateo, a political subdivision of the state of California, of the following parcels of real property situate in the county of San Mateo, state of California, more particularly described as follows towit: Parcel 1-A: All that certain parcel of land situate in San Mateo county, state of California being a strip of land lying easterly of the westerly right of way line of Junipero Serra Boulevard Extension, under authority of 'Joint Highway District No. 10 of the State of California,' said right of way line being 87.5 feet westerly and concentric with the surveyed center line of said boulevard and said strip also lying westerly of the San Pedro Road and being more particularly described as follows: (Here follows description by metes and bounds). * * *

"Be It Further Resolved that said lands are suitable, adaptable, necessary, and required for the public use of said county of San Mateo, towit: for the construction, operation, maintenance, and use of an extension to Junipero Serra Boulevard. It is necessary that a fee simple title be taken to said lands.

"The district attorney is hereby ordered and directed to commence proceedings in eminent domain against the owners of said parcels of land and of any and all interests therein or claims thereto for the condemnation thereof for the public use of the county of San Mateo as aforesaid. * * * Each of said parcels sought to be taken includes only a part of an entire parcel or trust or piece of property, as specifically shown upon the map attached hereto.

"That all of the said land above described is necessary for the public use of plaintiff as a right of way for a highway, the location of said right of way is shown on the map attached hereto; the general route of said highway is from a northwesterly to a southeasterly direction and the termini of said highway are the cities of San Francisco and Burlingame, in the state of California, and that it is necessary that a fee simple title be taken by plaintiff in said land for the construction and maintenance of said highway."

In paragraph V the title and ownership of the defendants as shown by a search thereof is set forth. Paragraphs VI, VII, VIII, and IX describe additional parcels owned by other defendants. The prayer is that the property be condemned "* * * to plaintiff's use * * *" and asks for "* * * a final decree in condemnation of said right of way placing title to the same in the county of San Mateo of the state of California. 6. That plaintiff be let into immediate possession of said premises." The map attached to the pleading has the legend printed thereon, "State of California—Joint Highway District No. 10, San Francisco and San Mateo Counties. Junipero Serra Boulevard Extension."

The complaint was filed January 5, 1934. On the same day there were also filed the affidavits of Joseph J. Phillips, E. J. Riordan, and F. H. Somers. On the same date the trial court made an order for the deposit of moneys with the clerk and that the plaintiff be let into the immediate possession of the property described in the complaint. On January 10,

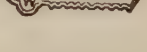
the trial court made a final order for possession reciting that the moneys had been paid as ordered, and that the plaintiff immediately enter into possession. On February 7, this petitioner served a notice that on the 19th day of February, 1934, she would move the court for an order vacating the order for immediate possession. On February 16, amended affidavits of Joseph J. Phillips, E. H. Riordan, and F. H. Somers were filed. Thereafter the trial court made an amended order for immediate possession and use of land and right of way, and then on February 19, 1934, it made an amended final order for possession. The record also discloses the receipt of the county clerk for $4,061.20 as the total sum and the receipt specifically designates the amount in dollars and cents deposited for the account of each owner.

[1] The petitioner asserts that the trial court had no jurisdiction to amend, modify, or vacate its order ex parte and without notice or hearing afforded the parties. We think the point may not be sustained. The original orders purported to be made pursuant to the jurisdiction conferred by section 14, article 1, of the Constitution. That section does not require that notice be given. Section 937 of the Code of Civil Procedure provides as follows: "An order made out of court, without notice to the adverse party, may be vacated or modified, without notice, by the judge who made it; or may be vacated or modified on notice, in the manner in which other motions are made."

[2] Claiming that the basic action was in effect in behalf of Joint Highway District No. 10 and that the action was brought under chapter 1025, p. 2072, of the Statutes of 1931, the petitioner asserts that section 33 of said statute is unconstitutional. The vice in the contention of the petitioner rests in the assumption that the action was brought under the provisions of chapter 1025 of the Statutes of 1931. There is nothing in the complaint showing such to be the fact. If the action had been so brought the pleading should have contained allegations showing that the said Joint Highway District had requested the county of San Mateo to bring the action. Section 33, c. 1025, p. 2097, St. 1931. However, an examination of the pleading discloses no allegation to that effect. Several different statutes authorize boards of supervisors to institute condemnation proceedings. (Chapter 256, St. 1913; chapter 1025, p. 2072, St. 1931; Pol. Code, § 2690; Pol. Code, § 4041.7 (as added by St. 1929, p. 1453) title 7, part 3 (§ 1237 et seq.) Code Civ. Proc. and § 14, art. 1, State Constitution.) An examination of the complaint in eminent domain clearly discloses that the plaintiff was proceeding under section 14, article 1, of the Constitution and the procedure delineated in title 7, part 3, of the Code of Civil Procedure.

The amended order of the superior court is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



139 Cal.App. 1

PATRICK v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 9434.

District Court of Appeal, First District, Division 2, California.

May 29, 1934.

Rehearing Denied June 28, 1934.

Hearing Denied by Supreme Court July 26, 1934.

1. Witnesses ⇐276.

In action against corporation for breach of oral contract of employment, where officer of corporation who did not have personal knowledge of details of plaintiff's work was examined at length as upon cross-examination as to cause of plaintiff's discharge, limiting examination by refusal to direct officer to answer further questions *held* not error (Code Civ. Proc. § 2055).

2. Mandamus ⇐40.

Where objections to questions which witness refused to answer on taking of deposition could properly be sustained on grounds other than improper ground of objection made at time questions were asked, Court of Appeal would not compel trial court by mandamus to direct witness to answer questions (Code Civ. Proc. § 2055).

3. Appeal and error ⇐854(4).

Where evidence is excluded by trial court of own motion or on insufficient objection thereto, its ruling will be sustained if evidence was for any reason inadmissible.

4. Depositions ⇐64(4).

Where counsel in taking deposition refused to reveal purpose of questions as to conversation in which named person was intimidated and questions asked did not show what conversation was about or that witness took part in conversation, refusal to direct witness to answer *held* not error, there being no proper foundation for questions.

5. Evidence ⇐271(18).

In action against corporation for breach of oral contract of employment where plaintiff did not show that written statement constituting self-serving declaration given to defendant shortly before plaintiff's discharge was admission of plaintiff or that it supported defense of defendant, statement *held* not admissible on ground that it could have been introduced by defendant.

6. Mandamus ⇐7.

Issuance of writ of mandate is not matter of right but rests to considerable extent within discretion of court to which application is made.

7. Mandamus ⇐40.

In action against corporation for breach of oral contract of employment where trial court, though it could properly have directed officer of corporation to answer further questions as to cause of plaintiff's discharge, permitted examination at length as upon cross-examination, Court of Appeal had discretion to refuse writ of mandate directing trial court to compel witness to answer questions (Code Civ. Proc. § 2055).

Proceeding by George A. Patrick against the Superior Court of the State of California, in and for the City and County of San Francisco, and the Honorable Daniel C. Deasy, judge thereof, for a writ of mandate to compel the respondent court to direct a witness to answer certain questions asked upon the taking of a deposition. Upon filing of the petition, the District Court of Appeal issued an alternative writ.

Alternative writ discharged, and petition for writ of mandate denied.

George Olshausen and Sol Silverman, both of San Francisco, for petitioner.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, for respondents.

SPENCE, Justice.

Petitioner seeks a writ of mandate to compel the respondent court to direct a witness to answer certain questions asked upon the taking of a deposition.

The deposition was taken in an action brought by petitioner against the Honolulu Oil Corporation and certain officers of said corporation, including the witness Mattei, the vice president thereof. In said action petitioner sought to recover damages for an alleged breach of an oral contract of employment. Petitioner alleged in his amended complaint that defendants had agreed to employ him as long as he did satisfactory work. He further alleged that he did satisfactory work for about twenty-eight months and until he was discharged by defendants. The deposition of the witness Mattei was taken solely on the ground that he was a party to the action. On the taking thereof it appeared that there was another action pending in the United States District Court involving the same controversy in which action the petitioner was the plaintiff but the corporation was the sole defendant. The reason for the pendency of two actions does not appear. The deposition proceeded at two separate hearings and the transcript of the testimony consists of 113 pages. The witness was examined at length on many subjects and his testimony negatived the existence of any contract of employment such as was alleged by petitioner. He testified regarding his conversation with petitioner at the time petitioner was employed and stated that he told petitioner that he "couldn't give him any assurance as to how long he would stay with the company" because of the uncertainty of business conditions. He further testified to the effect that petitioner was discharged because of contraction of business and also because of inefficiency and insubordination on the part of petitioner. The witness also testified in response to questions by petitioner's counsel to specific instances of inefficiency and insubordination. It appears, however, that the witness did not directly supervise the work of petitioner and that he did not have detailed personal knowledge of all of the facts. During the examination on the day to which the taking of the deposition was continued, counsel for defendants in said action interposed several objections to questions and instructed the witness to decline to answer. Thereafter petitioner obtained an order to show cause and upon the hearing thereof by the respondent court, said order to show cause was discharged. Thereupon petitioner commenced this proceeding for a writ of mandate.

[1-3] Upon the filing of the application herein an alternative writ was issued as several of the questions which the witness had refused to answer appeared to be relevant questions. Respondents allege in their answer herein and contend in their brief that practically all of the subject-matter involved in said questions has been adequately covered by the previous questions and answers. From a reading of the deposition, respondents' re-

ply seems to be sufficient in so far as it relates to the questions covering petitioner's work and the specific acts of alleged inefficiency and insubordination. The witness did not purport to have personal knowledge of the details of petitioner's work and in our opinion the trial court did not abuse its discretion in limiting the further cross-examination under section 2055 of the Code of Civil Procedure by refusing to direct the witness to answer certain further questions with respect thereto. Petitioner points out that while the objection made to several of said questions on the taking of the deposition was merely the general objection that the questions were incompetent, irrelevant, and immaterial, respondents in this proceeding claim that the questions had been asked and answered. Petitioner then contends that the latter objection had been waived. As we view the situation in this proceeding against the respondent court, it is immaterial what objections, if any, may have been interposed by defendant in said action at the time of taking of the deposition. The question here presented relates solely to petitioner's right to the extraordinary remedy of mandamus to compel the trial court to direct the witness to answer said questions, and if any objection to the questions might properly have been sustained, the writ should not issue regardless of whether the proper objection or any objection was made by said defendants at the time the question was asked on the taking of the deposition. As was said in Davey v. Southern Pacific Co., 116 Cal. 325, at page 330, 48 P. 117, 118, "An objection to evidence is but a reason offered for its exclusion. The objection may be untenable or insufficient, yet, if sustained, and there appears any other reason for which the evidence should have been excluded, the ruling must stand. And even where no objection is made, but the court excludes evidence of its own motion, the ruling will be sustained, if the evidence was for any reason inadmissible."

[4] Petitioner asked certain further questions which the witness declined to answer. The witness was asked whether he was present at a certain time and place during the month of July, 1933, when a Mr. Kerrigan came in with a Mr. Robillard and told Mr. Robillard, "You are in a hell of a jam" and Inspector Bohr uncovered his star and said to Mr. Robillard, "Do you know what this is?" Counsel for petitioner conceded that at the time of the taking of the deposition that these questions were addressed to a collateral matter and refused to disclose his purpose until after the questions had been asked. It is now stated that petitioner proposed to show that certain persons present were officers of the defendant company, that Mr. Robillard was a prospective witness for petitioner in the action, and that an attempt was being made to intimidate said prospective witness. Several objections are here urged to this line of questioning, but we believe it sufficient to point out that, even assuming that such testimony might possibly have been admissible for the purpose stated, no proper foundation was laid. We find nothing in the record nor in the questions asked to indicate what the alleged conversation was about, what the circumstances were under which the conversation was had, whether the action in which the deposition was taken or any action had been commenced or was contemplated by petitioner at the time of said conversation or whether Mr. Mattei or any one connected with the defendants in said action played any part in said conversation or was present other than as a mere bystander.

[5] Petitioner further complains of the refusal of the trial court to direct the witness to produce a written statement made by petitioner to the defendant company shortly before his discharge. Petitioner frankly concedes that the statement is a self-serving declaration regarding his claim to a contract of employment and that it could not be introduced in evidence by him for that reason. He states, however, that he requested it "on the theory that the defendants could introduce it." He quotes from Jones' Commentaries on Evidence, second edition (1926), volume 5, page 3820, to the effect that the examination "may extend to matters in support of the case or defense of the other party." But it does not appear that said statement constituted any admission on the part of petitioner or that it supported any "defense of the other party."

[6, 7] We may state that a reading of the deposition which is before us discloses that petitioner was on a "fishing expedition" in taking the deposition of one of the parties defendant under section 2055. The witness was compelled to attend at two separate hearings and was examined at length as upon cross-examination. There may be some questions which the trial court could properly have directed the witness to answer, but upon cross-examination the question is whether a sufficiently wide range has been allowed rather than whether some particular question or questions should have been allowed. East Bay Municipal Utility District v. Kieffer, 99

Cal. App. 240, 261, 278 P. 476, 279 P. 178. Furthermore, the issuance of a writ of mandate is not altogether a matter of right and the granting or refusing thereof rests to a considerable extent within the discretion of the court to which the application is made. 16 Cal. Jur. 768. We are of the opinion that even though petitioner may have been entitled, strictly speaking, to a response to some of the questions propounded and to which no response was had, this court should exercise its discretion and refuse to compel the trial court by writ of mandate to further extend the examination of the witness when it appears that such examination had already been sufficiently prolonged and had covered a sufficiently wide range.

The alternative writ is discharged, and the petition for a peremptory writ of mandate is denied.

We concur: NOURSE, P. J.; STURTEVANT, J.

139 Cal.App. 183

MacALISTER v. BAKER et al.

Civ. 9766.

District Court of Appeal, Second District, Division 2, California.

June 8, 1934.

1. Municipal corporations ⇐144.

Oath of office taken by councilman before notary *held* effective, though city charter authorized city clerk to administer oath.

2. Municipal corporations ⇐149(1).

Appointment by city council of councilman to fill vacancy became complete when roll call, by which members voted, was made and recorded, and appointment was not subject to change thereafter by motion for reconsideration.

Evidence disclosed that at the meeting of the council the roll was called, and that the members answered by stating name of person desired to fill the vacancy. The appointee received nine votes, and thereupon a motion was made and seconded that his appointment be made unanimous. Thereupon the president without putting the question, on hearing no objection, instructed the clerk to record the appointment by unanimous vote. When the council reconvened, a motion for reconsideration was made and seconded by members who did not vote for the appointee on the roll call.

3. Municipal corporations ⇐134.

Selection of officer by city council is act of appointment which cannot be affected by requirement of subsequent clerical action or by subsequent parliamentary procedure.

4. Municipal corporations ⇐134.

Members of city council who failed to vote for appointee on roll call *held* not to have voted with "prevailing side" within rule of parliamentary procedure governing motion to reconsider, though by subsequent motion, which was never put, appointment was made unanimous.

Persons who did not vote for the chosen appointee on the roll call did not vote with the "prevailing side" within parliamentary rule limiting motion to reconsider to members voting with the prevailing side, since the appointment was completed when the roll call was made and recorded, since city charter authorized only two methods of voting on appointment, one by ballot and one by roll call, and since the motion to make the appointment unanimous was never put to a vote, but was merely entered when no objection was heard.

Petition by Robert S. MacAlister for writ of mandate against George W. C. Baker and others.

Writ granted.

Loren A. Butts, of Los Angeles, for petitioner.

Ray L. Chesebro and Robert F. Shippee, both of Los Angeles, for respondents.

John J. Beck, of Los Angeles, amicus curiæ.

STEPHENS, Presiding Justice.

Petitioner herein prays that we issue the writ of mandate to require the councilmen of the city of Los Angeles to recognize him as a duly appointed councilman. Our alternative writ heretofore issued, and the councilmen have appeared by demurrer and by return.

Under charter provisions the city of Los Angeles is geographically divided into fifteen districts, and the legislative body designated as the council is composed of one councilman for each district. Nowhere in the charter is it specifically required that the councilman for a district shall reside in such district, although the election provisions of the charter provide that no one can be a candidate at a primary or general election for council-

man for any district unless he has been a resident of the district for the two years last past. Originally this provision was not in the charter, but subsequently the charter was amended in this particular. In this regard section 9 of the charter is significant: "An office becomes vacant when the incumbent dies * * * or ceases to be a resident of the city, where residence therein is made a qualification for the office." There is no mention here as to residence of a councilman in the district he represents. Section 268 of the charter provides: "In the event of a vacancy * * * in any elective office the council shall fill the same by appointment." Section 12 provides: "In all voting upon the appointment * * * of officers, the members of the council * * * shall vote by open ballot or call of the roll, and the ballot or vote of each member shall be spread upon the minutes." Section 25 of the charter, so far as applicable, says: "Except as otherwise in this charter provided, action by the council shall be taken by a majority vote of the entire membership of the council." The filling of a vacancy is not otherwise provided for.

We have recited these provisions as an aid to the clarity of this opinion, although it should be understood at the outset that the question whether or not petitioner was a resident of a certain district when the council was voting to fill a vacancy, or whether or not the charter requires such a residence, is not before us in this proceeding. This is not a trial of the qualifications of petitioner to sit as a councilman, but is a judicial inquiry as to the legal effect of certain council proceedings, whereby petitioner was first declared appointed, and then such appointment was declared to have been reconsidered.

A question will arise herein as to the necessity of a certifiate of election, and we therefore discuss the charter requirements therefor. A "certificate of election" is by the charter specifically required as to the election by vote of the people of all elective officers. No such requirement specifically applies to the appointment of any officers, and the only mention in the charter referring at all thereto is the following concluding sentence of section 9: "Should any officer fail to qualify within ten days from the time he receives his certificate of election or appointment, the office to which he was elected or appointed shall be deemed vacant for the purpose of filling the same by appointment." It will hereinafter be shown that a certificate of election or appointment is a ministerial duty and does not affect the legality of the election or appointment. However, the mere incidental mention of a certificate of appointment, where there is none required by any section of the charter, along with the mention of a certificate of election, where a charter section requires it as to elective officers, convinces us that it was an inadvertent inclusion and is of no effect.

All of the facts used in this opinion are taken from a written stipulation on behalf of all the parties and filed in the proceeding. On May 8, 1934, the council convened; all members being present. The president stated: "The question before the council is on the filling of the vacancy in the Eleventh Council District, and the clerk will record the vote for the respective candidates heretofore considered. As your name is called you will answer to the roll by stating the name of the person whom you desire to fill the vacancy." The roll was called and petitioner received nine votes. A motion was then made and seconded "that the appointment of Robert S. MacAlister by the council, to fill the vacancy in the Eleventh Council District, be made unanimous." Whereupon, without putting the question in any way, the president, hearing no objection, instructed the clerk to record the appointment of petitioner to fill the vacancy in the Eleventh council district, by a unanimous vote. Thereafter the council adjourned. Upon the council's convening on May 9th, Councilman Thrasher made a motion, which was seconded by Councilman Baker, "that the vote by which Robert S. MacAlister was appointed to fill the vacancy in the Eleventh Council District be reconsidered." The president declared the motion out of order. Councilman Thrasher appealed from the decision of the chair, which appeal was duly seconded by Councilman Baker, the chair was not sustained, and the motion to reconsider was put and carried.

On the 10th of May, 1934, petitioner took the oath of office before a notary public, the city clerk having been restrained from administering it by a superior court order, and demanded of the council that he be allowed to participate in the council proceedings as a councilman, but this has been denied him.

[1] Respondents claim that the oath of office taken before a notary public is ineffective, as the city clerk alone can administer the oath. The only basis for this claim is that the charter authorizes the clerk to administer such an oath. But this is not exclusive, and the oath before the notary was effective for all purposes.

[2, 3] We come now directly to the reconsideration proceedings. We gain from the authorities that an appointment to office is

complete and beyond change, annulment, or reconsideration by the appointing power when everything requiring the action of the appointing power has been done. The authorities are not entirely harmonious in their determination of just what is required to be done by the appointing power. After a thorough review of the decisions, however, we think the doctrine of the best-reasoned cases justifies the conclusion that the appointing power is executive in nature, and anything that is definitely required to be done by a clerk after the executive has acted is ministerial, and that the appointment is complete and not subject to reconsideration, even if the clerk has not acted. This reasoning, carried into actions by assemblages such as city councils, carries us to the conclusion that appointments of officers through the choice of the membership of an assembly is none the less executive in nature and that its selection by vote is the act of appointment, incapable of being affected by the requirement of subsequent clerical action or parliamentary procedure.

In Marbury v. Madison, 1 Cranch, 137, 2 L. Ed. 60, Chief Justice Marshall held that the appointment was complete after confirmation by the Senate when, but not before, the President signed the commission required by him to be signed, but that the affixing of the seal by the Secretary of State was a ministerial act and not a part of the appointment. He announced the rule that the appointment was complete when the last act of the appointing power had been performed. In Conger v. Gilmer, 32 Cal. 75, our own Supreme Court commented extensively on Marbury v. Madison, supra, and held that the appointment by a board of supervisors of a county was not complete, hence not effective, until the board had issued its commission signed by the proper officers of the board as the law then provided. This case also distinguishes executive from legislative acts by the following paragraph quoted from the opinion: "The fact that Boards of Supervisors, when they exercise the appointing power, do so by first taking a vote, does not affect the character of the power, or render it at all different from what it is when exercised by the Governor. The Board acts by majorities, and in all cases the sense of the Board has therefore necessarily to be ascertained by taking a vote. The will of the Board can be ascertained in no other way, and the vote serves that purpose only, and does not convert the power exercised by them from that of 'appointment' to that of 'election.'" This case also holds that the issuance of a commission to an elective office is a ministerial act.

In State ex rel. Coogan v. Barbour, 53 Conn. 76, 22 A. 686, 687, 55 Am. Rep. 65, the common council of Hartford was proceeding under its charter to appoint a prosecuting attorney. A clear majority voted for Coogan. Two resolutions were then passed, one declaring the ballot null and void, the other declaring Barbour elected. The court says: "It will be observed that the business of the convention was limited to making appointments. For all the purposes of this case, we may assume that its sole business was to appoint a prosecuting attorney, and that it had no other powers or duties. It had but one thing to do, and, when that was done, its powers were exhausted. Unlike legislative bodies convened for purposes of ordinary legislation, it had no power to enact and repeal, and its power to reconsider was very limited, being confined to the preliminary proceedings." The court referred at length to the Marbury-Madison and Conger-Gilmer Cases and held that there was no required act to be done by the council after its choice expressed by ballot, and held Coogan the legal appointee. Many cases are analyzed in this opinion, including State ex rel. Miller v. Foster, 2 Halsted (7 N. J. Law) 101, wherein the court held that reconsideration under parliamentary law was proper in a similar case. The court says: "We cannot regard that case as an authority controlling or materially influencing our decision, for several reasons. It was hastily decided, and manifestly was not well considered. It confounds legislative proceedings with executive acts, and applies the rules regulating the former to the latter, while such rules are applicable only to a limited extent. It assumes that the convention had power to undo as well as to do, to remove as well as to appoint."

In State v. Phillips, 79 Me. 506, 11 A. 274, 275, under facts similar to State v. Barbour, supra, the court says: "We are aware of no authority which holds that, when the election by ballot is declared and entered of record, it may be reconsidered at an adjourned meeting on a subsequent day, and a new election had. When the aldermen balloted and declared the election of Blaisdell, and it was recorded, their power over the election to that office was exhausted, unless he should decline to accept it."

In the case of State v. Wadhams, 64 Minn. 318, 67 N. W. 64, 67, the court says: "* * * He (the appointee) could not be deprived of it

(the office) by any subsequent reconsideration of the vote whereby his appointment was duly confirmed." In the case of State v. Tyrrell, 158 Wis. 425, 149 N. W. 280, 283, Ann. Cas. 1916E, 270, the court held that the issuing of the required certificate "was ministerial, and is no part of the appointing power." Draper v. State, 175 Ala. 547, 57 So. 772, as reported in Ann. Cas. 1914D, 301, is in harmony with these referred to cases, and is accompanied by a complete note and collation of authorities. There are cases not in harmony with the doctrines of the above cases, but some of them, if not most of them, can be distinguished in fact.

While we are convinced that reconsideration of an executive act of the council cannot be had and that parliamentary rules relating thereto do not apply, except in a limited way to preliminary proceedings, we deem it appropriate to more particularly consider the proceedings had under the motion to reconsider. The charter provides that "the council shall have power to prescribe the rules of its proceedings," and the council has adopted a rule adopting Roberts Rules of Order as to parliamentary matters not otherwise provided for. Respondents cite Roberts Rules of Order, wherein the subject of reconsideration is treated, and stress the following: "It is in order at any time * * * during the day on which a motion has been acted upon, or the next succeeding day to move to 'Reconsider the vote.' * * * This motion can be applied to the vote on every other question except * * * a vote electing to office one who is present and does not decline." (Petitioner was not present.) The quotation, according to respondents, is from Roberts Rules of Order, edition 1895, Griggs & Co., publishers. The Los Angeles county law library furnishes us with an edition of Roberts Rules of Order copyrighted as late as 1915 and published by another house. There is much difference and much rearrangement in the later edition. The Los Angeles charter was adopted by the people in 1923.

[4] But, aside from all that has gone before, the reconsideration proceedings must be disregarded, for the reason that Roberts Rules of Order, concurred in by every accepted parliamentary procedure unless specifically excepted, provide that the motion to reconsider "must be made * * * by a member who voted with the prevailing side." Neither Mr. Thrasher, who made the motion to reconsider, nor Mr. Baker, who seconded it, voted with the prevailing side. Again, if respondents suggest that the vote for petitioner was made unanimous, and that therefore upon the final vote all of the councilmen voted on the prevailing side, we shall answer that this suggestion is refuted by three sanctions: First, under the authorities cited herein it is apparent that the council had completed its appointment when the roll call had been made and recorded; second, that the charter authorizes but two methods of voting on appointments, by ballot or by roll call, and the motion was neither; and, third, the motion was never put. The president evidently considered it informal and complimentary, and merely stated it could be so entered since he heard no objection thereto.

Upon the foregoing opinion, we hold that petitioner was legally appointed a councilman.

The writ will issue as prayed.

We concur: DESMOND, J.; ARCHBALD, Justice pro tem.



139 Cal.App. 233

COLLINS v. MEIS.

Civ. 1075.

District Court of Appeal, Fourth District, California.

June 12, 1934.

1. Partnership ⇐108.

Where partner obtained loan of $450 from bank which he transferred within few moments to copartner on latter's personal note, that partner deposited money in partnership account in which he carried his personal funds before checking $450 from account to copartner, and that partner paid loan to bank from partnership account as he customarily paid personal debts, *held* not to render money partnership funds so as to prevent partner from suing on copartner's note without settlement of partnership accounts.

2. Partnership ⇐94.

Partner may engage in transactions with partners outside scope of partnership during continuance of partnership, though he is trustee of partnership funds under his control.

3. Partnership ⇐108.

Rule that one partner cannot sue another in absence of settlement of accounts applies only to demand arising out of partnership transactions.

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

Action by E. Collins against Chas. Meis, who filed a cross-complaint which was subsequently stricken out on plaintiff's motion. Judgment for plaintiff, and defendant appeals.

Affirmed.

Chas. Meis, in pro. per.

C. L. Brown, of El Centro, for respondent.

HAINES, Justice pro tem.

During the times with which we are in this action concerned the plaintiff and respondent Collins and the defendant and appellant Meis were partners engaged in the bakery business. Meis worked as a baker, and Collins handled the banking and largely attended to the outside work. It is claimed that there had formerly been a third partner, who had died, and that in his place one Salman had become a member of the firm as a third partner. The firm account was kept in bank under the name "Home Bakery, E. Collins," with the knowledge and acquiescence of Meis, if not with his actual consent. Collins mingled his own moneys with those of the partnership in the same account. Meis desired to buy an automobile at a cost of $450 and discussed the matter with Collins. Collins, on March 4, 1931, borrowed the $450 of the bank, gave his personal note for the loan, deposited the proceeds in the partnership account, and on the same date checked out this identical amount to Meis, who executed to Collins individually his note for it. Three days later Collins paid off his $450 note to the bank by drawing a check on the partnership account for the $450 and 30 cents interest and subsequently, and a few days before the trial, charged himself on the partnership books with $450. At none of these times was there less than $1,400 in the account at the bank, though how much of it may have belonged to the partnership cannot, until an accounting is had, be determined. Collins said he believed that there was three or four hundred dollars of it belonging personally to him at the time he repaid the $450 loan at the bank. Meis' note to Collins not having been paid, the present action was brought to enforce it by complaint in the usual form. The answer admits the execution of the note, but asserts that Meis in fact borrowed the money represented by it from the partnership; that it is in fact owed not to Collins but to the partnership; that Collins, Meis, and Salman are equally interested in the partnership and therefore have equal interests in the note, and as such partners are owners thereof; that there has been no partnership accounting and that therefore Collins has not the legal capacity to maintain the action. Meis also filed a cross-complaint setting up the same contentions, seeking to have Salman brought in and made a party to the action and asking a partnership accounting. The evidence shows that there is a separate action pending for such an accounting. The cross-complaint was stricken out by the court on Collins' motion. The trial was had on the complaint and answer, resulting in findings that Meis' note to Collins was not held in trust by the latter for the partnership. Collins was thereupon awarded judgment against Meis in accordance with his prayer and Meis appealed.

[1] It seems to us that the vital question in the case is whether the particular money loaned to Meis was that of Collins or the partnership. There is no doubt that Collins got $450 from the bank on his personal note and, though he passed the amount through the partnership account, in which also his personal funds were carried, that without the lapse of more than a few moments of intervening time he checked $450 out of the account to Meis. We think that in these circumstances the money did not lose its identity, but that that which was checked out to Meis should be holden to have been the same just borrowed by Collins from the bank. Neither do we think the circumstance that three days later Collins paid his note at the bank out of the partnership account, as he was accustomed to pay all his other personal matters, is material. The loan took its character from the original transaction and not from what was done afterwards, and whether in repaying the bank Collins drew more than he was entitled to draw from the account can only be ascertained in the partnership accounting action and does not appear to us a matter with which we are concerned in this case.

[2] There is, of course, no question about the proposition that a partner is a trustee for his copartners in respect of the partnership funds under his control. But that does not mean that he may not, even while the partnership continues, engage in transactions with his partners that are outside its scope.

[3] As was said in Bull v. Coe, 77 Cal. 54, 59, 18 P. 808, 810, 11 Am. St. Rep. 235: "It is well settled in this state, as elsewhere, that one partner cannot sue another upon a demand arising out of the partnership transac-

tions, in the absence of a settlement of the accounts. But by the terms of this rule it does not apply where the transaction is not a partnership matter. And it seems plain that a loan from one partner to another is not a partnership transaction, notwithstanding the fact that the borrower intends to put the money into the firm and does so. Accordingly it is well settled that the lender in such a case can maintain an action for the recovery of the money, although there has been no settlement of the partnership accounts."

See, also, Arnheim v. Gordon, 21 Cal. App. 754, 132 P. 840; Johnson v. Rosenstein, 132 Cal. App. 675, 676, 677, 23 P.(2d) 418.

We see no justification for disturbing the trial court's conclusion that the loan transaction here involved should be treated as one between Collins and Meis as individuals and their partnership relations separately dealt with in the accounting suit.

Appellant complains of the trial court's action in striking out his cross-complaint. That action was taken, of course, before the evidence was heard. We need not at this stage of the case inquire whether the cross-complaint ought to have been stricken out or not, since it now appears from the evidence that no relief could have been granted under it.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

139 Cal.App. 191

TRADERS' FINANCE CORPORATION OF VENTURA v. SANDERS et al.

Civ. 8984.

District Court of Appeal, First District, Division 1, California.

June 9, 1934.

1. Money received ⇐1.

Basis of action for money had and received is that defendant has money which in equity and good conscience he should pay to plaintiff.

2. Principal and agent ⇐78(6).

Evidence in principal's action against agent for amount collected on price of plaintiff's meat market fixtures, sold by defendant with latter's grocery fixtures, *held* not to show that defendant had money which, in equity and good conscience, he should pay to plaintiff.

Appeal from Superior Court, Ventura County; Wm. D. Dehy, Judge.

Action by the Traders' Finance Corporation of Ventura against Roy E. Sanders and others. From a judgment against named defendant only, he appeals.

Reversed.

James C. Hollingsworth, of Ventura, for appellant.

Jarrett Beckett, of Long Beach, for respondent.

JAMISON, Justice pro tem.

The complaint in this case contains two counts. The first alleges that prior to the 9th day of April, 1931, plaintiff was the owner of certain meat market fixtures and equipment, and that defendant Sanders was the owner of certain grocery store fixtures and equipment, contained in a certain store building located in the town of Saticoy, Cal., all of said property being in the possession of defendant Sanders; that, with the consent of plaintiff, defendant Sanders sold all of said equipment to one Roy Rasmussen and one E. J. Gordon for the sum of $4,000, and that defendant Sanders has received all of said sale price except the sum of $650 still owing from the purchasers; that plaintiff and defendant Sanders did not determine in advance the respective proportions of the sale price each was to receive, and that plaintiff's portion thereof was two-thirds of said sale price. The second count is for money had and received in the sum of $2,666.66.

The action was brought against Sanders and One Doe and Two Doe, and defendants Rasmussen and Gordon were served with summons and substituted for One Doe and Two Doe, Rasmussen appearing in person and Gordon not appearing. Judgment was rendered against Sanders alone. He moved for a new trial, and, same being denied, appeals from said judgment.

In December, 1927, appellant was conducting a grocery and general merchandise business in the town of Saticoy. Shortly thereafter he leased a portion of the premises occupied by him to one Jackman for the purpose of operating a meat market. Jackman installed certain fixtures in the meat market consisting of an ice box, ice machine, two meat box-

es, Stimson scales, etc. The title to the meat market fixtures was in respondent. Jackman, after conducting the meat market business for a brief period, disappeared. After Jackman left, respondent, through its agent and general manager W. V. Scott, agreed with appellant that the meat market fixtures should remain in the possession of appellant upon the understanding that appellant would keep the said fixtures in repair, and he was authorized to sell them for respondent whenever a buyer could be found. In February, 1931, fire injured and damaged appellant's stock of groceries and merchandise, and what remained of it was disposed of. After said last-named date, only the meat market fixtures and the grocery store and merchandise fixtures remained. It was agreed that appellant should have the right to sell said meat market fixtures, the price of same to be determined after the sale. In April, 1931, appellant obtained a buyer for all of said equipment, including the grocery and meat market fixtures, for the sum of $4,000; defendant Rasmussen being the purchaser. Shortly after said sale appellant informed Scott of the fact of the sale, and they endeavored to determine what amount Scott should receive for the meat market fixtures. Scott demanded $2,000, to which sum appellant objected and offered $850; this Scott refused to accept. Failing to arrive at any agreement regarding the meat market fixtures, appellant notified Scott that he would go back to Rasmussen and get him to release the meat market fixtures from said sale. Appellant then took the matter up with Rasmussen, and by agreement with him the meat market fixtures were released from the said sale, and the sum of $1,250 was credited on said purchase price of $4,000.

Under the contract of sale executed by appellant and Rasmussen for the grocery, general merchandise, and meat market fixtures, it was agreed that Rasmussen would pay to appellant the sum of $4,000; $1,000 to be paid upon the execution of the contract, $1,000 on May 10, 1931, $500 in groceries and meat as required by the household of appellant, and the remaining $1,500 in monthly payments of $50 per month. Appellant has received from Rasmussen the sum of $2,350 on the contract. The undisputed testimony of Rasmussen is that there is a balance of $400 owing by him on the contract, and this, added to the $1,250, for which sum he received credit, makes the unpaid balance on the entire contract $1,650. Therefore the finding of the trial court that appellant had collected on said contract the whole of said $4,000, except the sum of $431.04, is not supported by the evidence.

Appellant contends that respondent ratified the release, from the contract of sale, of the meat market fixtures. To support this contention he produced two witnesses. One of these, Rasmussen, testified that shortly after the release was made Scott called upon him and gave him to understand that respondent was the owner of the meat market fixtures and offered to sell same to Rasmussen. When Rasmussen desired time to consider the matter, he agreed with him that he would leave the said fixtures with Rasmussen free of rent. The other witness, Harry W. McNeil, testified that he operated the meat market in Rasmussen's store; that, after Scott had talked with Rasmussen, he came over to where the witness was working and said he would like the witness to sell the meat market fixtures for him; that he knew Rasmussen placed confidence in him; and that he would give him $100 if he succeeded in making the sale to Rasmussen for $1,250. Scott, testifying for respondent, said that he had a talk with Rasmussen and learned from him that a credit of $1,250, representing the value of the meat market fixtures, had been placed on the contract; that he told Rasmussen he was going to sue appellant, and, in case the result of the suit was that said fixtures came back to him, he wanted to make a deal for them with Rasmussen, who told him he would leave their value up to McNeil; that thereupon he had a talk with McNeil and said to him if the said fixtures came back to him that in that event, if McNeil could sell the fixtures, he would give him $100.

There was evidence that the meat market fixtures had been in use for some five years, and their value was placed by witnesses at from $500 to $2,000. The trial court found in effect that the value of said fixtures was the sum of $1,500.

[1] It has been held that, when an agent makes a sale, he has no authority to cancel it without the consent of his principal (Burroughs Adding Machine Co. v. Harris, 99 Cal. App. 604, 279 P. 216; Thomas v. Anthony, 30 Cal. App. 217, 157 P. 823); that the principal has still the right, notwithstanding the act of the agent, of compelling the purchaser to abide by the terms of the sale. However, this action is not against the purchaser but against the agent to recover from him money that he has received which belongs to his principal. Respondent is entitled to recover from appellant only money which the latter had collected and which belonged to respondent. The basis

of an action for money had and received is that defendant has money which in equity and good conscience he ought to pay to plaintiff. 17 Cal. Jur. p. 602; Ackley v. Prime, 99 Cal. App. 534, 278 P. 932.

[2] We are of the opinion that the appellant, under the facts disclosed in this case, has not money which in equity and good conscience he ought to pay to respondent, and therefore the judgment is reversed.

We concur: TYLER, P. J.; CASHIN, J.



139 Cal.App. 139

PEOPLE v. WILSON.

Cr. 2534.

District Court of Appeal, Second District, Division 2, California.

June 7, 1934.

1. Forgery ⇐37.

In prosecution for forging former employer's name to sales slips for merchandise obtained from department store, cross-examination as to whether former employer had account with department store *held* properly excluded as immaterial.

2. Forgery ⇐7(1).

Forging of sales slips for merchandise thereby obtained from department store *held* violation of forgery statute (Pen. Code, § 470).

3. Criminal law ⇐1167(4).

In prosecution for forging sales slips for merchandise obtained from department store, allowing amendment of information to show that sales slips were for "merchandise," instead of for "payment of money," as originally charged, *held* not prejudicial, where information originally set forth copies of sales slips (Pen. Code, § 470).

4. Criminal law ⇐1202(3).

In forgery prosecution, admitting certified copy of record from warden of Missouri state penitentiary, consisting of photograph, fingerprint records, and commitment, to show prior conviction of accused *held* proper (Pen. Code, § 969b).

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Francis A. Wilson was convicted of forgery, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

DESMOND, Justice.

The defendant in this case was found guilty in a jury-waived trial upon five counts of forgery, and appeals from the judgments and from an order denying his motion for new trial upon each of said counts.

At the trial, defendant offered no evidence and moved for an acquittal after the completion of the people's case, which motion was denied. From the evidence it appears that all the offenses charged in the five counts arose out of transactions at the store of the May Company in Los Angeles. Five salesmen testified that on different dates defendant secured certain merchandise—three suede coats, two overcoats, and a raincoat—by signing the name Henry Wurtzel to five different sales slips therefor. It further appeared that at one time defendant had worked in the home of Mr. and Mrs. Henry Wurtzel and that Mrs. Wurtzel had an account with the May Company. Henry Wurtzel testified that he had no charge account with the May Company store and that he had no authority to order goods upon his wife's account. He also testified that he had never given defendant authority to sign his name to any of the five sales slips that were offered in evidence, and stated that he did not authorize defendant to charge his, Wurtzel's, account "with any sum at all on account of these sales slips at the May Company store, or any purchases made at the May Company stores."

Upon cross-examination defendant's counsel sought to show that Henry Wurtzel at no time had an account at the May Company in his own name, and the ruling of the court that such evidence would be immaterial is set up as the first ground of error upon this appeal. The second ground is that in each case the sales slip which appellant signed is a receipt for the delivery of merchandise and not an order for merchandise, and therefore that the act proven did not constitute a violation of section 470 of the Penal Code. The third ground is that appellant was prejudiced by an order of the court which allowed the district attorney to amend the information in such manner as to show that the sales slips

and orders in writing were for "merchandise" instead of for "the payment of money," as originally charged therein. The fourth ground of error rests upon the ruling of the court by which, for the purpose of showing a prior conviction, there were admitted in evidence certified copies of the photograph and fingerprints of defendant as part of the certified copy of a commitment in the state of Missouri.

[1] As to the first assignment of error, we hold that the question whether or not Henry Wurtzel had an account in his own name with the May Company is immaterial. The gravamen of the charge is that defendant obtained property by forging the name of Henry Wurtzel, and it is apparent that whether or not the latter had a charge account with the May Company would have no direct bearing upon that question.

[2] As to the second assignment, it is immaterial whether the documents in question were receipts or orders for merchandise, under the reasoning of People v. Munroe, 100 Cal. 664, 35 P. 326, 327, 24 L. R. A. 33, 38 Am. St. Rep. 323, where it is said: "It is a matter of perfect indifference whether it possesses or not the legal requisites of a bill of exchange, or an order for the payment of money or the delivery of property. The question is whether, upon its face, it will have the effect to defraud those who may act upon it as genuine."

[3] With reference to the third assignment of error—that the defendant was prejudiced in his constitutional rights when the court permitted an amendment to charge the forging of an order in writing for "merchandise" instead of "the payment of money"—we note that each count sets forth a copy of the original sales slip, one of which we here reproduce:

"Name Henry Wurtzel
Address 1108 So. Haywood
Purchased by: Henry Wurtzel L. A.

Sales No.	Section	Date	Enclosure	Amt. Received
2114	21	1/3		chg.
1 coat				19.75
Check number			Tax	.49
			copied by	20.24"

The sales slip in each case was prepared by the salesman, the only entry in the hand of defendant being the name of Henry Wurtzel, where it appears on the third line. It is manifest that appellant could not have been prejudiced by the ruling complained of, for if he read the information, he undoubtedly knew specifically the basis of each charge brought against him.

[4] As to the fourth and final assignment of error, that the court erred in permitting the introduction of a record from the warden of the Missouri state penitentiary, we find that the certified copy, according to the reporter's transcript, consisted of three parts: (1) Photograph. (2) Fingerprint records. (3) Commitment. Under section 969b of the Penal Code it appears that this certified copy was properly admitted.

Judgments and order affirmed.

We concur: STEPHENS, P. J.; ARCHBALD, Justice pro tem.

1 Cal.(2d) 104

PEACOCK v. PAYNE, Auditor.

L. A. 14568.

Supreme Court of California.

June 14, 1934.

1. Levees and flood control ⇐15.

Change in conditions necessary to justify departure from original plan for flood control does not mean that a change in geological formation or in facts actually existing at outset must take place, but modified plan is justified so long as there is no departure from general purpose of control and conservation of waters (St. 1931, p. 690, § 15).

2. Levees and flood control ⇐34.

Fees for appraisement of land to be acquired below Whittier Narrows *held* allowable out of proceeds of bonds issued for flood control purposes as against contention that expenditures were voted for control and conservation of waters flowing through San Gabriel Canyon, whereas land proposed to be acquired would also control and conserve waters flowing from tributaries, where conservation of tributary waters was but incident necessarily appurtenant to main purpose of project applicable to San Gabriel river area.

3. Levees and flood control ⇐1.

That which is necessarily incidental to main purpose of project for control and conservation of waters is authorized to be done (St. 1931, p. 690, § 15).

In Bank.

Original proceeding in mandamus by Oliver S. Peacock against H. A. Payne, as County Auditor of the County of Los Angeles and ex officio Auditor of Los Angeles County Flood District.

Peremptory writ of mandamus issued.

O'Melveny, Tuller & Myers and James L. Beebe, all of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and Roy W. Dowds, Flood Control Counsel, both of Los Angeles, for respondent.

SHENK, Justice.

This is an original proceeding in mandamus to compel the respondent county auditor, as ex officio auditor of Los Angeles County Flood Control District, to approve the petitioner's claim for services rendered in appraising certain lands along the San Gabriel river below a point known as Whittier Narrows. The appraisal of the land was ordered by the board of supervisors, and the claim was approved by the board and ordered paid. The auditor refused to approve the claim on the ground that the claim would be paid, if at all, from the proceeds of certain bonds issued for flood control purposes and that such expenditure from the bond fund would be unauthorized. As a return to the alternative writ the respondent filed a general demurrer to the petition.

The basis for the auditor's objection is that the portion of the bond funds here sought to be charged with said expenditure were voted for the control and conservation of waters flowing through the San Gabriel Canyon; whereas the lands proposed to be acquired for conservation purposes below the narrows would not only control and conserve waters from that canyon, but would also control and conserve waters which flow into the San Gabriel river above the narrows from tributaries below the mouth of said canyon. The waters arising in the San Gabriel Canyon which would be controlled and conserved by the proposed plan are approximately from 61 to 67 per cent. of all of the waters in the San Gabriel river at the narrows. The tributaries referred to furnish the remaining 33 to 39 per cent. of said waters.

The Los Angeles County Flood Control District was organized and is functioning pursuant to a special act of the Legislature in 1915 (St. 1915, p. 1502), following the disastrous floods in Los Angeles county in 1914. The original plan contemplated the construction of a high dam in San Gabriel Canyon. After this work had progressed to a certain point the plan was changed. One sufficient reason for the change was the refusal of the state department of public works to approve the plan for the high dam as originally proposed, pursuant to the authority vested in that department under the act of 1929 (St. 1929, p. 1505). Whether the expenditure of the bond funds could be made in accordance with that change of plans was tested and approved in Los Angeles County Flood Control Dist. v. Wright, 213 Cal. 335, 2 P.(2d) 168, the decision in which is hereby referred to for a history up to that time of the flood control project as especially relating to the San Gabriel river canyon feature of the enterprise.

According to the original report of the flood control engineer in 1924, pursuant to which the bonds were voted, it appeared that more that one-half of the precipitation and runoff of the waters originating in Los Angeles coun-

ty occur in the San Gabriel Mountain area. The principal stream leaving this area is the San Gabriel river. This river runs in a single channel for a distance of about seven miles below the mouth of the canyon. It then divides into two branches, one known as the Rio Hondo and the other as the San Gabriel river. For some miles these two branches of the San Gabriel are approximately five miles apart, but in Puenta hills, about thirteen miles from the mouth of the canyon, there is a pass at which the two branches of the river are about a mile and a half apart. This pass is called the Whittier Narrows. Below the narrows the distance between the two branches widens gradually and the streams reach the Pacific ocean through separate channels.

The San Gabriel basin, so called, includes the mountain drainage area in which the river rises, the San Gabriel Valley above Whittier Narrows and the coastal plain below the narrows. The large volume of water originating in the San Gabriel watershed which percolates through the gravel beds of the San Gabriel basin supplies the San Gabriel Valley and most of the coastal plain with water for irrigation and domestic uses. In the coastal plain area there are a number of important cities, towns, and other communities which depend upon this underground water for their source of supply, including Long Beach, Whittier, Artesia, Norwalk, Signal Hill, Montebello, Seal Beach, and other areas extending as far west as the city of Torrence and easterly somewhat beyond the city of Whittier. A constantly increasing city and rural population and a more intensive use of agricultural lands of this area have made heavy drains upon this underground water supply. The level of the underground waters has gone steadily downward. In the coastal plain area there has been a substantial encroachment of salt waters due to the recession of the underground waters. Engineers familiar with the subject have repeatedly recommended that more of the San Gabriel waters must be put underground and conserved if the water supply of that important coastal basin area is to be maintained.

Since the originally planned high dam was abandoned, the proposed plan for the control and conservation of the San Gabriel waters has been changed in some respect three times. One of the purposes contemplated by the modified plan approved in Los Angeles Flood Control Dist. v. Wright, supra, was the construction of works for spreading grounds below the mouth of the canyon. The change in the plan now proposed is to provide additional and extensive spreading grounds farther down and in the San Gabriel river basin.

By appropriate resolution the board of supervisors of the district found that the replenishment of the underground water supply in the coastal basin is a vital necessity; that additional engineering studies have disclosed that a portion of the waters of the San Gabriel Canyon which will be placed in the underground basin beneath the proposed spreading grounds will rise to the surface at the Whittier Narrows; and that unless lands are acquired and spreading grounds developed as now proposed, flood and storm waters from the San Gabriel Canyon will waste into the ocean. It was further found that the public necessity and welfare required the acquisition and development of the proposed spreading grounds in order to control and conserve the flood and storm waters of the Rio Hondo and San Gabriel river. The proposed change in plan was ordered and the acquisition of the necessary lands directed by appraisal and purchase or by condemnation.

The abandonment of the high dam project, which contemplated extensive impounding of water, necessarily resulted in the subsequent change to the alternative of providing lower dams and spreading grounds heretofore approved by this court. The additional change now proposed is but an extension of the prior spreading ground plan. This change is declared to be necessary because of excessive costs in the acquisition of certain of the lands included in the prior plan and also by the necessity for additional spreading grounds to aid in the successful conservation of waters, the accomplishment of which was one of the main purposes of the organization of the district and the voting of the bond issue.

[1-3] It should require no extended argument to justify the conclusion that, so far as the control and conservation of the waters of the San Gabriel watershed are concerned, the change of plans to extend the area and location of spreading grounds is plainly within the power of the board to bring about under the facts disclosed. Section 15 of the Flood Control Act (as amended by St. 1931, p. 690) requires the district to expend the bond funds in conformity with the "report, plans, specifications and map theretofore adopted, as above specified, unless the doing of any of such work described in said report shall be * * * rendered contrary to the best interests of said district by some change of con-

ditions in relation thereto, in which event said board of supervisors may * * * order necessary changes made in such proposed work or improvements, and may cause new plans and specifications to be made and adopted therefor." Under section 21 the act and every part thereof is to be liberally construed to promote its objects and carry out its purposes. The change in conditions necessary to justify a departure from the original plan does not mean that a change in the geological formation or in the facts actually existing at the outset must take place. If the facts and conditions assumed from engineering or other data then in hand are later shown to be incorrect or inadequate "some change in conditions in relation to" the project is then brought to light, and the modified plan is justified, so long as there is no departure from the general purpose of the improvement, viz., the control and conservation of the waters of the watershed. Here no such departure is contemplated, and hence no violation of the terms of the act or the so-called contract with the voters in the district.

It is insisted by the respondent that the portions of the bond funds voted in 1924 to control and conserve the flood waters of the San Gabriel Canyon may not be used to control or conserve flood waters from other areas. The contention is based on the statement that if the spreading grounds are acquired and improved as proposed, the waters of certain tributaries flowing into the San Gabriel river above Whittier Narrows and below the mouth of the San Gabriel Canyon will also be controlled and conserved and that this was not one of the purposes of the bond issue as voted. The fact is admitted, but the conclusion does not necessarily follow. The control and conservation of such tributary waters is but an incident necessarily appurtenant to the main purpose of the project applicable to the San Gabriel river area. These tributary waters reach the San Gabriel basin by nature's processes. Their debouchment into the valley is not only physically unavoidable, but would appear to be highly beneficial to the purposes of the district from a conservation standpoint. What is necessarily incidental to the main purpose of the project is authorized to be done. See City of South Pasadena v. Pasadena Land, etc., Co., 152 Cal. 579, 93 P. 490; Uhl v. Badaracco, 199 Cal. 270, 248 P. 917.

No point is made that the proceedings leading up to the change of plan are in any respect irregular, nor that the board has abused its discretion in adopting the same. The appraisal of the land sought to be acquired is a necessary part thereof.

Let the peremptory writ issue as prayed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.



1 Cal.(2d) 71

BURLINGAME v. JUSTICE'S COURT OF CITY OF BERKELEY et al.

S. F. 15042.

Supreme Court of California.

May 28, 1934.

1. Certiorari ⇐42(8).

By demurrer to certiorari petition, facts alleged in petition are in effect adopted as return to writ.

2. Justices of the peace ⇐126.

Justice's order substituting son as judgment debtor under default judgment against father in action naming only father and mother as defendants *held* void as exceeding jurisdiction.

3. Certiorari ⇐5(1), 28(1), 33(1).

Certiorari lies only on application of party beneficially interested where there is excess of jurisdiction and no right of appeal and no other plain, speedy, and adequate remedy (Code Civ. Proc., §§ 1068, 1069).

4. Justices of the peace ⇐199.

Judgment debtor's son *held* not "party to action" within statute governing appeals and hence respecting right to certiorari could not have appealed from justice's order substituting son in judgment against debtor, since creditor, to make son party to action against debtor, should have sued or intended to sue son and generally court should have acquired jurisdiction of his person pursuant to process statute (Code Civ. Proc. §§ 416, 983, 1068, 1069).

[Ed. Note.—For other definitions of "Party (In Practice)," see Words & Phrases.]

5. Certiorari ⇐5(1).

When person not party to action is given opportunity, as by statute, to become party to record and appeal from adverse ruling, ap-

peal rather than certiorari is proper remedy (Code Civ. Proc., §§ 938, 1068, 1069).

6. Justices of the peace ⇐194(1).

Where judgment debtor's son, though not named or appearing in action, was ordered substituted in justice's judgment against debtor, son *held* without plain, speedy, and adequate remedy, justifying certiorari (Code Civ. Proc., § 1068).

7. Certiorari ⇐33(1).

"Party beneficially interested" within statute entitling such party to bring certiorari need not necessarily be party to action where judgment inter partes is not sought to be reviewed (Code Civ. Proc., § 1069).

8. Justices of the peace ⇐199.

Judgment debtor's son whom justice ordered substituted in judgment against debtor *held* "party beneficially interested" within statute entitling son to bring certiorari (Code Civ. Proc., § 1069).

In Bank.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Certiorari proceeding by R. A. Burlingame against the Justice's Court of the City of Berkeley, County of Alameda, Oliver Youngs, justice thereof, to review an order of the Justice's Court substituting petitioner as the judgment debtor in a default judgment entered against O. A. Burlingame in an action brought by Charles Kaufman against O. A. Burlingame and wife. From a judgment for petitioner, annulling the justice's order, respondent appeals.

Affirmed.

Prior opinion, 25 P.(2d) 53.

Nathan G. Gray, of Berkeley, for appellant.

John F. O'Sullivan, of San Francisco, for respondent.

SHENK, Justice.

[1, 2] This is an appeal from a judgment of the superior court in a certiorari proceeding annulling an order of the justice's court. The matter was submitted to the court on a demurrer to the petition. The effect of the demurrer was to adopt as the return to the writ the facts alleged in the petition. Stoner v. City Council of Los Angeles, 8 Cal. App. 607, 97 P. 692. The facts set forth in the petition are therefore uncontroverted and are as follows: Charles Kaufman commenced an action to recover rent in the justice's court of the city of Berkeley (having a population of more than 30,000), naming O. A. Burlingame and Mrs. O. A. Burlingame, father and mother of the petitioner, R. A. Burlingame, as defendants. The affidavit of service showed that a copy of the summons and complaint had been served on O. A. Burlingame. He failed to appear, his default was entered, and the court rendered judgment against him for $251 and costs, which was the amount sought to be recovered. A copy of the summons and complaint was also handed to R. A. Burlingame, the son, who made no appearance and no return of service of summons upon him appears to have been made. Seventy-eight days after the entry of the judgment the plaintiff in said action served on R. A. Burlingame a notice of motion for an order substituting him as the judgment debtor in said action. The motion was granted. An order was made substituting R. A. Burlingame as the judgment debtor in said judgment and an execution against him was threatened. No appeal from the order was taken or attempted. Thereafter, R. A. Burlingame filed his petition in the superior court to have the order of substitution annulled on the ground that the justice's court had exceeded its jurisdiction, and that the order was void. The superior court entered judgment annulling the order, hence this appeal.

It further appears from the petition that R. A. Burlingame was not named as a party to said action; that O. A. Burlingame, the father, was sought by the plaintiff to be sued in said action; and that R. A. Burlingame was in no way interested therein.

The appellant concedes that the justice's court was without jurisdiction "to make an order substituting R. A. Burlingame as the judgment debtor in the place and stead of O. A. Burlingame, the judgment debtor named in said judgment," but insists that what the justice's court really did was to make an order "correcting the record so as to make it speak the truth," and that therefore the order was valid.

The answer to the appellant's position is that it was alleged in the petition and is therefore admitted that the order of substitution was one substituting R. A. Burlingame "as the judgment debtor in the place and stead of the defendant in said action, O. A. Burlingame, the father of your petitioner." The appellant is bound by that allegation and the order must be deemed void. This is not an action where R. A. Burlingame was sued under a false or fictitious name or has been

sued by an inaccurate designation of his own name; but it is an action wherein he was never sued at all, was not sought to be sued, and no attempt was made to bring him into the case until long after the entry of the judgment, which, so far as the record discloses, has never been set aside.

[3] The appellant contends that, even if the order be void, the facts stated in the petition are insufficient to afford relief in certiorari. To justify the issuance of the writ three conditions must concur: (1) An excess of jurisdiction in an inferior tribunal; (2) no right of appeal; and (3) no other plain, speedy, and adequate remedy. If any one of these essentials be lacking, the writ will not lie. Noble v. Superior Court, 109 Cal. 523, 42 P. 155; Postal, etc., Co. v. Superior Court, 22 Cal. App. 770, 136 P. 538; section 1068, Code Civ. Proc. Also, under section 1069 of the Code of Civil Procedure, the application must be made on the verified petition of a party beneficially interested.

[4, 5] The first essential, namely, excess of jurisdiction to make the order, is present. Next, had the respondent a right of appeal? If he had, it would be on the theory that the order complained of was a special order made after final judgment as contemplated by section 983 of the Code of Civil Procedure and that the petitioner was a party to the action. Assuming that the order was such a special order, the petitioner was not a party to the action. In order that he be made a party to the action it was necessary that he be sued or be intended to be sued, as disclosed by the record, and generally that jurisdiction of his person be acquired pursuant to the issuance of process as provided in section 416 of the Code of Civil Procedure. He was not thus or otherwise made a party to the action and was not entitled to appeal under section 983 of the Code of Civil Procedure, as the same was in effect at the time in question, for as that section then read only a party to the action could appeal. The rule is different under the amendment of the section in 1933 (St. 1933, p. 1893), and on appeals from the superior court under section 938 of the Code of Civil Procedure, where a party aggrieved may make himself a party to the record and be entitled to appeal even though he may not be a party to the action. When he has the opportunity thus to become a party to the record and then take an appeal from an adverse ruling, he must pursue that remedy; failing to do so he is not entitled to a writ of review. Elliott v. Superior Court, 144 Cal. 509, 77 P. 1109, 103 Am. St. Rep. 102; Tattenham v. Superior Court, 155 Cal. 205, 100 P. 248. But here, under the old section 983, merely being a party to the record would not entitle the petitioner herein to an appeal. He must therefore be deemed to be without the right of appeal, for the reason that he is not a party to the action.

[6] It does not appear that the petitioner had a plain, speedy, and adequate remedy. The superior court, pursuant to said section 1068, concluded that he had none and we perceive no abuse of discretion in that regard.

[7, 8] The appellant further contends that if the respondent had no right of appeal, he is not a "party beneficially interested" as contemplated by section 1069 of the Code of Civil Procedure, and is therefore not entitled to the writ. It is claimed that the word "party" is used in the same sense in both sections 983 and 1069. The argument is that if the word "party" as employed in section 983 means a party to the action, the use of the same word in section 1069 is in the same sense. That this is not necessarily so is commented on in Elliott v. Superior Court, supra, where it is pointed out that the use of the words "party beneficially interested" in section 1086 of the Code of Civil Procedure does not mean that one entitled to the writ of mandate must be a party to an action or some other judicial proceeding before he can be so entitled. We think the same reasoning should apply to the language employed in section 1069, where the judgment inter partes is not sought to be reviewed. A person directly and prejudicially affected by an order such as we have on the record before us should be entitled to the writ. He is in effect a party to a collateral proceeding by which it is sought to seize his property for the satisfaction of a debt under a judgment to which he is not lawfully a party. The rule applicable here is stated in a Montana case where the language of the statute is the same as our own. The court in that case said:

"The writ of review will issue only at the instance of a 'party beneficially interested' (section 9838, Rev. Codes 1921), but this does not require that the applicant be a party to the action or proceeding in which it is alleged the court acted without jurisdiction. 'The true rule deducible from the authorities is this: In the exercise of its discretionary authority a court * * * upon the application of any party to a judicial proceeding, or person interested in a proceeding * * * because of some special or peculiar injury to himself in person or property * * * may grant the use of its writ of certiorari to re-

view the same for jurisdictional error.' State v. Chittenden, 127 Wis. 468, 107 N. W. 500, 509; Clary v. Hoagland, 5 Cal. 478; People v. Andrews, 52 N. Y. 445; State v. Rose, 4 N. D. 319, 58 N. W. 514." State ex rel. Johnston v. District Court, 93 Mont. 439, 19 P.(2d) 220, 222.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; TYLER, Justice pro tem.

1 Cal.(2d) 87

SUNNY SLOPE WATER CO. v. CITY OF PASADENA et al.

L. A. 13194, 14004.

Supreme Court of California.

May 31, 1934.

1. Constitutional law ⇐101.

Application for permit under boiler ordinance by one desiring to drill well before zoning ordinance was passed did not give applicant any vested right, and such fact was immaterial in determining whether zoning ordinance was reasonable as to such applicant.

2. Municipal corporations ⇐122(2).

Company claiming that zoning ordinance, generally valid, was void as to it, must show such ordinance was unreasonable as to it in face of strong presumption to contrary.

3. Municipal corporations ⇐625.

Zoning ordinance placing within most highly restricted residential zone territory largely devoted to growth of citrus and walnut trees *held* not unreasonable as to water company desiring to drill well in such territory, notwithstanding existence of other wells nearby and of high-tension power line running through area.

4. Municipal corporations ⇐625, 626.

Density of population is not conclusive test in determining validity and reasonableness of zoning ordinance and whether classification is discriminatory.

5. Municipal corporations ⇐625.

Zoning ordinances, or ordinances excluding any commercial use of property in certain area, must be reasonable, and use excluded must bear some reasonable relation to public interest.

6. Municipal corporations ⇐625.

Where reasonable minds may differ as to propriety of classification in zoning ordinance, legislative determination is conclusive as to reasonableness.

7. Municipal corporations ⇐601.

Commercial water well and pumping plant is "commercial use," and may properly be excluded from residence zone by zoning ordinance.

[Ed. Note.—For other definitions of "Commercial," see Words & Phrases.]

8. Municipal corporations ⇐601.

City is not bound by its zoning ordinance as regards right to have wells and pumps in restricted area.

9. Municipal corporations ⇐625.

In determining reasonableness of zoning ordinance, findings respecting alleged motives and purposes of city officials in passing ordinance were immaterial, where they fell short of charging actual fraud.

10. Municipal corporations ⇐625.

Purpose or motive of city officials in passing ordinance is irrelevant to any inquiry concerning reasonableness of ordinance.

11. Costs ⇐190.

Where parties stipulated that daily transcript should be prepared, fact that trial judge said "Very well" did not constitute order requiring preparation of daily transcript within statute allowing costs thereof to be recovered when court has ordered such transcript to be prepared (Code Civ. Proc. § 274).

In Bank.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Suit by the Sunny Slope Water Company against the City of Pasadena and others. From an adverse judgment and from an order taxing costs, defendants appeal.

Reversed.

Harold P. Huls, City Atty., and John W. Holmes, Deputy City Atty., both of Pasadena, and James H. Howard, of Los Angeles, for appellants.

Woodruff, Musick & Hartke, Lawrence B. Martin, and Woodruff, Burr & Smith, all of Los Angeles, for respondent.

PER CURIAM.

The city of Pasadena and certain of the city officials appeal from a judgment determining that a certain zoning ordinance and a so-called boiler ordinance of the city of Pasa-

dena are inapplicable to respondent, and also appeal from the order taxing costs. The facts giving rise to the controversy are as follows:

Since 1895 the respondent, Sunny Slope Water Company, has been engaged in the business of owning, developing, and acquiring water, water rights and waterworks and in distributing water at cost to its stockholders in a territory embracing some 2,282 acres. For many years respondent company has owned the underground water rights to and the right to drill for, water on a certain 160 acres, which area, until 1930, was entirely outside the city limits of the city of Pasadena and adjacent to the southeast boundary of that city. Arthur and Sedenia Richards, not parties to this proceeding, are the owners of the surface rights to a certain lot designated as lot 9, which lot is located within this 160 acres. It is conceded that the Richards acquired their title to lot 9 subject to and with full knowledge of the rights of respondent company. In December, 1929, respondent company notified Richards of its intention to drill a well and locate a pumping plant on lot 9, pursuant to its admitted rights. On February 14, 1930, respondent company commenced the drilling of a 24-inch well on lot 9 and continued its operations until March 20, 1930, when the casing in the well collapsed. In the meantime, Richards and other property owners in the vicinity approached certain officials of the city of Pasadena with the suggestion that a portion of the 160 acres above mentioned should be annexed to the city. Pursuant to the method provided by law, a portion of the 160 acres, consisting of 30 acres, and known as Lombardy annex, on March 8, 1930, was annexed to the city of Pasadena. Included within this 30 acres was lot 9, owned by Richards. The annexation was accomplished by the affirmative vote of three of the four qualified voters in the area.

After the collapse of the contemplated well on March 20, 1930, and after the annexation had been completed, respondent company desired to drill a new well about 50 feet south of the collapsed well. The site of this proposed well was also on the Richards property. Respondent's contractor, on May 20, 1930, applied to the city manager of the city of Pasadena for a permit to resume operations with a steam engine, boiler, and well rig. This permit was requested under the so-called boiler ordinance of the city of Pasadena. This ordinance had been passed in 1928, and provided that it shall be unlawful to install, set up, or commence the operation of any steam boiler unless a permit be first obtained. It is conceded that the request for a permit was in proper form. The city manager denied the request, but did issue a limited permit for the purpose of allowing respondent's contractor to set up necessary machinery to remove the casing from the collapsed well. Respondent company then submitted its request for a permit to drill the new well directly to the board of directors of the city, but that board likewise denied the request. The request for a permit was renewed on several occasions, but each time was denied. Respondent company offered to construct its pumphouse underground, to soundproof the pumphouse, and to landscape the area. The city officials, however, refused to grant the permit. This action was then commenced on July 10, 1930. On July 22, 1930, the general zoning ordinance of the city of Pasadena was duly and properly amended in the manner provided by law, so as to place Lombardy annex within zone E as defined in the ordinance; said zone being the most highly restricted residential zone, all commercial uses being prohibited therein. It is conceded that in 1929 the city of Pasadena was and now is actively engaged in the production, distribution, and sale of water to its customers in the city of Pasadena and county of Los Angeles. The purpose of this action was to have the boiler and zoning ordinances declared inoperative as to respondent company. The trial court found in favor of respondent, and the city and its officers appeal.

The findings of the trial court are voluminous. No useful purpose would be served by reviewing them in detail. So far as necessary for the purposes of this appeal, in addition to the above facts, the trial court found that, if a permit had been issued under the boiler ordinance, it would not endanger the life, health, or property of the citizens of the city, and that the refusal of the city manager and board of directors to grant the permit was, under the facts, arbitrary and unreasonable. The zoning ordinance was likewise found to be, as to respondent, inapplicable and discriminatory. The court made a whole series of findings dealing with the motives and purposes of the city officials in assisting in the annexation, in denying the request for a permit and in causing the zoning ordinance to be amended. The theme of these findings is that the city is engaged in the water business as a competitor of respondent company, and that the city desired to prevent respondent from drilling and extracting water from the Pasadena basin, which was also the source of supply of the city. It is found as a purported fact that the zoning ordinance was amended

solely for the purpose of preventing respondent company from drilling the well, and was not passed to protect the public peace, health, safety, security, or general welfare of the citizens. It is also found, in some detail, that the 30 acres included within Lombardy annex are largely devoted to farming and agricultural pursuits; that there are other commercial wells in the general vicinity; that the city is engaged in acquiring an extensive area adjacent to Lombardy annex for water purposes; that the city operates commercial wells belonging to it within zone E in various places in the city. By its judgment the court declared that the boiler and zoning ordinances were, as to respondent company, unreasonable, discriminatory, unconstitutional, and unenforceable, ordered that the city manager issue a permit, and enjoined the city and its officials from interfering with the drilling of the well.

[1] Before discussing the specific problems presented on this appeal, certain general observations should be made. The general validity of the zoning ordinance is conceded by all involved. Moreover, the fact that Lombardy annex was not zoned until after the application for a permit is without significance. The rights of the parties are to be determined as of the present time rather than the time of the application for a permit. By its application for a permit before the zoning ordinance was passed, respondent company secured no vested right to the same. Wheat v. Barrett, 210 Cal. 193, 290 P. 1033; Brougher v. Board of Public Works, 205 Cal. 426, 271 P. 487; Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A. L. R. 1479.

[2, 3] The specific question here presented is whether the zoning ordinance, generally valid, is void as to respondent company, because of the facts shown by the record. Before respondent can succeed in its efforts to avoid the application of the ordinance to it, it must be held that it established that the ordinance is unreasonable as to it, in the face of a strong presumption to the contrary. Miller v. Board of Public Works, supra; Euclid, Ohio, v. Ambler Realty Co., 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 54 A. L. R. 1016.

Examining the record and the various exhibits transmitted to this court by stipulation, it appears that the main part of the city of Pasadena lies to the northwest of Lombardy annex. At the present time, the 30 acres included within the annex are largely devoted to the growth of citrus and walnut trees.

The tank of the El Campo Water Company, a commercial water company, is located near the proposed well of respondent company, having been located there for over twenty years, and a high-tension power line carrying 220,000 volts run through the area. The evidence shows that power lines of equal power transverse many high-class residential areas.

There are several high-class residences close to the proposed well site. Within a circle with a quarter-mile radius, the proposed well being the center, there are 18 residences, mostly of a high-class character, some with from 21 to 28 rooms. There are 88 residences within a half-mile radius of the proposed well site. The city of San Marino lies westerly of Lombardy annex, and the area there included is high-class residential. There are several improved streets running through or along the boundaries of the annex. The only commercial development nearby, in addition to the growing of citrus and walnut trees, consists of the El Campo well and the power lines already mentioned, another well of the respondent company located outside the city limits, and the city's wells above referred to. The portions of the city of Pasadena contiguous to the annex are zoned as first-class residential. Eaton wash, a stream bed bordering the annex, is wooded and undeveloped. Respondent's testimony emphasizes the fact that the area is devoted to home sites with large grounds, with orchards surrounding them. There can be little doubt, from a reading of the record, that Lombardy annex is now a region characterized by citrus and walnut groves, and recently turned to development as a large lot residential tract. The annex stands directly in the path of the future residential development of San Marino and the city of Pasadena.

[4] The density of population cannot possibly be held to be the conclusive test. The determination that commercial uses should be entirely excluded from certain areas is primarily a matter of legislative concern. Such legislation is not only based on existing conditions, but also looks to the future. As was said by this court in Jones v. City of Los Angeles, 211 Cal. 304, 308, 295 P. 14, 16: "It cannot be seriously contended that relative density of population in the permissive and restricted districts is a controlling test of the validity of a zoning plan, so far as the claim of discriminatory classification is concerned. The object of the present ordinance is to exclude hospitals for the treatment of insanity and nervous diseases from these districts which are devoted to residential purposes, because it is in such districts that they adversely affect the public welfare. This being so, it is immaterial whether the restrict-

ed district is densely or sparsely populated, if it is residential. The ordinance is concerned with the nature of the district. A growing residential area is as reasonable an object of protection as one which is fully built up. On the other hand, while the permitted districts include some territory which is densely populated, that territory is not residential in character. It is devoted to business purposes and hence requires none of the special regulation deemed desirable to foster and protect the development of homes and the maintenance of a proper environment for children. Moreover, the argument of plaintiffs, carried to its logical conclusion, would destroy the usefulness of zoning ordinances as an effective means of city planning, for it would require an examination of the regulation solely on the basis of present conditions. But zoning legislation looks to the future. It is a constructive movement in municipal legislation and, as such, it has received the approval of our courts."

In Ex parte Hadacheck, 165 Cal. 416, 420, 132 P. 584, 586, L. R. A. 1916B, 1248, the rule is stated as follows: "Whether or not this trade, however strictly the manner of its conduct may be regulated, can be pursued at all in a residential district without causing undue annoyance to persons living in the district, is certainly a question upon which reasonable minds may differ. If this be so, the propriety of entirely prohibiting the occupation within such districts is one for the legislative determination. The courts will not substitute their judgment upon this issue for that of the legislative body."

[5, 6] Of course, zoning ordinances, or ordinances excluding any commercial use, must be reasonable, and the use excluded must bear some reasonable relation to the public interest. But, as indicated from the above quotations, where reasonable minds may differ as to the propriety of the classification, the legislative determination is conclusive. The principle is quite clearly stated in Marblehead Land Co. v. City of Los Angeles (C. C. A.) 47 F.(2d) 528, 532, as follows: "The legislative body intrusted with the police power has a wide discretion which cannot be interfered with by the courts. Their laws or ordinances enacted in pursuance of the police power are invested with a strong presumption of validity. If the question as to whether or not the legislation is unreasonable or arbitrary or an unequal exercise of power is fairly debatable, the legislation must be upheld as valid."

[7] It is quite clear that a commercial water well and pumping plant is a commercial use and may quite properly be excluded from a residence zone. The problem is the same in principle as that involved in the Marblehead Land Company Case above referred to. In that case it was contended that the city of Los Angeles acted unreasonably in zoning an area for residential purposes, consisting largely of unimproved land, and thereby excluding the plaintiff's proposed use for the production of oil and gas. The plaintiff had invested $136,000 in the area in the anticipation of its proposed use at a time when such use was permitted. Later the area was rezoned for residential purposes. In holding the ordinance valid, the Circuit Court of Appeals for the Ninth Circuit stated:

"In view of the surroundings of the appellants' property, the fact that it is in the line of development of the residential district of Los Angeles, that expensive dwellings had already been erected in the neighborhood, that adjacent property has been improved by opening streets and paving and sidewalking the same, there would seem to be little doubt of the right of the city under zoning ordinance to prevent the use of appellants' property for industrial and manufacturing plants or the erection of gas works which would be entirely out of harmony with the development of the neighborhood.

"The situation disclosed by this record, however, does not deal primarily with the right to improve the appellants' property by the erection of buildings thereon, but rather with the right of the owner to produce from the soil the minerals therein contained. * * * If there is any difference between the taking of the unearned increment by zoning ordinances and the taking of the inherent value of the soil or its contents, it arises from the fact that it might be deemed unreasonable to prevent a man from developing natural gas upon his property and reasonable to prohibit the erection of gas works, because in the former case gas works can be erected in other suitable zones or districts in the city, while in the case of natural gas it must be reproduced from the land in which it exists. It might therefore be held that an ordinance is reasonable where it requires the establishment of gas works or oil refineries in a certain zone and prohibited in others, and might be unreasonable and therefore void because it prohibited an owner from producing natural gas from the land in which it was located. In either event, however, there can be no question of the inherent right of the city to control or prohibit such production, provided it is done reasonably and not arbitrarily. In

that event the loss must fall upon the owner whether it prevents him from erecting structures or establishing industries which he desires to erect or establish, or whether it prevents him from developing the inherent potentialities of his land."

The United States Supreme Court denied a petition for a writ of certiorari in this case. 284 U. S. 634, 52 S. Ct. 18, 76 L. Ed. 540.

The precise question involved on the instant appeal has been recently decided adversely to respondents by the District Court of Appeal in City of South Pasadena v. City of San Gabriel, 25 P.(2d) 516, 517, in which case this court denied a hearing, and in which the United States Supreme Court has recently dismissed the appeal and denied certiorari. 54 S. Ct. 642, 78 L. Ed. ——. In that case the city of South Pasadena purchased a tract of land in the city of San Gabriel for the purpose of drilling a water well thereon. South Pasadena contemplated using the well to supplement its water supply. The city of San Gabriel had an ordinance somewhat similar to the boiler ordinance here involved, prohibiting the drilling of a well without a permit. Apparently no zoning ordinance was involved. The city of South Pasadena requested a permit, which request was refused, whereupon that city sought by mandate to compel its issuance. There are some factual differences between this and the instant case, but on the whole the factual situations involved are remarkably similar. The action of the city officials in denying the permit was upheld. In so doing, the appellate court stated: "It is contended by South Pasadena that Ordinance 197 is invalid because it confers arbitrary and uncontrolled powers over the disposition of petitions for permits to drill for water. It is said that where a business is lawful, and permits for its inauguration are required, an ordinance providing the requirement must contain rules and regulations to be followed by the officer or officers who consider applications for permits. This is indeed the rule as to businesses which cannot work harm to the morals, health, or general welfare of the city in which it is to be inaugurated, or to citizens in its proposed neighborhood. But the rule is different where the business, although perfectly lawful in character, may work such harm in its conduct. In such instances the granting or refusing of a permit to operate the business may be confided to the reasonable and proper discretion of an officer or officers, without the imposition of rules to regulate or guide their actions. Gaylord v. Pasadena [175 Cal. 433, 166 P. 348], supra; In re Holmes, 187 Cal. 640, 203 P. 398; Parker v. Colburn, 196 Cal. 169, 236 P. 921. We think we may take judicial notice that the drilling for water and the consequent use of the water thereby developed, together with the employment and maintenance of such agencies as may naturally conduce to such use, might under certain circumstances and in certain portions of the territory of San Gabriel, or of any other city, be detrimental to the health, comfort, or welfare of its inhabitants."

After discussing the nature of the district where the proposed well was located, the court continued: "It may be true that the district in question here is partially subjected to horticultural and agricultural pursuits in the same manner as are some parts of rural territory, but it is nevertheless urban and not semirural. That is settled by the fact that it lies within the territorial limits of San Gabriel. As a part of the city, and considering its condition at the time the evidence was taken in the trial court, as well as its adaptability for further settlement and improvement as a residence district, it is entitled, together with the remainder of San Gabriel, to be protected from the invasion of business establishments which, however lawful, are yet susceptible of a manner of operation injurious to the health, comfort, or general welfare of its inhabitants."

The court concluded with the following observations:

"South Pasadena attempts to make much of the fact that in the operation of its water plant it is engaged in the discharge of a sacred trust in behalf of the beneficiaries thereof, the people of the portion of the city which is served from the water system. It is contended, in effect, that because of this circumstance South Pasadena was entitled to special consideration at the hands of the city council of San Gabriel when the former city asked for the permit we have so often mentioned. We think the circumstance leads to the contrary conclusion. San Gabriel, too, is engaged in the administration of a trust, that of protecting its people from dangers to their health, comfort and general welfare. San Gabriel is not concerned with the trust with which South Pasadena burdened itself when it embarked in the conduct of the water business, if the execution of the latter trust improperly impinges upon the rights of the people of San Gabriel. When South Pasadena asked the permit from the city council of San Gabriel, no matter how honestly that request was made, no matter how badly South Pasa-

dena required an augmentation of its water supply, the latter city asked too much. Under the law South Pasadena could not levy such a tribute upon San Gabriel as would have been paid if the permit had been granted. To grant the permit would have been to impose upon San Gabriel no inconsiderable portion of the burden which rests upon South Pasadena as a purveyor of water to a portion of its territory. The city council of San Gabriel was amply justified in refusing the permit.

"At the back of the above discussion lies the rule that official duty is presumed to have been correctly performed, as well as the rule that where, in such instances as that which presented itself to the city council of San Gabriel, there is a question upon which minds may differ—a conflict of evidence—the decision of the body concerned cannot be disturbed. But there is little reason to invoke these rules, after all, as we fail to perceive how the city council of San Gabriel could properly have granted the requested permit."

The reasoning of that case is equally applicable here. Of course, this court recognizes that the drilling for water and the serving of it to the public is a very important commercial enterprise. We are not here presented with a situation where the only water bearing area available for respondent's purposes has been zoned for residential purposes. Such a situation would present questions not involved on this appeal. Each case must be determined on its own merits. In the instant case, the evidence shows that respondent owns the underground water rights to 130 acres of land adjoining Lombardy annex, outside the city limits, on which it may drill water wells. The evidence is quite clear that the major portion of the entire 160 acres overlies the same supply of underground water.

[8] Respondent emphasizes the fact that the city is also engaged in the water business and owns and operates wells and pumps in the restricted area in other portions of the city. Most of these wells antedated the zoning ordinance, but even as to the new wells it is quite clear that the city is not bound by its zoning ordinance. C. J. Kubach Co. v. McGuire, 199 Cal. 215, 248 P. 676; Balthasar v. Pacific Electric R. Co., 187 Cal. 302, 202 P. 37, 19 A. L. R. 452.

[9, 10] As already stated, the trial court made extensive findings in reference to the alleged motives and purposes of certain city officials in assisting Richards and the other property owners in Lombardy annex in working out the details of the annexation, in denying the permit, and in passing the amendment to the zoning ordinance. The findings in effect declare that because of the activity of certain city officials in these matters the annexation was consummated, the permit denied, and the amendment to the zoning ordinance passed with some evil motive. As far as the zoning ordinance is concerned, none of these activities was connected up with the legislative board of the city, the board of directors. In any event, all these findings, falling, as these do, far short of charging actual fraud, are entirely immaterial. It is well settled that the purpose or motive of the city officials in passing an ordinance is irrelevant to any inquiry concerning the reasonableness of the ordinance. In the case of In re Smith, 143 Cal. 368, 373, 77 P. 180, 182, this court stated the rule as follows: "* * * As it must happen in the case of many of these ordinances that the unreasonableness and oppression is not apparent upon the face thereof, evidence in such cases will be admitted to show the existing conditions. But this evidence will not go to motive. If the conditions justify the enactment of the ordinance, the motives prompting its enactment are of no consequence. If the conditions do not justify the enactment, the inquiry as to motive becomes useless. This is but in accordance with the well-settled rule, and for that reason the allegations touching the motive of the board of supervisors in passing the ordinance here under consideration have been and are entirely disregarded."

In Soon Hing v. Crowley, 113 U. S. 703, 5 S. Ct. 730, 734, 28 L. Ed. 1145, the United States Supreme Court states the reason for the rule as follows: "Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile."

See, also, Ex parte Yung, 7 Cal. App. 440, 94 P. 594; State v. Superior Court, 155 Wash. 244, 284 P. 93.

[11] Appellants also appeal from the order taxing costs. The only item complained of is the cost of a day by day transcript. The parties had stipulated that a daily transcript should be prepared and, in case of an appeal, the daily transcript could be used. Nothing was said in the stipulation as to who should pay for the transcript or whether it could properly be included in the cost bill by the winning party. As far as the record shows,

when this stipulation was stated to the trial court, no remark of any kind was made by him. Respondent contends, however, that the trial judge said "Very well." It is not contended that any order in reference to the daily transcript was made by the trial court other than this observation. Such statement falls far short of an order requiring the preparation of a daily transcript. The right to recover costs is purely statutory, and it is only when the trial court has ordered the transcript to be prepared that the statute (section 274, Code Civ. Proc.) allows the cost thereof to be recovered. See Senior v. Anderson, 130 Cal. 290, 62 P. 563; City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 P. 585.

For the foregoing reasons, the judgment and order appealed from are, and each is, reversed.

138 Cal.App. 736

SETSUKO NITTA et al. v. HASLAM et al.

Civ. 1286.

District Court of Appeal, Fourth District, California.

May 28, 1934.

Hearing Denied by Supreme Court July 26, 1934.

1. Appeal and error ⇐989.

To determine whether implied findings of jury that defendant was negligent and that plaintiff was not contributorily negligent were supported by evidence, reviewing court will consider only evidence supporting verdict and judgment.

2. Automobiles ⇐245(80).

Traversing obstructed intersection at speed greater than 15 miles per hour is not of itself negligence as matter of law (St. 1923, p. 553, § 113(b)(2).

3. Automobiles ⇐245(80).

Whether motorist approaching obstructed intersection at 15 miles per hour who when 5 feet from intersection saw truck 30 feet to his left traveling in excess of 30 miles per hour was contributorily negligent in proceeding across intersection *held* for jury (St. 1923, p. 553, § 113(b)(2).

4. Automobiles ⇐206.

Motorist entering intersection first had right of way and had right to presume that driver of truck to motorist's left would yield right of way to motorist (St. 1931, p. 2126, § 131).

5. Automobiles ⇐245(61).

Whether negligence of truck driver approaching obstructed intersection in excess of 30 miles per hour was proximate cause of collision with automobile *held* for jury (St. 1923, p. 553, § 113(b)(2).

6. Automobiles ⇐245(14).

Whether motorist crossing intersection who did not drive as closely as practicable to right-hand edge of highway was guilty of negligence contributing to collision with truck *held* for jury (St. 1931, p. 2124, § 122).

7. Appeal and error ⇐1053(3).

In action by father and small children for death of wife and mother, alleged error in allowing testimony of separation of children and breaking up of family unit was cured by instruction that in measuring damage of children only their pecuniary losses should be considered.

8. Automobiles ⇐246(47).

Instruction as to imminent danger in street intersectional automobile collision *held* warranted by evidence.

9. Trial ⇐295(1), 296(1).

Instruction must be construed as a whole and with all other instructions given.

10. Trial ⇐296(4, 5).

Instruction on imminent danger *held* not erroneous as permitting jury to excuse contributory negligence, because latter part of instruction did not repeat statement of first part of instruction that plaintiff must be placed in position of sudden peril without negligence on his part, where by other instructions jury was told that plaintiff's contributory negligence would defeat recovery.

11. Damages ⇐128.

Verdict for damages cannot be held excessive unless it appears that verdict was result of passion, prejudice, or corruption on part of jury.

12. Death ⇐99(4).

$20,000 to father and three small children for death of 30-year old wife and mother who had assisted her husband in business besides performing duties as wife and mother, *held* not excessive.

13. Death ⇐84.

In action by heirs for damages resulting from death, doctor's and hospital bills, nursing expenses, and cost of ambulance are not recoverable, expenses being incurred prior to death.

14. Death ⇐81.

In action by heirs for damages resulting from death in automobile collision, damage to automobile in which deceased was riding is

not recoverable, such damage not being pecuniary loss resulting from death.

15. Pleading ⇐53(2).

In action by father and minor children for death of wife and mother resulting from automobile collision, father should have set up in separate count of complaint cause of action for special damages for doctor's and hospital bills, nurse's expenses, and damage to automobile.

16. Appeal and error ⇐193(3).

Judgment would not be reversed because two causes of action were commingled in single count and were not separately stated, in absence of special demurrer or motion to strike (Code Civ. Proc., § 378).

17. Damages ⇐142.

Items of special damage not alleged cannot be recovered and amount of recovery is limited by amount alleged.

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Action by Setsuko Nitta and others, minors, by their guardian ad litem B. G. Nitta, and B. G. Nitta, individually, against D. W. Haslam and another, individually and as copartners doing business under the firm name and style of Haslam & Hollingshead. Judgment for plaintiffs, and defendants appeal.

Modified and, as modified, affirmed.

Ray W. Hays and Everts, Ewing, Wild & Everts, all of Fresno, and Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellants.

Harris & Hayhurst and Rue C. Gibson, all of Fresno, for respondents.

MARKS, Justice.

This is an appeal from a judgment in favor of plaintiffs in the sum of $20,505 for damages resulting from the death of Mikie Nitta, wife of B. G. Nitta, and mother of the other plaintiffs who were the minor children of the two. At the time of her death Mikie Nitta was of the age of 30 years, B. G. Nitta of the age of 39 years, Setsuko, a daughter, of the age of 4 years, Masumi, a son, of the age of 2 years, and Satorn, a son, of the age of 5 months. Mikie had an expectancy of life of 35 and 33/100 years and her husband of 28 and 91/100 years.

Mikie Nitta died from injuries received in a collision between a light coupé driven by her husband, in which she was riding, and a three-ton truck carrying a load of about four tons of raisins in sweat boxes. The collision occurred at about 2 o'clock in the afternoon of September 17, 1932, in the intersection of Central and Willow avenues in the county of Fresno. The streets intersect at right angles. Central avenue runs east and west and is 50 feet in width with a pavement 16 feet wide. This pavement was not built in the exact center of Central avenue, the greater width being on the south side of the center line. There is an oiled shoulder 2 or 3 feet in width on the south side of the pavement with a smooth graded portion beyond the shoulder suitable for travel by motor vehicles. Willow avenue is 50 feet in width north of Central avenue and 45 feet in width south of Central with a hard oiled surface in its center.

Appellants present four grounds upon which they rely for a reversal of the judgment: (1) That B. G. Nitta was guilty of contributory negligence as a matter of law; (2) that the defendants were prejudiced by the admission of evidence showing that the death of Mikie resulted in the minor plaintiffs being separated and the surviving family unit being destroyed; (3) that the trial court erred in instructing the jury on the doctrine of imminent danger; (4) that the award of damages in the sum of $20,505 is excessive as a matter of law. We will consider these assignments of error in the order stated.

[1] In considering the question of contributory negligence it should be first observed that the evidence is sharply conflicting. Had the jury returned a verdict in favor of appellants, it would have been supported by ample evidence showing that they were not guilty of any negligence and that the negligence of B. G. Nitta was the sole and proximate cause of the accident. However, the jury returned a verdict in favor of respondents, thereby, by implication, finding the appellants guilty of negligence and Nitta free from contributory negligence. This has finally resolved all conflicts in the evidence against appellants. We need consider only the evidence supporting the verdict and judgment to determine whether or not these implied findings of the jury are supported by any competent and material evidence. If they are, the first contention of appellants must be resolved against them.

[2] It is admitted by both parties that the intersection was an obstructed one within the definition of paragraph 2 of subdivision "b" of section 113 of the California Vehicle Act (St. 1923, p. 553). While there is still a permissive speed of 15 miles an hour in traversing such an intersection, since the adoption of

subdivision "d" of this same section (St. 1931, p. 2120), a greater speed is not of itself deemed to be negligence as a matter of law. Kellner v. Witte, 133 Cal. App. 231, 23 P.(2d) 1045; Christy v. Baruch (Cal. App.) 27 P.(2d) 660; Nieves v. Vigolino (Cal. App.) 27 P.(2d) 916.

Nitta testified that with his wife and three children he was traveling east on Central avenue approaching the intersection at a speed of between 18 and 20 miles an hour; that when 50 or more feet west from Willow avenue he saw something which resembled a house moving southerly on that street; that he reduced his speed to 14 or 15 miles an hour and when 5 feet from the intersection he saw appellants' truck thirty feet from the north line of the intersection proceeding south at a speed of 30 or more miles an hour; that he took his foot off from his brake and gave his automobile a little gas and proceeded to cross the intersection; that he was traveling on the south half of the pavement about 2 feet south of its center; that about the time his car was passing into the southeast quarter of the intersection, the truck struck its left rear fender causing the accident which resulted in the death of his wife. There is no evidence as to the exact speed at which Nitta was traversing the intersection.

[3] Appellants urge with force and sincerity that the reading of the record leaves the necessary conclusion of negligence on the part of Nitta that contributed to the accident. They say that when he was 5 feet from the intersection he knew that he had at least 30 feet plus the length of his car to go to clear the path of the truck and that the truck had about 55 feet to go before it reached the path of his automobile; that he knew his own speed was about 15 miles an hour and that of the truck was 30 or more miles an hour; that a mere statement of these facts drawn from Nitta's testimony demonstrates that he should have realized that a collision was imminent if he continued on his way and the truck did not stop or greatly reduce its speed. Were this the first time a similar question was presented to an appellate court we might be constrained to hold that an ordinarily prudent person possessed of the knowledge that Nitta admitted would not have tried to "beat the truck to the crossing," but would have stopped rather than endanger the lives of himself and his family by proceeding on his way. However, there are a legion of cases holding the question of contributory negligence, under the circumstances here presented, one of fact for the jury, and it having absolved Nitta from contributory negligence, the judgment cannot be upset on appeal. We must follow these decisions.

[4, 5] Nitta entered the intersection first, had the right of way, and had the right to presume that the appellants would yield the right of way to him. Section 131, California Vehicle Act (St. 1931, p. 2126); Olsen v. J. J. Jacobs Motor Co., 99 Cal. App. 423, 278 P. 1051; Jackson v. Miller, 130 Cal. App. 427, 20 P.(2d) 113; Leblanc v. Coverdale, 213 Cal. 654, 3 P.(2d) 312, 313. In the case last cited it is said: "Defendant does, however, contend that the evidence, without conflict or contradiction, shows that the plaintiff was guilty of contributory negligence as a matter of law in attempting to cross the intersection after he had observed the defendant approaching the intersection at such a rate of speed as would bring the two cars into collision if both continued across the intersection at the rate of speed at which each was then traveling. The plaintiff testified that he could stop his machine at the rate of speed he was traveling at the time he entered the intersection within 10 to 12 feet. Atlantic avenue is 80 feet wide. Plaintiff, therefore, had ample time after entering the intersection to have stopped his car before reaching the center of Atlantic avenue. As the defendant was traveling on the westerly side of the avenue, if plaintiff had stopped his machine before reaching the center line of said avenue, the accident would have been avoided. Under these circumstances, the defendant insists that the plaintiff, in failing to stop and permit the defendant to pass over the intersection, was guilty of negligence as a matter of law. Plaintiff, having entered the intersection first, had the right of way over the defendant's car. Even had the two machines approached the intersection at approximately the same time, the plaintiff's machine, as it was to the right of the defendant's, had the right of way over the latter. Section 131, California Vehicle Act (St. 1929, p. 541, § 55). It was therefore, the duty of the defendant to yield the right of way to the plaintiff. Crabbe v. Rhoades, 101 Cal. App. 503, 282 P. 10; Wynne v. Wright, 105 Cal. App. 17, 21, 286 P. 1057; Couchman v. Snelling, 111 Cal. App. 192, 295 P. 845, 847. Furthermore, the plaintiff as a reasonably prudent person had the right to assume that the defendant would obey the law and yield the right of way at the intersection. In Wynne v. Wright, supra, at page 21 of 105 Cal. App., 286 P. 1057, 1059, the court in a case much similar to the present one said: 'While the plaintiff was exercising ordinary care in the operation of his car, he had the right to assume that the defend-

ant would also use ordinary care to avoid an accident and would obey the law and yield the right of way at the intersection. Crabbe v. Rhoades, 101 Cal. App. 503, 282 P. 10.'" Respondents submitted evidence from which the conclusion may be drawn that appellants' truck approached and traversed the intersection at a speed in excess of 15 miles an hour from which the jury might conclude that the driver was guilty of negligence; that the truck was not then entirely on its own right-hand side of the road; that by the application of all of its brakes it could have been stopped in a very few feet; and that if the brakes had been applied or if the truck had been swerved slightly to its right after the Nitta car entered the intersection, the collision would have been avoided. Under the oft-repeated rules that the questions of the negligence of a defendant and the contributory negligence of a plaintiff are to be determined by the jury, and that the questions of whether or not the negligence of the defendant was the proximate cause of the injury, and whether the negligence of the plaintiff contributed to the accident are generally matters of fact to be determined by the jury, we are bound by the implied findings of the jury that Nitta was free from contributory negligence and that the negligence of appellants was the proximate cause of the accident in which Mikie Nitta received the injuries which resulted in her death.

Appellants rely principally upon the cases of Donat v. Dillon, 192 Cal. 426, 221 P. 193, and Cady v. Sanford, 57 Cal. App. 218, 207 P. 45, as supporting their argument that Nitta was guilty of negligence as a matter of law. In both of these cases the plaintiffs had recovered judgments against the defendants, both of whom had been found guilty of negligence which in each case was the proximate cause of the injury of the plaintiff. An argument similar to that made by appellants here was urged in the case of Flores v. Fitzgerald, 204 Cal. 374, 268 P. 369, 370, with Donat v. Dillon, supra, cited in support of it. The Supreme Court disposed of the contention as follows: "As to the contention that respondent failed to properly observe the movements of appellant's machine, after first seeing it 150 feet west of the intersection, appellant has cited Donat v. Dillon, 192 Cal. 426, 221 P. 193 where this court, on page 429 of the opinion (221 P. 194) said: 'The defendant seeks to take the case out of the operation of this rule, and would, in effect, have us decide as a matter of law that one having reached the intersection and having given the signal indicating his intention to turn has then relieved himself of all further care in the matter. But it is obvious that such is not the law. A motorist must at all times use due care to avoid colliding with another; he must be ever alert and watchful, so as not to place himself in danger, and, while he may assume that others will exercise due care, he cannot for that reason omit any of the care which the law demands of him. Assuming, therefore, that the defendant had the right of way, he was required to proceed across the intersection in a careful and prudent manner, ever watchful of the direction in which danger was most likely to be apprehended. He could not close his eyes so far as southbound traffic on Chester avenue was concerned. To the contrary, having observed Riddle's car approaching at an exceedingly fast rate of speed for that vicinity, the defendant was no longer entitled to rely upon the presumption that the driver of this machine would comply with the rules of the road, and he was bound to take such reasonable measures as he could, under the circumstances, to prevent the injury.' This decision, therefore, instead of being in favor of appellant's contention that the contributory negligence of respondent was a matter of law, plainly and in unequivocal language states that it is a matter of fact to be determined by the trial court, and that the finding of the ultimate fact by the trial court was binding upon this court."

[6] Appellants urge that Nitta in approaching and traversing the intersection did not "drive as closely as practicable to the right hand edge or curb of the highway" (section 122, California Vehicle Act, as amended by St. 1931, p. 2124) and in violating the statute was guilty of contributory negligence as a matter of law. The question of whether or not the violation of the provisions of this section was negligence which actually contributed to the accident is held to be a question of fact to be decided by the jury. Kellner v. Witte, supra.

[7] Over the objection of appellants the trial court admitted evidence to the effect that after the death of Mikie Nitta, the two older children were cared for at the home of their father by his sister, while the youngest child was being reared by another sister in another city some miles from the father's home. Appellants urged that this evidence was incompetent for any purpose and that it tended to arouse the sympathy of the jury by showing that the Nitta family unit had been broken up by the death of the mother. The competency of the evidence is questiou-

able to say the least. However, the trial court instructed the jury that in measuring the damage of the minor children only their pecuniary losses should be taken into consideration. This instruction cured the error, if any, in admitting the evidence.

The trial court instructed the jury on the doctrine of imminent danger. Appellants urge that the doctrine is not applicable to the facts of this case and that it did not correctly state the law. Under the first theory they maintain there was no evidence justifying the theory that Nitta was suddenly confronted with an imminent peril, and under the second that the instruction was not a correct statement of the law.

[8] Without repeating the facts of the case bearing on the question of sudden peril, it is sufficient to say that we have reached the conclusion that under the conflicting evidence respondents were entitled to have the doctrine of imminent danger given to the jury under the rule announced in the cases of Kearney v. Castellotti, 55 Cal. App. 541, 203 P. 1029, Reinders v. Olsen, 60 Cal. App. 764, 214 P. 268, Olsen v. J. J. Jacobs Motor Co., supra, and Mogle v. Hunt, 110 Cal. App. 177, 293 P. 844.

[9, 10] The instruction given was in the following language: "One who, without negligence upon his part, is suddenly confronted with imminent danger, or seeming imminent danger, is not required to exercise that degree of care and skill which is required in the commission of an act after careful deliberation; he is required to act only as a reasonably prudent man would act under same or similar circumstances; and, therefore, if the plaintiff B. G. Nitta was suddenly put in peril without having sufficient time to consider all the circumstances, he is excusable for omitting some precaution or making an unwise choice under this disturbing influence, although if his mind had been clear he ought to have done otherwise. This is especially true if the peril is caused by the defendant's fault. In such case, even if in bewilderment he runs directly into the very danger which he fears, he is not at fault." Appellants complain of this instruction for the reason (as given by them) that it permitted the jury to excuse contributory negligence on the part of Nitta. They urge that the latter part of the instruction does not repeat the statement that he must be placed in the position of sudden peril without negligence on his part. The instruction must be read and construed as a whole and with all the other instructions given. The questioned instruction opens with the statement that "One who, without negligence on his part, is suddenly confronted with imminent danger." By other instructions the jury was told many times that contributory negligence would defeat recovery by Nitta. It sufficiently appears that imminent danger would not excuse Nitta for an unwise choice unless he was free from negligence. Galwey v. Pacific Auto Stages, Inc., 96 Cal. App. 169, 273 P. 866; Marshall v. American Meter Co., 98 Cal. App. 759, 277 P. 894; Miner v. Dabney-Johnson Oil Corp. (Cal. Sup.) 28 P.(2d) 23.

[11, 12] Appellants complain of the verdict as being excessive. That it is large must be admitted. It cannot be held excessive unless it appears that it was the result of passion, prejudice, or corruption on the part of the jury. The evidence is undisputed that Mrs. Nitta was a faithful and dutiful wife and a careful and attentive mother. She had been educated in the schools of Japan and the United States. She spoke four languages. She assisted her husband in his business—a service station, general merchandise store, ice cream parlor, and lunch room, and baths—besides performing her duties as a wife and mother. In Bach v. Swanston & Son, 105 Cal. App. 72, 286 P. 1097, 1100, where a judgment in the sum of $30,000 in favor of a husband and four minor children was sustained, the court said that "there can be no fixed standard by which that loss can be determined." Under the facts before us we cannot hold the verdict excessive as a matter of law.

The complaint alleged general damages in the sum of $30,000, and special damages in the sum of $505. The verdict was for $20,505, or the exact amount of the special damages alleged in the complaint plus $20,000. The verdict did not segregate the general and special damages.

[13, 14] The complaint alleges among the special damages, doctor's bill $60, hospital bill $25, nurse's services $10, ambulance hire $10, and damages to the automobile $150. Appellants object to the inclusion of these items in the judgment because they were incurred prior to the death of Mrs. Nitta and are not recoverable in an action for damages resulting from her death. Salmon v. Rathjens, 152 Cal. 290, 92 P. 733. It seems clear that in an action by the heirs for damages resulting from death the doctor's and hospital bills, nursing expenses, and the cost of an ambulance are not properly recoverable as they were expenses incurred prior to the death in an effort to save life. It is equal-

ly clear that damage to the automobile in which deceased was riding is not a pecuniary loss resulting from the death, but a loss occurring prior to and independent of the death.

The complaint alleged these items of special damage and the answer contained a denial of them. There was no motion to strike these items of special damage from the complaint nor any demurrer upon the ground that two causes of action were commingled in one count and not separately stated. These items of special damage were suffered by B. G. Nitta individually and not by the other plaintiffs and he had a separate cause of action against appellants to recover them.

[15, 16] Since the amendment of section 378 of the Code of Civil Procedure (St. 1927, p. 631), it has contained the following: "All persons may be joined in one action as plaintiffs who have an interest in the subject of the action or in whom any right to relief in respect to or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally or in the alternative, where if such persons brought separate actions any question of law or fact would arise which are common to all the parties to the action." The items of special damage in question certainly involve many of the same questions of both law and fact as are involved in the action of the heirs of Mikie Nitta to recover damages resulting from her death. Under the provisions of this section, B. G. Nitta should have set up in a separate count of the complaint a cause of action for these damages. This he did not do but mingled his cause of action with the cause of action for damages resulting from the death. In the absence of a special demurrer or motion to strike, we cannot now reverse a judgment because two causes of action are commingled in a single count and are not separately stated.

[17] The items of special damage were particularly alleged and totaled the sum of $505. They included damage to the automobile in the sum of $150. The trial court instructed the jury that they might include all of these items of special damage within the amount of their verdict and we must assume that the jury followed the instruction given it. As the jury included in its verdict an odd sum of $505, just the amount of the special damages alleged, it would be splitting hairs to assume that it did not include in its verdict the exact amount of the special damage alleged. It is also clear that items of special damage not alleged cannot be recovered and that the amount of the recovery is limited by the amount alleged. There is a variance between the allegations and proof on some of these items.

As we have observed, the complaint alleged damage to Nitta's automobile in the sum of $150, which was included in the sum of $505 alleged as a special damage. Under the rule announced in Smith v. Calley, 103 Cal. App. 735, 284 P. 974, there was no sufficient evidence before the court upon which the damage to the automobile could be fixed. The items of special damage proved and as limited by the allegations of the complaint are as follows: Funeral expenses $250, doctor's and hospital bills $50, nurse hire $10, and ambulance hire $10, or a total of $320, which is $185 less than the amount alleged of $505. The judgment should be reduced by deducting from it the sum of $185.

It is ordered that the judgment of $20,505 be reduced to the sum of $20,320, and, as so reduced, is affirmed. The parties will pay their respective costs on appeal.

We concur: BARNARD, P. J.; JENNINGS, J.



139 Cal.App. 228

TAFT v. SECURITY-FIRST NAT. BANK OF LOS ANGELES et al. (two cases).

Civ. 1338, 1342.

District Court of Appeal, Fourth District, California.

June 12, 1934.

Hearing Denied by Supreme Court Aug. 9, 1934.

1. Appeal and error ⇐611.

Appeal from judgment was dismissed where appellant, having filed request for transcript, did nothing further by way of settling or filing transcript.

2. Appeal and error ⇐117.

Appeal from order denying motion for statutory relief and to set aside order terminating proceeding for transcript was dismissed, where appeal was taken after order of termination became final and no transcript was filed (Code Civ. Proc. § 473).

Although motion to set aside order terminating proceeding to procure transcript purported also to ask for relief, such re-

lief was not from failure to prepare transcript during 8½ months which elapsed between notice of appeal and order terminating proceeding for transcript, but relief was sought under Code Civ. Proc. § 473, on ground that order terminating proceeding for transcript had been entered through mistake, inadvertence, surprise, and excusable neglect of counsel, and it affirmatively appeared that section 473 was not complied with, in that transcript was not offered for filing.

3. Appeal and error ⇨113(2).

Order denying motion to set aside appealable order is nonappealable.

Appeals from Superior Court, Fresno County; C. J. Goodell, Judge.

Action by Walter W. Taft against the Security-First National Bank of Los Angeles, as executor, and others. From a judgment for defendants, and also from an order denying a motion to set aside an order terminating and dismissing a proceeding to procure a transcript, plaintiff appeals separately. Motion to dismiss each appeal.

Motions granted, and appeals dismissed.

Rollin L. McNitt, of Los Angeles, for appellant.

Sutherland, Deering & Jertberg, of Fresno, W. U. Goodman, of Fairfield, and David E. Peckinpah, of Fresno, for respondents.

BARNARD, Presiding Justice.

Judgment in this action was entered on March 29, 1933. A motion for a new trial was denied on May 31, 1933. On June 10, 1933, the plaintiff filed notice of appeal and also filed a notice addressed to the clerk of the court requesting the preparation of a transcript. The clerk fixed the amount of the undertaking to be filed in connection with said request for a transcript and notified counsel for the appellant. No undertaking has been filed and no transcript has been settled or filed. The record does not disclose that anything further has ever been done in connection with preparing or filing any transcript. Counsel for the respondents filed on September 8, 1933, a notice of motion to terminate proceedings for preparing a transcript. This motion was noticed for September 15, 1933, at which time it was continued to September 29, 1933. On September 28, 1933, the appellant filed a substitution of attorneys, substituting himself as his own attorney in the action; the substitution being duly signed and served by and on all parties concerned. On September 29, 1933, the appellant appeared in person and requested a continuance, and the hearing of the motion was continued to October 20, 1933. Thereafter, at the request of the appellant, the hearing was continued respectively to November 24, 1933, to February 2, 1934, and to February 23, 1934. On the last-mentioned date said motion came on for hearing, and, no undertaking having been filed and no transcript having been settled or filed, the court granted the motion and entered its order terminating and dismissing the proceeding to procure such a transcript.

On April 3, 1934, the cause was transferred by the Supreme Court to this court. On April 11, 1934, the respondents filed a notice that on April 27, 1934, they would move this court for an order dismissing the appeal in said action. When the matter came on for hearing on that day, the appellant was present in person, without counsel, and filed a supplemental certificate of the county clerk setting forth the following matters which had occurred in the trial court after the original clerk's certificate was issued: On April 18, 1934, a substitution of attorneys was filed substituting Rollin L. McNitt as attorney for the appellant. On the same day, the appellant, through his substituted counsel, filed notice of a motion to set aside the order of February 23, 1934, granting the motion to terminate the proceedings to prepare a transcript, and for relief under section 473 of the Code of Civil Procedure; it being set forth that the motion would be based upon the ground that the order of February 23, 1934, was entered through the mistake, inadvertence, surprise, and excusable neglect of appellant's attorney. This motion was heard upon affidavits on April 21, 1934, and, on that day, the court entered an order denying the motion and refusing to vacate the previous order entered on February 23, 1934. On April 25, 1934, the appellant filed notice of appeal to the Supreme Court from the order so entered on April 21, 1934. On the same day the appellant gave notice to the county clerk requesting the preparation of a clerk's transcript upon that appeal.

On April 27, 1934, the motion to dismiss the appeal above referred to was by this court ordered marked ready for submission. On April 30, 1934, the second appeal, being the one from the order made on April 21, 1934, was transferred to this court by the Supreme Court. On May 1, 1934, the respondents filed in this court a notice of motion to dismiss

this appeal from the order of April 21, 1934, on the ground that the same is not an appealable order. This motion was heard on May 15, 1934, at which time the appellant was present in person, but without counsel. In due time briefs were filed by counsel for the respective parties, and both motions to dismiss have been submitted and will be taken up together.

[1] No appeal was taken from the order of February 23, 1934, and that order became final before the appeal was taken from the order of April 21, 1934, and it is obvious that the motion to dismiss the appeal from the judgment should be granted unless the same is prevented by what subsequently occurred, a matter which is presented by the second appeal.

[2, 3] It is appellant's contention that the order made on April 21, 1934, was an appealable order, that this has been conclusively settled by the decision in Wood v. Peterson Farms Co., 214 Cal. 94, 3 P.(2d) 922, and that both of these motions to dismiss must therefore be denied.

In the case just referred to, a transcript had been actually prepared and presented, excuse was shown for a delay in paying the filing fee, the delay had not been unreasonable, and the order terminating the proceedings for the preparation of a transcript was also appealed from and had not become final. A motion to relieve the appellant from default in the preparation of a transcript was filed, heard, denied, and appealed from before the order terminating the proceedings had become final. It thus appears that the appellant in that case, instead of moving to set aside the order terminating the proceedings, filed a motion for relief and then took a timely appeal from both adverse orders. While a part of the language of the opinion seems to support this appellant's contention, the decision in that case was expressly limited to the circumstances there appearing. The circumstances in the case now before us are considerably different, and we feel that any holding in the case above referred to should not be extended in the manner here contended for by this appellant.

In the case before us eight and one-half months elapsed between the notice of appeal and the order terminating proceedings for a transcript, with nothing done. The appellant waited until a few days before the order of termination became final and then filed a motion to set the same aside, including an attempted request for relief. He appealed from the order denying this motion, after the prior order became final. Although he then gave notice requesting the preparation of a transcript on the second appeal, none has been filed or offered, although forty-eight days have since elapsed. Under appellant's contention, the respondents must, after an appropriate time, again move for an order terminating the proceedings for the preparation of a transcript on the second appeal, and, when that motion is granted, the same procedure can be repeated by the appellant, and "so on far into the night." The injustice of this is apparent. The very contention should defeat itself, and leads inevitably to the conclusion that the holding in the case referred to should not be so extended as to govern here.

Not only was the second appeal here taken after the order of termination had become final, but the motion on which the second order was based was one to set aside the prior order, and, while the motion purported also to ask for relief, the relief asked for was not from the failure to prepare a transcript, but was on the ground that the order terminating the proceedings for a transcript had been entered through the mistake, inadvertence, surprise, and excusable neglect of the attorney. It affirmatively appears that section 473 of the Code of Civil Procedure was not complied with, in that the transcript was not offered for filing, and it would also seem that no excuse was in any way offered for the delay while the appellant was acting as his own counsel. We take it that the request for relief was not only insufficient but that it was, in fact, incidental to and a part of the motion to set aside the order of termination. Under these circumstances, the motion from which the second appeal is taken must be considered only as a motion to set aside the prior order, and the usual rule applies that, when an order is appealable, an order denying a motion to set the same aside is not appealable. De la Montanya v. De la Montanya, 112 Cal. 101, 44 P. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165; In re Estate of Gregory, 122 Cal. 483, 55 P. 144; People v. Bowles (Cal. App.) 27 P.(2d) 411.

For the reasons given, both motions are granted, and both of the appeals are dismissed.

I concur: MARKS, J.

JENNINGS, J., being absent, does not participate in this opinion.

139 Cal.App. 362

HARTFORD ACCIDENT & INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 9547.

District Court of Appeal, Second District, Division 2, California.

June 20, 1934.

1. Master and servant ⇐417(7).

Findings in compensation case will not be disturbed unless commission acted in absence of substantial evidence or exceeded its jurisdiction by disregarding convincing contrary evidence.

2. Master and servant ⇐405(2).

Evidence in compensation case sustained finding that deceased truck driver hauling materials for road construction in his own truck was employee of general highway contractor.

3. Master and servant ⇐361.

Whether person is acting as another's servant depends largely on whether he is subject to other's orders and control and liable to be discharged, and other factors for consideration are hours of labor, terms of compensation, place, manner, and nature of work.

Proceedings under the Workmen's Compensation Act by Sadye Underwood for an employee's death, opposed by the Hartford Accident & Indemnity Company and others. To review an award of compensation by the Industrial Accident Commission, the insurer named petitions for a writ of review.

Award affirmed.

George L. Greer, of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco, for respondent Industrial Accident Commission.

Drumm, Tucker, Martell & Drumm, of Santa Ana, for respondent Sadye Underwood.

CRAIG, Justice.

An award by respondent commission for injury sustained by an owner and operator of a truck and against certain contractors and their insurance carrier is presented for review by said carrier. It is undisputed that the employee received injury while hauling with his own conveyance material for highway construction at Mountain View, and that said injury caused his demise; that he and other truckmen had been employed elsewhere in hauling materials for road construction by a partnership known as Nollenberger & Knapp; that the latter were using their own trucks and those so employed in hauling cement, sand, and rock, commonly termed "batching," under an agreement with a general contracting firm known as Basich Brothers at the rate of $2.25 per hour per truck; that upon removal to Mountain View the trucks were occupied in "batching" part of the time and when not so engaged were permitted to carry dirt for building "shoulders," etc., on said highway. An award for dependents of said deceased was granted, based upon findings that decedent, while employed as a truck driver by defendant Basich Brothers, sustained injury arising out of and occurring in the course of said employment, and that defendants Nollenberger & Knapp were not the employers at the time of said injury. It is contended in this proceeding that Basich Brothers were not the employers at the time of the injury in question, that they did not have the power to hire or discharge truck owners and employees, and that said decedent was at the time of injury an independent contractor. We think the objections resolve themselves into a test as to the sufficiency of the evidence upon which such findings and conclusions were founded.

The witness Knapp, one of the general contractors, testified that the latter employed decedent and others to work with their own drivers in hauling "batches," that they had agreed to furnish all necessary trucks, and that if more were needed they were "to go out and hire them"; that Basich Brothers paid the hired truckmen in this work, but that amounts so paid were taken out of the firm account of Nollenberger & Knapp; that he supervised all trucks while "batching"; that at the Mountain View job "if they weren't busy and I knew Basich wanted extra trucks he would tell me * * * and they would go to work for him if they wanted to"; that Underwood, the decedent, hauled dirt for $2.25 an hour, which was paid directly to drivers as their compensation; that Nollenberger & Knapp had no contract to haul dirt and gave no instructions at such times. The witness occasionally kept the time of men and turned it in "just for accommodation," but did not consider them his men—they were not on his pay roll and his firm received nothing for their work when not hauling cement, sand, and rock. He swore positively: "I was to receive $2.25 for my trucks; if they needed any extra trucks to haul dirt * * *"; hired truckmen "had the same privilege. If they were not busy then if Basich needed

trucks they could go to work for him." He told them, "I knew Basich needed extra trucks on the dirt hauling" and "explained explicitly to Mr. Underwood that if he hauled dirt he hauled for Basich * * * and told them they were working for Basich when they worked on the dirt. Basich set the price. In fact, their superintendent came to me one day and said that 'he could only pay $2.00 an hour for that work' * * * and he went to Underwood and said they could only pay $2.00 an hour and asked him if he wanted to stay on, and he [Underwood] said 'what are you doing?' and I said, 'I am pulling my trucks off', and he said, 'I will do the same thing, then', and finally they agreed to pay $2.25." The job superintendent of Basich Brothers testified that he hired these men for hauling dirt; their manager stated under oath that he agreed with that testimony. Said superintendent was in charge of the dirt hauling, and "Basich Brothers told them where to dump dirt * * * where to get dirt * * * when to start work * * * when to quit work. * * * He could have fired them any time. * * * They paid all these truck owners and drivers." Asked if Nollenberger & Knapp had "anything to do with these truck drivers such as Underwood on the dirt hauling," he replied, "Not to my knowledge." Other evidence tended to corroborate the foregoing testimony of witnesses of the contractors found by the commissioners to have been employers of the decedent when he was injured.

[1-3] In the review of proceedings upon application of the party aggrieved for final determination as to the sufficiency of the evidence to sustain an award, the findings of respondent commission will be disturbed only when it becomes apparent that the triers of fact, with the witnesses before them, arrived at their decision in the absence of substantial evidence, or so in disregard of convincing evidence to the contrary as to exceed their jurisdiction. Bissinger & Co. v. Ind. Acc. Comm., 105 Cal. App. 441, 287 P. 540; Carlson v. Ind. Acc. Comm., 213 Cal. 287, 2 P.(2d) 151. The record herein does not permit of such a conclusion. And further, Chapman v. Edwards, 133 Cal. App. 72, 24 P.(2d) 211, 213, so completely answers the second question of the petitioner as to be controlling here. It was there held upon an abundance of authority: "Perhaps no single circumstance is more conclusive to show the relationship of an employee than the right of the employer to end the service whenever he sees fit to do so. Press Publishing Co. v. Ind. Acc. Comm., 190 Cal. 114, 210 P. 820. The real test by which to determine whether a person is acting as the servant of another is to ascertain whether, at the time when the injury was inflicted, he was subject to such person's orders and control and was liable to be discharged for disobedience or misconduct. * * * Other factors which may be considered are the hours of labor, terms of compensation, place where work is done, and manner and nature of work to be performed." In each of these particulars the record discloses evidence which may have and doubtless did compel the rendition of said award, and it cannot be held as a matter of law an excess of jurisdiction to accept it as true even were there evidence directly at variance therewith.

The award is affirmed.

We concur: STEPHENS, P. J.; ARCHBALD, Justice pro tem.



139 Cal.App. 316

SPENCER v. ASSOCIATED ROCK CO. et al.

Civ. 8416.

District Court of Appeal, Second District, Division 2, California.

June 18, 1934.

1. Appeal and error ⇐1011(1).

Finding on conflicting testimony that director suing for compensation for services rendered was not employed at an agreed monthly compensation and that directors had not assumed or guaranteed his compensation was conclusive.

2. Evidence ⇐471(29).

Testimony of director suing for compensation for services rendered that his codirectors had agreed both as individuals and as stockholders to pay for services rendered was a mere conclusion as to the capacity in which they allegedly agreed.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by E. B. Spencer against the Associated Rock Company and others. From a judgment of nonsuit as to the other de-

fendants and a judgment for the named defendant, plaintiff appeals.

Appeal from order denying new trial dismissed, and judgment affirmed.

Davis & Thorne, of Los Angeles, for appellant.

John B. Haas and John D. Home, both of Los Angeles, for respondent Associated Rock Co.

CRAIG, Acting Presiding Justice.

A former director and vice president having instituted suit against the Associated Rock Company, a corporation, for alleged compensation for services, and joined others alleged to have assumed the indebtedness, a nonsuit as to the latter and judgment in favor of the corporation were granted, from which plaintiff appeals.

The plaintiff and the company owned adjoining lands which became the subject of negotiations for financing and sale. A share of stock was issued to plaintiff, he was elected director and vice president, and the board as so constituted endeavored to consummate various transactions toward accomplishment of the common design. The defendants denied any agreement to pay him except from proceeds of their united efforts. It was testified by plaintiff in support of his claim that his associates had expressed a desire to pay a salary each month for such portion of his time as might be needed; that they visited the properties and made trips to other parts of the state, and that at one time when pressed for funds with which to pay taxes he received certain notes of the company, but that the same were returned by him; that "every time we had a transaction under way, why they said we would wait until we got through with that matter or finished that transaction" in order that funds should be available for each of the parties, and that he "naturally figured it would come out of the finances of that transaction." Evidence on behalf of the defendants was to the effect that at no time did they have funds or consummate a transaction.

[1, 2] It is contended that findings that plaintiff was not employed at an agreed monthly compensation, and that the rock company's codefendants did not for a consideration assume his claim therefor or guarantee the same were contrary to the evidence. It lay within the province of the trial court to accept or reject the testimony of any witness. The plaintiff swore that his associated directors agreed both "as individuals" and "as stockholders" that they would pay for services rendered in said transactions. This statement as to the capacity in which they agreed, if at all, amounted to a mere conclusion, and, since the contingency failed, the subject of the alleged guaranty fell therewith, and its validity became immaterial. Hence the findings of the trial court are conclusive, and other errors, if any, including the granting of a nonsuit, need not be considered.

The attempted appeal from the order denying a new trial is dismissed, and the judgment is affirmed.

We concur: DESMOND, J.; SCOTT, Justice pro tem.

GOLAND et ux. v. PETER NOLAN & CO. et al.

Civ. 7976.

District Court of Appeal, Second District, Division 1, California.

June 4, 1934.

Hearing Granted by Supreme Court Aug. 2, 1934.

1. Malicious prosecution ⇐47.

Complaint for malicious prosecution of action wherein defendant levied attachment on plaintiffs' interest in land and thereby prevented consummation of purchase by plaintiffs *held* not to state cause of action (Civ. Code, § 3333).

Complaint alleged that defendant corporation maliciously filed action against plaintiffs knowing that its claim was fraudulent, pretended, and did not in fact exist; that defendant had attachment levied on plaintiffs' interest in certain land and subsequently dismissed action with prejudice and released attachment; that plaintiffs had entered into escrow agreement for purchase of land and had made $5,000 deposit; that purchase was not consummated because of commencement of action and levy of attachment, and plaintiffs thereby forfeited deposit, and were unable to redeem trust deed of $26,000 used as collateral for loan of deposit to their damage of $21,000, and lost profit of $200,000 and another profit of $214,000 in future exchange of property. Complaint also pleaded

cause of action on stockholders' liability, alleging that plaintiffs did not know true names of stockholders or respective amounts of stock owned by defendants. Complaint also alleged $100,000 as punitive damages.

2. Pleading ⇐17.

Material allegations must be distinctly stated in complaint.

3. Damages ⇐18, 20.

Damages recoverable in tort action must be clear, proximate, and natural results of wrong, and must be confined to principal thing complained of and to its natural attendant consequences (Civ. Code, § 3333).

4. Pleading ⇐251.

Sustaining demurrer to second amended complaint without leave to amend *held* not error where same vulnerable points appeared in original and first amended complaints.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by H. Goland and Esther Goland, husband and wife, against the Peter Nolan & Co. and others. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Jos. M. Wapner and Henry Cohen, both of Los Angeles, for appellants.

Freston & Files, of Los Angeles, for respondents.

HAHN, Justice pro tem.

This appeal comes to us from a judgment entered upon an order sustaining defendants' demurrer to plaintiffs' second amended complaint without leave to amend.

In order to present an intelligent consideration of the points to be discussed, it will be necessary to quote at length from the second amended complaint which, in the interest of brevity, will be referred to as the complaint, and also from the demurrer.

[1] After alleging the necessary preliminary matters, the complaint proceeds with a declaration that on or about June 8, 1928, "the defendant, Peter Nolan & Company, a corporation, maliciously and for the purpose of injuring the plaintiffs herein, filed an action in the Superior Court of Los Angeles County, on a pretended and unfounded claim against said H. Goland for the sum of Six Thousand ($6,000.00) Dollars; * * * that said defendant herein, Peter Nolan & Company, a corporation, well knew that said claim was fraudulent, pretended and did not in fact exist; and in furtherance of said defendant's Peter Nolan & Company design to harass and maliciously injure the plaintiffs herein it filed with the clerk, of the above entitled court, an Affidavit for and an Undertaking on Attachment, and thereupon the Clerk of said Court did, under his hand and seal of office, issue a Summons and also a Writ of Attachment demanding and authorizing the Sheriff of said Los Angeles County, State of California, to levy a garnishment and attachment upon the property of the plaintiff herein, H. Goland, to satisfy the amount alleged due on said pretended and unfounded claim in said action.

"That on or about the 8th day of June, 1928, pursuant to said Writ of Attachment * * * the Sheriff of said county did levy, garnishee and attach all the right, title and interest of the plaintiffs in the within action, as aforesaid, in that certain real property situate in the City and County of Los Angeles, State of California, and described as follows, to-wit:

"The South eighty-one (81) feet of Lots Two (2) and four (4) of Block three (3) of Fairview Tract, * * * together with an escrow then pending for the purchase and sale of the above described property.

"That * * * defendant, Peter Nolan & Company, did on or about the 12th day of May, 1930, voluntarily abandon such action and attachment and dismissed said action with prejudice and released said attachment.

"That plaintiffs at no time were indebted to defendants, Peter Nolan & Company, a corporation, * * * that said action was filed, commenced and instituted by said Peter Nolan & Company, a corporation, and the said Writ of Attachment caused to be issued as alleged herein and said property and escrow garnisheed and attached maliciously and without probable or any cause therefor, and for the sole and only purpose of harassing, annoying and injuring plaintiffs and putting them to trouble and expense."

The complaint then proceeds with an allegation that the plaintiff H. Goland "agreed to and did purchase certain real property * * * hereinbefore described, and had entered into an escrow, as aforesaid, for the purpose of consummating said sale and purchase and had paid to the vendors the sum of Five Thousand ($5,000.00) Dollars as a deposit and part payment on said property; that in the negotiation of the purchase of the property hereinbefore mentioned it became

necessary for plaintiff, H. Goland, to place an encumbrance on said property in the sum of One Hundred Thousand ($100,000.00) Dollars; that by reason of the commencement, filing and institution of the said action by the defendant * * * and the issuance and levy of said Writ of Attachment, * * * the purchase of said property could and was not consummated and the plaintiffs forfeited said Five Thousand ($5,000.00) Dollars paid to the vendors, all to their damage in the sum of Five Thousand ($5,000.00) Dollars, no part of which has been paid."

It is then alleged that the plaintiffs were the owners of a trust deed in the sum of $26,000, which was used as collateral security in borrowing the $5,000, which was paid to the vendor in the alleged transaction; that said trust deed was on property valued greatly in excess of the sum of $26,000; and "that by reason of the acts and conduct of the defendant, Peter Nolan & Company, as aforesaid, plaintiffs were unable to redeem said trust deed heretofore placed as collateral security for the loan of said $26,000.00, all to their damage in the sum of Twenty-one Thousand ($21,000.00) Dollars."

Paragraph IX of the complaint reads as follows: "Plaintiffs further allege that had it not been for the acts of defendant, Peter Nolan & Company, a corporation, in instituting and filing said suit on said pretended claim, which in fact did not exist, and in causing the issuance and levy of said Writ of Attachment, as aforesaid, thereby preventing the consummation and purchase of said property, as hereinbefore mentioned, plaintiffs would have made a net profit and/or earned and/or acquired their equity in the same over and above the encumbrance in the sum of Two Hundred Thousand ($200,000.00) Dollars."

The complaint further alleges: "That plaintiffs herein had entered into an agreement for the exchange of their equity in the property above mentioned, together with property located in Block Island, Rhode Island, for certain real property described as follows:" (then follows a description of certain lots and parcels of land situate in Orange and Imperial counties, Cal.); "Whereby plaintiffs would have earned and made a net profit of Two Hundred Fourteen Thousand ($214,000.00) Dollars; said exchange could not be consummated by reason of the suit and action, as aforesaid, all to plaintiffs' damage in the sum of Two Hundred Fourteen Thousand ($214,000.00) Dollars."

The second count undertakes to plead a cause of action on stockholders' liability. There is, however, no allegation in the complaint as to the amount of capital stock authorized, or issued, or subscribed, or the par value thereof, nor is there any allegation as to the number of shares owned by the fictitiously named stockholders of the Peter Nolan & Co. corporation, although the complaint does allege that the plaintiffs did not know the true names of the stockholders or the respective amounts of stock owned by said defendants. The complaint asks, in addition to the compensatory damages alleged, the additional sum of $100,000 as punitive damages.

The complaint was demurred to on the following grounds: (1) That several causes of action have been united and not separately stated. (2) There is a defect and misjoinder of parties plaintiff. (3) There is a defect and misjoinder of parties defendant. (4) The complaint does not state sufficient facts to constitute a cause of action.

The demurrer also charges that the complaint is uncertain, ambiguous, and unintelligible.

Under each stated ground of demurrer, the pleader sets forth in extended detail the considerations urged in support thereof.

[2] The complaint as to each count is clearly vulnerable to attack on grounds of both general and special demurrer. There is no allegation as to what, if any, right, title, or interest plaintiffs or either of them had in the land upon which the attachment was levied. The allegation that plaintiff H. Goland "agreed to and did purchase the real property described and had entered into an escrow * * * for the purpose of consummating said sale and purchase, and had paid to the vendors the sum of $5,000 as a deposit and part payment on said property," leaves much to be desired in the way of direct allegation as to what right, if any, plaintiffs did have in the land which was the subject of H. Goland's negotiations. Nor does it appear in what way plaintiffs' rights, if any, they had in the land attached, were interfered with by the levy. The only allegation bearing upon the effect of the suit and attachment is that "the purchase of said property could and was not consummated." This statement is markedly lacking in the necessary allegations to show that the suit and attachment were the proximate cause of the failure to consummate the purchase. Indeed, no facts are stated from which it may be even inferred in what respect, if at all, the filing of the suit, or the levy of the attachment, or both, were the proximate cause of the alleged losses or any of them. Material allegations must be dis-

tinctly stated. People v. Jones, 123 Cal. 299, 55 P. 992; Clement v. Dunn, 114 Cal. App. 60, 299 P. 545.

As to the damages claimed because the purchase of the Fairview tract lot was not consummated, there is no allegation as to the market value of the lot, or the price at which plaintiffs had agreed to purchase it. Indeed, there is no allegation that the purported vendors ever agreed to sell this lot to plaintiffs. Nor does it appear that the plaintiffs could have borrowed $100,000 on the Fairview lot, even if the suit had not been filed and the attachment levied.

The same and additional defects appear in the allegations concerning the proposed exchange of the Fairview tract lot and the Rhode Island property.

The claimed damages are segregated into four items: (1) $5,000, which was paid to the vendor of the Fairview lot as a deposit, and forfeited when the purchase of "said property could not be consummated"; (2) $21,000 because "plaintiffs were unable to redeem" a certain trust deed of the face value of $26,000, which they had put up as collateral security for the loan of the $5,000 deposit on the proposed purchase of the lot in the Fairview tract; (3) $200,000, which is the profit plaintiffs allege they would have made had they consummated the purchase of the Fairview lot; and (4) $214,000, which is a profit plaintiffs alleged they would have made in a proposed deal wherein they expected to trade the Fairview lot, if and when acquired, and property in Rhode Island for real property situate in Orange and Imperial counties, Cal.

[3] The alleged profits which constituted the larger part of the alleged damages are at best conjectural and remote. Profits on anticipated future deals are rarely allowed as damages, because of the difficulty, if not the impossibility, of adequately stating and proving what may result in the future, whether it be a loss or a profit. Damages that are recoverable in a tort action "must be the clear, proximate, and natural results of the wrong, and must be confined to the principal thing complained of, and to its naturally attendant consequences." Section 3333, Civ. Code; Martin v. Deetz, 102 Cal. 55, 68, 36 P. 368, 372, 41 Am. St. Rep. 151. "Conjectural profits of the kind sought here cannot be recovered as damages in such cases. They must be damages capable of ascertainment by proof to a reasonable certainty. Uncertain and speculative profits, which might or might not have been realized, are not recoverable in such action." Crow v. San Joaquin Irr. Co., 130 Cal. 309, 62 P. 562, 563, 1058; Friend & Terry Lumber Co. v. Miller, 67 Cal. 464, 8 P. 40; Gross v. Wright & Callender Bldg. Co., 116 Cal. App. 480, 2 P.(2d) 857; Martin v. Deetz, supra; Elder v. Kutner, 97 Cal. 490, 32 P. 563.

For the reasons indicated, as well as others that might be pointed out, we are of the opinion that the general demurrer, as well as the special demurrer for uncertainty, was properly sustained as to the first cause of action.

The second cause of action appears to be identical with the second cause of action in the first amended complaint, a demurrer to which cause of action was sustained without leave to amend. Including this second cause of action in the second amended complaint might well have justified the court in striking it from the complaint. However, no such action was taken and the complaint is before us with both causes of action to which the demurrer was again sustained. This second cause of action is defective, in that it contains no allegations as to the amount of authorized capital stock, or the amount of subscribed and issued capital stock of the defendant Peter Nolan & Co., a corporation. Nor does it allege that the fictitiously named stockholders were stockholders, or subscribers at the time the alleged cause of action arose. Roebling's Sons Co. v. Butler, 112 Cal. 677, 45 P. 6; San Francisco Commercial Agency v. Miller, 4 Cal. App. 291, 87 P. 630; Bidwell v. Babcock, 87 Cal. 29, 25 P. 752.

[4] Apparently as an afterthought, appellants for the first time at the close of their reply brief suggest that if the demurrer was well taken, they should have been allowed to file a third amended complaint. It has been ruled that after a pleading has once been amended, the right to further amend lies wholly within the discretion of the court. Billesbach v. Larkey, 161 Cal. 649, 120 P. 31; Galusha v. Fraser et al., 178 Cal. 653, 174 P. 311.

Under the circumstances as disclosed by the record, we cannot say the trial court abused its discretion in sustaining the demurrers without leave to amend. An examination of the three complaints filed, as also the demurrers filed, discloses that the vulnerable points found in the second amended complaint appear in the original and the first amended complaints, notwithstanding the demurrers filed to each of the complaints were directed toward the weaknesses pointed out. The trial judge may well have concluded that inasmuch as the pleaders failed in their third pleading to correct the defects pointed out in their

previous complaints, they were unable under oath to supply the matters necessary to a sufficient complaint.

Having concluded that the judgment must be affirmed for the reasons stated, it will serve no useful purpose to consider the other points raised by appellants.

Judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.



139 Cal.App. 219

NEW YORK INDEMNITY CO. v. WESTERN LOAN & BUILDING CO.

Civ. 5094.

District Court of Appeal, Third District, California.

June 12, 1934.

1. Building and loan associations ⇐23(4).

Indemnity company, which issued building indemnity bond to contractor upon representation of employee of loan company's agent that loan company would lend more money to landowner, assumed burden of showing that employee was loan company's agent.

2. Principal and agent ⇐22(1).

Witness' statement as to his authority was inadmissible to prove his agency, it being for trial court to determine facts and circumstances shown to exist as to alleged agency.

3. Appeal and error ⇐1011(1).

Where trial court found on conflicting evidence that person upon whose statements plaintiff relied in issuing indemnity bond was not agent of defendant and did not act as such agent, appellate court was bound by such finding.

4. Appeal and error ⇐931(1).

In examining sufficiency of evidence to support questioned finding, appellate court must accept as true all evidence tending to establish correctness of finding as made, taking into account all inferences which might reasonably have been thought by trial court to lead to same conclusion, and every substantial conflict in testimony is to be resolved in favor of finding.

5. Building and loan associations ⇐23(4).

Indemnity company could not recover from loan company for fraudulently inducing it to issue indemnity bond to contractor in reliance on statement of employee of loan company's agent that loan company would lend additional money to landowner, where employee was not agent of loan company and had no authority to make such statement.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by the New York Indemnity Company against the Western Loan & Building Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

Eugene P. Fay, of Los Angeles, for appellant.

Bicksler, Parke & Catlin and James C. Ingebretsen, all of Los Angeles, and Ingebretsen, Ray & Rawlins, of Salt Lake City, Utah, for respondent.

RANKIN, Justice pro tem., delivered the opinion of the court.

By this action plaintiff seeks a judgment for damages predicated upon fraud and deceit. The complaint, after averments of the corporate existence of the parties, alleges: "That the defendant, Earl Lund, is and was, at and during all the times herein mentioned, the agent, servant and representative of the defendant, Western Loan and Building Company, a corporation, at its office in the City of Los Angeles in said State of California," and alleges acts and representations of the defendant, "By and through the defendant, Earl Lund, while acting as the agent, servant and representative of the defendant, Western Loan & Building Company."

The trial court found: "It is not true that the defendant, Earl Lund, on or about the 21st day of December, 1926, or at any other time in plaintiff's complaint alleged, was the agent and/or servant and/or representative of the defendant, Western Loan & Building Company, a corporation," and further found in favor of defendant upon all material issues made in the pleadings.

While appellant's statement of the questions presented by its appeal is ambiguous, it is apparent that the sole question involved is whether or not the evidence supports the findings.

Appellant's contention is that the uncontradicted evidence establishes the agency of Earl Lund as alleged. We are unable to assent to this claim.

The plaintiff is a corporation doing a general surety business in the state of California. The witness Paul Doring was manager of the surety department conducted by plaintiff. His duties were the underwriting of surety bonds for all purposes and he had authority to execute bonds for the plaintiff. The defendant is a Utah corporation engaged in the building and loan business with its main office in Salt Lake City, Utah. On the dates mentioned in the complaint it maintained a branch office at 505 West Fifth street in the city of Los Angeles. S. H. Lund was the agent of the company in charge of that office. His authority as agent was evidenced each six months by a certificate issued by the defendant, granting him authority to take applications for its stock and collect the installments indicated in the applications, which certificate contains the limitations as follows: "No authority is granted by this commission to any agent to promise or contract to make loans for any amount at any time or to bind this company to pay any debt contracted by the agent or waive loans for any amount or at any time or to bind this company to pay any debts contracted by the agent or waive any of the conditions contained in the printed literature of this company. All contracts incurring the expenditure or refunding of money, granting or contracting for loans, must be arranged through the home office. Local agents may be appointed subject to the approval of the home office. Good for six months only."

No salary was paid by defendant corporation to S. H. Lund. He employed his own help. No person working for him was employed by the defendant. He received his compensation from commissions on loans paid by the borrower. The defendant had no responsibility in connection with the expenses of the office in Los Angeles.

The Los Angeles office conducted by S. H. Lund maintained on the doors or windows of its Fifth street office, in Los Angeles, the printed words: "Western Loan Agency of the Western Loan & Building Company, Salt Lake City, Utah. S. H. Lund, Agent."

S. H. Lund employed in his office three people, one of whom was Earl Lund. He paid this man a salary of $125 per month. Earl Lund had authority to interest prospects for loans, and attend to details connected with loans in process, such as checking insurance, procuring title papers, etc. He could and did sign letters, "S. H. Lund, by Earl Lund," and in S. H. Lund's absence he, together with another employee of Mr. Lund's, could sign checks for S. H. Lund.

The Los Angeles office was supplied with printed forms of applications for loans and other literature, together with letterheads, by the home office at Salt Lake. The office was rented by and belonged to S. H. Lund and all its expenses were paid by him. S. H. Lund carried on all his financial transactions through his personal bank account and in his own name.

The witness V. R. Martin testified that he was vice president and general manager of defendant; that S. H. Lund had the usual certificate which outlines his authority as agent up to the end of December, 1926, and had noticed the signs on the front door or front windows of the Los Angeles office. He knew that Earl Lund was working in that office but did not know in what capacity, as S. H. Lund hired his own men.

Some time in September, 1926, one A. M. Kal made a written application addressed to the defendant for a loan on certain real property. This application was submitted to S. H. Lund at the Los Angeles office by one Obuchon. This application was considered by S. H. Lund and he made some investigation of A. M. Kal's financial abilities and forwarded the application for loan to the Salt Lake office. The loan was afterwards approved by the defendant, but it did advise the Los Angeles office by letter that a "building indemnity" bond would be required before the first half of the proceeds of the loan would be advanced. After a note and mortgage to complete the loan were prepared and sent to the Los Angeles office to be executed, some question arose as to the title to the property covered by the mortgage. On November 29, 1926, Earl Lund carried on negotiations with the California Group Corporation for a loan by that corporation to Mrs. Kal. About December 18, 1926, Earl Lund called at the plaintiff's office with one Louis Schemnitz, the contractor who had entered into a building contract with Mrs. Kal, for the purpose of arranging for the execution of a material and labor bond and a faithful performance bond by the plaintiff, as surety for said contractor. Earl Lund at that time stated to plaintiff's manager Mr. Doring that there was $80,000 cash on hand from the building loan with which to meet the contract price of the building. Mr. Doring replied that such amount was insufficient inasmuch as it was $10,000 short of the contract price. Earl Lund thereupon stated that they would get an additional $10,000. Mr. Doring then replied: "If you, as representative of the Western Loan & Building Company will put that in writing we will write

the contract bond." Earl Lund said that he would do so and that he had authority to write such a letter. On December 21, 1926, Earl Lund addressed the promised letter to plaintiff under his own signature. This letter was written upon the form letterhead used by the Los Angeles office of the defendant, but otherwise made no mention whatever of the Western Loan & Building Company.

Relying upon the statements of Earl Lund and without further or any investigation or inquiry as to the authority of Earl Lund as agent or otherwise, the plaintiff executed the bonds applied for by the contractor Louis Schemnitz, and delivered said bonds to Earl Lund. The written application for the bonds addressed to plaintiff was signed by Louis Schemnitz, the contractor.

[1] The plaintiff assumed the burden of showing that Earl Lund was the agent of defendant. Evidence of the statements and acts of Earl Lund was admitted by the court with the understanding that plaintiff would connect up the latter to show the agency. Not only did plaintiff fail to prove agency, but it appears from the evidence that defendant never received an application for membership or loan from Earl Lund; that he was not an employee or agent of defendant in December, 1926, and was never under the direction of defendant in any way; that defendant was not informed nor did it have any notice or knowledge of the transactions between Louis Schemnitz and Earl Lund and the plaintiff relative to the issuance of said bonds, or of the letter dated December 21, 1926, written by Earl Lund over his own signature. There is nothing in the record from which it appears that defendant was obligated to or in any way intended to act as agent for the contractor in securing for the contractor bonds of any kind, nor does it appear that defendant had any knowledge that Earl Lund was acting as agent for the contractor in securing such bonds to be issued by plaintiff. So far as appears from the record the defendant was a stranger to said transaction and has no interest therein.

[2, 3] Appellant contends that Earl Lund was the ostensible agent of defendant and to substantiate his claim relies upon the oral statements of Earl Lund and the letter addressed to plaintiff written on Western Loan & Building Company's stationery and upon what is referred to as facts and circumstances. Earl Lund's own statement as to his authority was inadmissible to prove agency and it was the province of the trial court to weigh and determine the facts and circumstances shown to exist. The court having found on conflicting evidence that Earl Lund was not the agent of defendant and did not act as such agent, this court is bound by that finding.

[4] In examining the sufficiency of the evidence to support a questioned finding, an appellate court must accept as true all evidence tending to establish the correctness of the finding as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion; and every substantial conflict in the testimony is to be resolved in favor of the finding. Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 P. 1157.

[5] The finding against plaintiff on the question of agency is fatal to plaintiff's case and in harmony with that finding the court further found in favor of defendant upon all other material issues made by the pleadings.

It is unnecessary to cite further authorities in support of the rule that the appellate court will not review or disturb findings of fact on conflicting evidence. Appellant's contention that the agency of Earl Lund is established by ratification or estoppel is not supported by the record.

The judgment is affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

139 Cal.App. 178

DODGE v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.*

Civ. 9686.

District Court of Appeal, Second District, Division 2, California.

June 8, 1934.

Rehearing Denied July 6, 1934.

1. Abatement and revival ⇐10.

In order for one action to abate another, it must not only be pending at same time, for same cause, and between same parties, but must also be pending in same jurisdiction.

2. Abatement and revival ⇐13.

Pendency of prior action in another state between same parties, involving same cause of action, does not entitle party as matter of right to abatement of second suit.

3. Action ⇐69.

Court in its discretion may, where there is prior action in another state between same parties, involving same cause of action pending, stay second action until after decision in first.

4. Action ⇐69.

Principle of comity between states calls for refusal on part of courts of state to proceed to decision before termination of prior action between same parties in another state.

5. Abatement and revival ⇐8(2).

Test for determining whether or not identity of matter involved in both actions is same as respects right to maintain successive actions is whether final adjudication of issue in first case will be bar to same issue in second (Code Civ. Proc. § 1047).

6. Action ⇐69.

Court *held* not to have abused discretion in staying action pending final determination of action between same parties on same cause of action in another state where decision on merits had been rendered after long trial and matter was then pending before Supreme Court on appeal.

Original mandamus by E. G. Dodge, special administrator of the estate of Byron Hilton Canfield, deceased, against the Superior Court in and for Los Angeles County.

Petition dismissed.

McAdoo & Neblett, of Los Angeles, for petitioner.

Everett W. Mattoon and J. F. Moroney, both of Los Angeles (S. S. Hahn, W. O. Graf, and Phi O. Clough, all of Los Angeles, of counsel), for respondent.

ARCHBALD, Justice pro tem.

Proceedings brought to compel the superior court to proceed with the trial of a case after making the following order in response to a motion to abate: "That the above action abate pending the final determination of said action No. 259-996 in the Superior Court of the State of Washington for King County, and in the event said action is finally terminated and adjudicated in favor of the defendants in said action, the defendants in this action be allowed to amend their answer to plead such judgment in bar of this action." It is urged that the pleadings and files of said superior court action show that the court exceeded its jurisdiction in making such order and that it was made entirely without authority.

Briefly stated, the pleadings in this case set out the pleadings in a prior action in the superior court of King county, Wash., which the parties admitted were true and correct copies in the opening arguments which preceded the urging of the defense set up in the answer of a prior action pending in the courts of such state between the same parties for the same cause. It appears from said pleadings that B. H. Canfield, a short time prior to his death, together with defendants E. W. Scripps, Josephine S. Scripps, and James G. Scripps, were the owners of the capital stock of various publishing companies, also named as defendants in both the California and Washington cases, Canfield owning approximately 30 per cent. of such stock and the other individual defendants approximately 70 per cent. It also appears that E. W. Scripps, Sr., started such business, and together with Canfield built the same into a very large and lucrative one. The senior Scripps had a son, James G. Scripps, who was the husband of defendant Josephine S. Scripps and the father of defendants E. W. and James G. Scripps. After the death of the elder E. W. Scripps, the management of the business continued in the hands of Canfield until shortly before his death, when he was succeeded by defendant E. W. Scripps. It appears that large sums of money had been loaned to Canfield by Josephine S. Scripps and E. W. Scripps, trustee, and that the stock of said Canfield had been pledged with defendant E. W. Scripps to secure said loans under certain trust agreements; that, after Canfield's death, such indebtedness be-

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Rehearing denied 34 P.(2d) 501.

ing in default, proceedings were commenced by said trustee to sell the Canfield stock to satisfy the same. The Washington case was instituted by plaintiff as special administrator with general powers of decedent Canfield's estate, with whom were joined as plaintiffs the legatees and devisees under the last will and testament of Canfield, for the purpose of preventing such sale on various grounds of invalidity of any attempted sale, including charges of fraud. The trial of such case consumed about four weeks, and resulted in a judgment for the defendants dismissing the action, from which judgment an appeal is now pending in the Supreme Court of Washington. After such judgment, defendants proceeded with said sale and bought in the Canfield notes.

The case involved here was brought by plaintiff to recover from defendants the sum of $1,100,000 damages caused by defendants "on May 26, 1933, at Seattle, Washington" (admittedly the date of the sale of the Canfield stock under the trust agreements), by the unlawful conversion and disposition of said stocks by said defendants, who were then in possession of the same.

That the validity of said sale is the issue in both cases would seem to be unquestioned, that such issue will be determined by the decision in the Washington case as between plaintiff and said individual defendants, who would seem to be the only real parties defendant in interest, is beyond controversy. In other words, the conclusion which the trial court reached, that the parties and issues were the same in both cases, finds ample support in the evidence before it.

[1] It is undoubtedly the law, as contended by petitioner, that, in order for one action to abate another, it must not only be pending at the same time, for the same cause and between the same parties, but it must also be pending in the same jurisdiction. Hatch v. Spofford, 22 Conn. 485, 58 Am. Dec. 433. The true reason for such rule, as shown in the cited case, is that "every country or state is entirely sovereign and unrestricted in its powers, whether legislative, judicial, or executive, and hence, does not acknowledge the right of any other nation, to hinder its own sovereign acts and proceedings; * * * and therefore, the courts of a country, where a second suit is brought, will not dismiss a suitor, merely because initiatory steps have been taken elsewhere." Such court, even as early as 1853, then said: "It may be cause for staying proceedings; but, to abate a suit is to put a final end to its existence." That such is the meaning of "abate" seems clear. Webster defines the word: "To put an end to; to do away with." Turning to the order made here, we find that it was not, strictly speaking, an order abating the action, but rather staying it until the determination of the pending litigation in Washington, at which time, if such determination is in favor of defendants, it may be pleaded as a bar in their answer to the California complaint.

[2-4] While it is unquestionably the law that the pendency of a prior action in another state between the same parties, involving the same cause of action, does not entitle a party as a matter of right to an abatement of a second suit, we think it is equally true that it is within the discretion of the court in which the second action is pending to stay the same until after the decision in the first (Beneke v. Tucker, 90 Or. 230, 176 P. 183), and that the principle of comity between the states calls for the refusal on the part of the courts of this state to proceed to a decision before the termination of the prior action (Sulz v. Mutual Reserve Fund Ass'n, 145 N. Y. 563, 40 N. E. 242, 28 L. R. A. 379); and in our opinion the fact that the first case, as here, after a long trial, has resulted in a decision on the merits which is before the Supreme Court of the state on appeal, would make a refusal to so stay the second action almost an abuse of discretion by a trial court.

[5] Under section 1047, Code of Civil Procedure, successive actions upon the same contract or transaction may be maintained whenever, after the former action, a new cause of action arises therefrom. Such a condition does not prevail here under the second action, which involves the same cause of action, viz., the alleged invalidity of the transactions leading up to the sale of the Canfield stock that is the cause of the first action. A final adjudication of such issue in the first case will be a bar to the same issue in the second, and that is the test for determining whether or not the identity of the matter involved in both actions is the same. McCormick v. Gross, 135 Cal. 302, 305, 67 P. 766; Baker v. Eilers Music Co., 175 Cal. 652, 655, 166 P. 1006.

[6] In our opinion, the trial court did not exceed its jurisdiction in making the order of which complaint is made.

The rule of the order to show cause is discharged and the petition dismissed.

We concur: CRAIG, Acting P. J.; DESMOND, J.

GREVA et al. v. RAINEY, Superintendent of Banks.*

Civ. 9336.

District Court of Appeal, First District, Division 2, California.

May 25, 1934.

Hearing Granted by Supreme Court July 23, 1934.

1. Banks and banking ⇐80(3).

Liquidating agent of bank *held* not entitled to pay interest to depositors in and creditors of commercial department of such bank from date when Superintendent of Banks took charge; paying of principal amount due being payment of "full amount" of such claims under statute (Gen. Laws 1931, Act 652, §§ 23, 25–27, 136).

[Ed. Note.—For other definitions of "Full Amount," see Words & Phrases.]

2. Banks and banking ⇐63.

Bank Act is to be construed as being inclusive and exclusive of law applicable to bank in liquidation (Gen. Laws 1931, Act 652).

3. Banks and banking ⇐63.

That Bank Act was enacted in 1909 and Usury Act was enacted in 1919 did not result in amendment of Bank Act (Gen. Laws 1931, Act 652; Act 3757).

4. Banks and banking ⇐63.

Bank Act covers entire field of law respecting insolvent banks, and therefore previous provisions of either common or statutory law in conflict therewith is no longer operative (Gen. Laws 1931, Act 652).

5. Banks and banking ⇐63½.

Statutory procedure for liquidation of bank must be followed (Gen. Laws 1931, Act 652, § 136, par. 2; § 136a).

6. Banks and banking ⇐80(3).

Where surplus remained after payment of claims in commercial department of bank in liquidation, liquidating agent should transfer money or assets remaining in such department to savings department where claims were not all paid (Gen. Laws 1931, Act 652).

SPENCE, J., dissenting.

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by Nels Greva and another against Edward Rainey, Superintendent of Banks of the State of California, and Liquidating Agent of the Pan American Bank of California, in liquidation. From an adverse judgment, plaintiffs appeal.

Modified and affirmed.

Dockweiler, Dockweiler & Finch, Walter E. Burke and Stanley & Lewis, all of Los Angeles, for appellants.

Robbins & Van Fleet and Devlin & Devlin & Diepenbrock, all of San Francisco, amici curiæ on behalf of appellants.

Charles Dell Rubin, of Los Angeles, and Colladay, McGarraghy, Colladay & Wallace, of Washington, D. C., amici curiæ for Pacific States Corporation.

Mathes & Sheppard, of Los Angeles, amici curiæ for American Surety Co. of New York.

Sullivan, Roche, Johnson & Barry, of San Francisco, for respondent.

STURTEVANT, Justice.

The plaintiffs, as depositors in the savings department of the Pan American Bank, in liquidation, brought suit to obtain a decree of declaratory relief. From the judgment in favor of the defendant, plaintiffs have appealed.

In the first count it is alleged that the Pan American Bank of California was formerly engaged in transacting business at Los Angeles; that it transacted its business in three several departments—a trust department, a commercial department, and a savings department; and that it so continued until the 19th day of July, 1929. On that date the Superintendent of Banks entered and took charge of the bank. Thereafter proceedings in liquidation were had. It is then alleged: "That in the process of liquidation the liquidating officer has continued to keep separate and segregated moneys collected from the assets in each department, and that he has now paid all of the legally allowed claims of the depositors and creditors of the trust department of said bank; that there are no claims of any kind or character against the trust department of said bank; that he has heretofore paid all of the claims of the depositors and creditors of the commercial department of said bank, except certain creditors whose claims are in liquidation, and that he is holding impounded in reserve a sufficient sum of money to pay such disallowed claims now in litigation if the determination of the litigation should be adverse to him. That in addition thereto he has a large sum of money, to-wit, in excess of $65,000 in said commercial department now being impounded by him for the purpose of paying interest at the rate of 7 per cent per annum from the date of the failure of said bank until the time of payment of said depositors and creditors of said commercial department. That he has heretofore

paid to the depositors and creditors of the savings department of said bank 85 per cent of the legally allowed claims against the savings department, and has impounded money sufficient to protect him against disallowed claims now in litigation and in addition thereto a small sum on hand in said savings department available for dividend purposes the exact amount being unknown to these plaintiffs." It is further alleged that to pay the remaining 15 per cent. to the savings depositors will require the expenditure of $140,000. From the reporter's transcript it appears that the Pan American Bank has abundant assets to pay the costs of administration and the principal sums due the depositors and creditors of the several departments. Other appropriate facts are alleged as stating a cause of action asking for declaratory relief, that is, a decree that under the facts the defendant should or should not pay the depositors and creditors of the commercial department interest.

[1] The defendant quotes the twelfth paragraph of section 136 of the Bank Act (1 Deering's Gen. Laws, Act 652, pp. 215, 302) as follows: "Whenever the superintendent of banks shall have paid to each and every depositor and creditor of such bank whose claim or claims as such creditor or depositor shall have been duly proved and allowed, the full amount of such claims, and shall have made proper provision for unclaimed and unpaid deposits or dividends, and shall have paid all the expenses of the liquidation, the superintendent of banks shall call a meeting of the stockholders of such bank giving notice thereof for thirty days in one or more newspapers published in the county where the principal office of such bank is located. * * *" Then stressing the expression "the full amount of such claims * * *," he argues that the expression means both principal and interest. The argument is not convincing. The meaning of the expression contained in the statute is the same whether the particular bank was hopelessly insolvent, or, like the Pan American Bank, temporarily embarrassed, but having assets more than sufficient to pay on the claims the amount of the principal. But, as shown by the decisions cited in Leach v. Sanborn State Bank, 210 Iowa, 613, 231 N. W. 497, 69 A. L. R. 1206, in the former instance no interest would be payable.

Still claiming that the statutes authorize him to pay interest to the depositors in the commercial department, he points to the fact that each department is to be considered as a separate bank (section 23) and, as shown by the facts, in the commercial department there are moneys sufficient to pay the interest. Continuing, he cites the provisions of sections 25, 26, and 27, as showing that in liquidation the funds in each department shall be held solely for the depositors and other claimants of such department. Until such claimants have been paid the principal sum coming to them it will hardly be disputed but that the contention of the defendant is correct. However, he quotes no word or words showing that such requirements of the statute are to the effect that interest is to be paid to such depositors and claimants of any one department to the exclusion of the creditors of the other departments.

The provisions of the statute quoted by the defendant are clearly to the effect that the depositors in any one department, to the extent of their principal, are preferred claimants to the funds and assets of that department. However, merely because certain claimants hold preferred claims does not under the general law entitle them to demand interest before the other creditors have received payment of the principal sums payable to them. People v. American Loan & Trust Co., 172 N. Y. 371, 65 N. E. 200. One who makes a special deposit has a preferred claim, but he is not therefore entitled to interest. Bank of America Nat. T. & S. Ass'n v. California S. & C. Bank, 218 Cal. 261, 22 P.(2d) 704, 712. Furthermore, if we carry defendant's contention to its logical end, it would follow that as soon as the defendant had received in the commercial department more money than necessary to pay the depositors and creditors of that department their principal and interest, it was his duty to pay such sums and terminate the liquidation of that department; and so with each department; and thus have three liquidations instead of one. To so hold is to interpolate many matters not even hinted at in the statute.

[2, 3] It is not claimed that at any place in the Bank Act an express provision is inserted authorizing the payment of interest. However, the defendant relies on the provisions of the Usury Act (2 Deering's Gen. Laws, 1931, Act 3757). Closely connected with the last point is another. The plaintiffs contend that the Bank Act is to be construed as being inclusive and exclusive of the law applicable to this case. We think that contention is sound. Formerly the banking laws of this state were contained in many different statutes. In 1909 they were revised by chapter 76 of the statutes of that year. Since then the latter act has been amended from time to time and at the present the amended revised

statute is a very full and complete statute (1 Deering's Gen. Laws, p. 215, Act 652). In the early case entitled State v. Conkling, 19 Cal. 501, at page 513, the court said: "We do not consider that the rule applicable here is, that this is a repeal by implication as that rule is usually applied; but the principle is, that when the Legislature makes a revision of particular statutes, and frames a general statute upon the subject-matter, and from the framework of the act it is apparent that the Legislature designed a complete scheme for this matter, this is a legislative declaration that whatever is embraced in the new law shall prevail, and whatever is excluded is ignored." That doctrine has since been reiterated many times. Mack v. Jastro, 126 Cal. 130, 133, 58 P. 372; Sponogle v. Curnow, 136 Cal. 580, 584, 69 P. 255; Wood v. Roach, 125 Cal. App. 631, 638, 14 P.(2d) 170; Carter v. Stevens, 208 Cal. 649, 284 P. 217. The fact that the Bank Act was enacted in 1909 and that the Usury Act was enacted in 1919 did not result in an amendment of the Bank Act. In the case entitled In re Washer, 200 Cal. 598, at page 606, 254 P. 951, 954, Mr. Justice Preston noted the enactment of the Bank Act and several others. Then speaking of the effect thereon of the enactment of the Usury Act he said: "These, and perhaps many other statutes, are the result of the best wisdom of our state and involve some of its most important and most cherished functions, and it is not for a moment to be held that this system of beneficent laws was to be set awry by a poorly drafted act meant only to protect the individual necessitous borrower from the rapacity of the more fortunate lender."

We have (1) insolvent estates arising under state insolvent acts; (2) insolvent estates arising under federal bankruptcy acts; and (3) insolvent estates of many different organizations the administration of which is governed by special statutes, such as the Bank Act, Insurance Act, Building and Loan Act, etc. In different jurisdictions the bank acts are similar in some respects, but so far as the writer has observed they are different in other respects. All of the parties in the instant action assert that our Bank Act was copied from the National Bank Act. Generally speaking, that assertion is correct. However, it differs in certain material respects. So do the bank acts in other jurisdictions. Under the National Bank Act the Secretary of the Treasury, the Comptroller of the Currency, and their assistants, are given broad powers. When a national bank becomes insolvent the Comptroller is authorized to take over the bank and proceed with the liquidation thereof. (12 USCA § 192.) That same rule obtains in Massachusetts and obtains in California. While the statute of Iowa is slightly different, nevertheless it has been construed by the Supreme Court of Iowa as being substantially similar to the National Bank Act. Leach v. Exchange State Bank, 200 Iowa, 185, 203 N. W. 31. At an early date Mr. Justice Field, writing the opinion of the court in Cook County Nat. Bank v. United States, 107 U. S. 445, at page 448, 2 S. Ct. 561, 564, 27 L. Ed. 537, stated as follows: "We consider that act as constituting by itself a complete system for the establishment and government of national banks, prescribing the manner in which they may be formed, the amount of circulating notes they may issue, the security to be furnished for the redemption of those in circulation, their obligations as depositaries of public moneys, and as such to furnish security for the deposits, and designating the consequences of their failure to redeem their notes, their liability to be placed in the hands of a receiver, and the manner, in such event, in which their affairs shall be wound up, their circulating notes redeemed, and other debts paid, or their property applied towards such payment. Everything essential to the formation of the banks, the issue, security, and redemption of their notes, the winding up of the institutions, and the distribution of their effects, are fully provided for, as in a separate code by itself, neither limited nor enlarged by other statutory provisions with respect to the settlement of demands against insolvents or their estates." Where that rule obtains it is manifest that the liquidating officer is an administrative government officer of the federal government, or of the state government under which he was appointed, and that his powers and duties are those prescribed in the bank statute and not otherwise. Port Newark Nat. Bank of Newark v. Waldron (C. C. A.) 46 F.(2d) 296. The rule in Cook County Nat. Bank v. United States, supra, which we have set forth, was adopted and followed by the Supreme Court of Massachusetts in Commonwealth v. Allen, 240 Mass. 244, 133 N. E. 625. In Tennessee when a bank becomes insolvent the Superintendent of Banks must apply to a court of equity to be appointed receiver and as such be clothed with the powers of a receiver. Code 1932, § 5969. Receivers appointed under such a statute ordinarily have the powers directly conferred by the statute and additional powers as the arm of the court of equity appointing them. State of Tennessee ex rel. McConnell v. Park Bank & T. Co., 151 Tenn. 195, 268 S. W. 638, 39 A. L. R. 449, therefore, is not controlling in the in-

stant case. In this connection it may be noted that the Bank Act of California, as amended (St. 1903, p. 368), was similar to the Tennessee statute in so far as it provided for the appointment of a receiver. Thereafter, the California Safe Deposit & Trust Company became insolvent and a receiver was appointed. Thereafter George S. Smith obtained permission and brought an action against the bank in liquidation on a written contract containing a promise to pay money. The decision in that case, People v. California, etc., Trust Co., 34 Cal. App. 269, 167 P. 181, is in point as to the powers of a court, but is not controlling in the instant case as to the powers of this defendant. Furthermore, that case rested on section 1917 of the Civil Code; but that section has been repealed.

Before proceeding further it should be noted that the National Bank Act differs from our Bank Act in another material respect. Under the former statute the claimants are given permisison to choose one of two methods of proving their claims. They may either (1) prove their claims before the comptroller of banks or (2) institute actions at law. For this reason various decisions under the National Bank Act regarding the payment of interest on claims proved before the courts are not controlling on the question of interest. Cosmopolitan Trust Co. v. Suffolk Knitting Mills, 247 Mass. 530, 143 N. E. 138, 140. See, also, White v. Knox, 111 U. S. 784, 4 S. Ct. 686, 28 L. Ed. 603.

[4] As stated above, the question before us is, What are the powers and duties of the defendant as Superintendent of Banks in so far as the payment of interest is concerned? The Bank Act is silent on the subject. However, as that act covers the entire field, previous provisions of either the common or statutory law in conflict therewith become no longer operative. Cook County Nat. Bank v. United States, supra; Commonwealth v. Allen, 240 Mass. 244, 133 N. E. 625, 627–628. In this connection the plaintiffs cite and rely on In re Prudential Trust Co., 244 Mass. 64, 138 N. E. 702. The defendant criticizes that case because the court does not therein cite its authorities. The criticism is not well founded. The interpretation of the Bank Act of Massachusetts had been the subject-matter of numerous decisions by the Supreme Court of that state. Commonwealth v. Allen, supra, and cases cited; Cosmopolitan Trust Co. v. Mitchell, 242 Mass. 95, 136 N. E. 403, and cases cited. As stated above, that court had already adopted the rule stated in Cook County Nat. Bank v. United States, supra. Then in the case entitled In re Prudential Trust Co., 244 Mass. 64, 138 N. E. 702, it applied the rule as to the question of interest. Three different trust companies had become insolvent and the commissioner of banks applied to the court to be instructed as to what were his powers—not the powers of courts of equity. The banks involved were departmental institutions. Chapter 172 of General Laws of Massachusetts (Ter. Ed.) provides that trust companies may be formed to transact both a trust business and a savings bank business. Sections 61, 62, and 63 are quite similar to sections 23, 25, 26 and 27 of our Bank Act. Chapter 167 provides for liquidation of banks by the commissioner of banking. Section 34 thereof is practically identical with paragraph 12, section 136, of our Bank Act. As to one of the banks the record showed that the depositors in the savings department had been paid 100 per cent. of the amounts due them when the commissioner took possession, and there were surplus moneys left in that department. Having discussed each section of its Bank Act pertinent to the case before it and although in Massachusetts they have a statute on the subject of interest on judgments (chapter 235, Gen. Laws) in writing its opinion, 138 N. E. 702, at page 706, the court said:

"4. The fourth question is: When are depositors in the savings department paid in full? This question arises on the petition respecting the Hanover Trust Company.

"The pertinent facts are that 100 per cent. has been paid to the depositors in the savings department of that company, a part of sums collected from stockholders' liabilities having been used for that purpose, and that since the payment of such dividend there has been realized from the assets of the savings department a considerable sum, and that there still remain assets of the savings department which appear to be good to a considerable amount, so that there is an excess of assets of the savings department above what is needed to pay to its depositors 100 per cent. of their claims as of the date when the commissioner took possession.

"The depositors in the savings department are entitled only to receive 100 per cent. on the amount of their claims on the date when the commissioner took possession of the company, with all interest or dividends due at that time but without interest since that date. * * *

"It follows that, upon the facts here disclosed, depositors in the savings department are paid in full when they have received 100

per cent. of their deposits on the date when the commissioner took possession, and when so paid have no further claim upon the assets of the savings department or upon the general assets of the company or upon sums received from stockholders' liabilities, and that funds in the savings department in excess of what is necessary to pay depositors in that department in full are to be used to satisfy the claims of commercial depositors."

The defendant cites and relies on In re People, by Stoddard, Superintendent of Insurance, 249 N. Y. 139, 163 N. E. 129. The facts before the New York court were that a Norwegian insurance company was granted permission to transact business in this country on the condition that certain securities for the general benefit of policyholders in the United States should be deposited with the insurance department of New York. Thereafter the company was thrown into bankruptcy. The assets in this country were more than sufficient to pay the claims, both principal and interest, due citizens of the United States, but the total assets of the company were insufficient to pay all of the claimants both in the United States and elsewhere. The court held that the insurance commissioner was bound to pay the American claimants, both principal and interest, and thereafter transfer the balance, if any, to the bankruptcy court in Norway. We think it is apparent that the case is not controlling in the instant case.

Basing our conclusion on the authorities mentioned above, we think it is clear that the defendant under the statute is not entitled to pay interest to the depositors in, and creditors of, the commercial department. Furthermore, in enacting the statute in those terms we think it is clear that the Legislature did not act inadvertently. As will be seen from some of the authorities cited above in some jurisdictions after the liquidating officer has completed his stewardship, a court of equity has entertained an action against the bank to determine the rights of claimants to be paid interest. In such actions all of the interested persons can be made parties. It can also be determined whether any law authorizes the payment of interest; and if so, on what claims. As the claims may fall in different classes the equities of each may be exactly ascertained. As the fund may be limited the rate of interest can be apportioned accordingly. As all claimants will have been paid 100 per cent. of the amount due when the superintendent took charge, the court will be in a position to enter a judgment that will do equity to each separate class. To do these things the statute has not cast on this defendant the duty, nor has it furnished him with the judicial machinery. In addition to questions heretofore intimated many others will arise. Claims in favor of beneficiaries under trusts assumed by the trust department will present one set of questions. Claims of depositors in the savings department under a written form of contract governing rates of interest on such deposits will present other questions. Claims of depositors in the commercial department will present others. And numerous other claims of creditors but not depositors will present yet other questions. 53 C. J. 244, 265, 293, 296, and 312.

[5] As to the second count the findings were in favor of the defendant. The plaintiffs assert that the trial court was in error when in substance it made a finding of fact that it was for the best interests of the depositors and creditors for the continuance of this liquidation by the Superintendent of Banks as liquidating officer of the court. The defendant states that he is a statutory liquidator or receiver of any bank of which he takes possession under the provisions of section 136 of the Bank Act; that that section specifies the manner in which the Superintendent of Banks must liquidate a closed bank; that he has no right or power to carry on this liquidation in any other manner; and that he is under the duty of continuing the liquidation until all of the depositors and creditors have received the full amount of their claims and thereupon it will become his duty to call a meeting of the stockholders and allow them to determine whether he shall be continued as liquidator or whether the stockholders shall carry on the further liquidation themselves. Continuing, he states that he has no power to change the procedure delineated in section 136 of the Bank Act, and respectfully adds that the courts have no such power. The answer is manifestly sound and complete. Under certain circumstances and within a limited period resort may be had to the courts. Section 136, par. 2; section 136a. But there is no claim that such steps were taken.

[6] Closely connected with the last point is the request of the plaintiffs that the defendant be, by the terms of the judgment, directed to transfer any moneys or assets now in the commercial department to the savings department. But, as to that request, we understand the defendant's reply to be that he understands the law to be that he must first pay interest to the commercial depositors and, if he is mistaken, then he desires to receive the directions of the court with which he is ready

to comply. So understanding the defendant's position, we have so framed the judgment as to give the defendant the benefit of the opinion of this court on the subject.

Our attention has not been directed to any conflict in the evidence. All issues of fact were covered by the findings. The errors are contained in the conclusions of law which were carried into the judgment. As shown above, the judgment was in part correct and in part it was erroneous, but it can be so modified as to eliminate all errors. It is therefore ordered that all of the judgment commencing with the words "Now, therefore," in the second paragraph, and ending with the words "* * * dates of payment of said respective claimants," at the end of the last paragraph, be stricken out and that there be inserted in the place of the portion so stricken out the following:

Now, therefore, it is hereby ordered, adjudged, and decreed as follows:

(1) That plaintiffs are entitled to a judgment and decree ordering and directing defendant, as such superintendent and liquidating agent, to transfer any moneys or assets now in the commercial department of said Pan American Bank of California, in liquidation, and any moneys or assets hereafter collected in said commercial department, to the savings department of said bank in liquidation for the purpose of paying claims against said savings department.

(2) It is further ordered, adjudged, and decreed that the defendant has no authority to pay to the depositors and claimants of the commercial department of said bank in liquidation, interest at the rate of 7 per cent. per annum from July 19, 1929, upon the principal amounts of their respective claims against said department of said bank on said date.

(3) That plaintiffs are not entitled to a judgment or decree of this court ordering or directing defendant to forthwith, or at all, sell all or any of the assets of said bank in liquidation now in his possession as liquidating agent thereof.

As so modified, the judgment is affirmed. The plaintiffs will recover their costs on this appeal.

I concur: NOURSE, P. J.

SPENCE, Justice.

I dissent. In my opinion the trial court correctly determined the questions before it, and the judgment should be affirmed for the reasons stated in the dissenting opinion on the companion appeal. Wood v. Rainey (Cal. App.) 33 P.(2d) 702.



WOOD et al. v. RAINEY, Superintendent of Banks.*

Civ. 9337.

District Court of Appeal, First District, Division 2, California.

May 25, 1934.

Hearing Granted by Supreme Court July 23, 1934.

1. Banks and banking ⇐80(3).

Liquidating agent of bank *held* not entitled to pay claimants interest after date Superintendent of Banks took charge, but claimants when paid full amount due on such date were "paid in full" within Bank Act (Gen. Laws 1931, Act 652, § 136).

[Ed. Note.—For other definitions of "Paid in Full," see Words & Phrases.]

2. Banks and banking ⇐80(3).

When depositors and creditors of bank in liquidation have been paid amount due when Superintendent of Banks took charge, under some circumstances it may be that they may assert claim for interest covering period between that date and date of payment, but such cause of action runs in favor of creditors and against bank (Gen. Laws 1931, Act 652, § 136).

SPENCE, J., dissenting.

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by Frank L. Wood and others against Edward Rainey, Superintendent of Banks of the State of California and Liquidating Agent of the Pan American Bank of California, in liquidation. From an adverse judgment, plaintiff appeals.

Modified and affirmed.

Dockweiler, Dockweiler & Finch, Walter E. Burke and Stanley & Lewis, all of Los Angeles, for appellants.

Robbins & Van Fleet and Devlin & Devlin & Diepenbrock, all of San Francisco, amici curiæ on behalf of appellants.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 41 P.2d 328.

Charles Dell Rubin, of Los Angeles, and Colladay, McGarraghy, Colladay & Wallace, of Washington, D. C., amici curiæ for Pacific States Corporation.

Mathes & Sheppard, of Los Angeles, amici curiæ for American Surety Co. of New York.

Sullivan, Roche, Johnson & Barry, of San Francisco, for respondent.

STURTEVANT, Justice.

[1] This is a companion case with Greva et al. v. Rainey (Cal. App.) 33 P.(2d) 697, this day filed. However, the instant action was brought by the stockholders instead of the depositors of the Pan American Bank in liquidation. The appeal is based on the same set of briefs, and the judgment is identical with the judgment in the case of Greva et al. v. Rainey, supra. The complaint was framed in three counts instead of two. The first and third counts are the same as the two counts contained in the complaint in the case of Greva et al. v. Rainey, supra. The additional count in this case is to the effect that the defendant claims the right, and unless restrained he intends, if there are sufficient funds for that purpose, to pay to the creditors and depositors of each of the several departments of the bank 7 per cent. interest on the principal sum of each claim from July 19, 1929, when he took charge of the bank, down to the date of payment. As shown by what we said in Greva et al. v. Rainey, supra, the claimants in the commercial department who have been paid 100 per cent. of their deposits on July 19, 1929, have been paid, within the terms of section 136 of the Bank Act (Deering's Gen. Laws 1931, p. 215, Act 652), in full, and the defendant is not entitled to pay them interest after said date. For the reasons there assigned, and for the following additional reasons, we think the defendant is not authorized to pay interest to other claimants.

The defendant is a statutory officer exercising statutory powers. There is no provision authorizing nor directing the defendant to make such payments. However, by this statement we are neither affirming nor denying that the depositors and creditors may never recover any additional sums as interest.

[2] If and when the depositors and creditors in the instant case have been paid the amounts due them on the day that the defendant entered and took charge of the bank under some circumstances it may be they, or some of them, may assert a claim for interest covering the period elapsing between July 19, 1929, and the date of the defendant's payment. But such cause of action runs in favor of the creditors and against the bank. It was so held as to state banks. People v. American Loan & Trust Co., 172 N. Y. 371, 65 N. E. 200. An examination of the National Bank Act discloses that it is silent on the subject. An examination of the cases discloses that in no single case has it been held that any power or duty, in this behalf, rests on a receiver of a national bank. On the contrary, it was held that the fact that the receiver had funds on hand after having paid all claims as of the date he took charge, did not give rise to a cause of action against him to recover additional claims for interest. Chemical Nat. Bank v. Bailey, 5 Fed. Cas. page 537, No. 2635. The cases, under the National Bank Act, involving the point and in which the action was sustained, were cases brought by the claimants against the insolvent bank. Bank of Bethel v. Pahquioque Bank, 81 U. S. (14 Wall.) 383, 20 L. Ed. 840; Merrill v. National Bank of Jacksonville, 173 U. S. 131, 133, 19 S. Ct. 360, 43 L. Ed. 640; Gamble v. Wimberly (C. C. A.) 44 F.(2d) 329, 332, and 12 U. S. C. A. 305, and Supp. 48. Therefore, we think it is clear that whatever may be the rights of the depositors for reimbursement for interest claimed to have accrued after the defendant took charge of the bank is a subject without the powers and duties of the defendant. It is a subject to be adjudicated in the courts in a proper action to be brought by the depositors and creditors against the bank. But it is not a matter which this defendant is directed or authorized to determine or have determined.

For the reasons which we have indicated, it is ordered that all of the judgment commencing with the words "Now, therefore," in the second paragraph, and ending with the words "* * * dates of payment of said respective claims," at the end of the last paragraph, be stricken out and that there be inserted in the place of the portion so stricken out the following:

Now, therefore, it is hereby ordered, adjudged, and decreed as follows:

(1) That plaintiffs are entitled to a judgment or decree of this court ordering and directing defendant as such superintendent and liquidating agent, to transfer any moneys or assets now in the commercial department of said Pan American Bank of California in liquidation, and any moneys or assets hereafter collected in said commercial department, to

the savings department of said bank in liquidation for the purpose of paying claims against said savings department.

(2) That plaintiffs are not entitled to a judgment or decree of this court ordering or directing defendant to forthwith, or at all, sell all or any of the assets of said bank in liquidation now in his possession as liquidating agent thereof.

(3) It is further ordered, adjudged, and decreed that the defendant has no authority to pay to the depositors and claimants of and against any of the departments of said bank in liquidation, interest at the rate of 7 per cent. per annum from July 19, 1929.

As so modified, the judgment is affirmed. The plaintiffs will recover their costs on this appeal.

I concur: NOURSE, P. J.

SPENCE, Justice.

I dissent. The fundamental question which must be decided in interpreting our Bank Act for the purpose of this appeal and the companion appeal (Greva v. Rainey [Cal. App.] 33 P.(2d) 697) is whether the depositors of a bank are ever entitled to interest on their deposits during the time of liquidation. Under the great weight of authority they are so entitled where the assets are sufficient even though the Bank Act is silent on the subject of interest. People v. California Safe Deposit & Trust Co., 34 Cal. App. 269, 167 P. 181; McGowan v. McDonald, 111 Cal. 57, 43 P. 418, 52 Am. St. Rep. 149; State v. Park Bank & Trust Co., 151 Tenn. 195, 268 S. W. 638, 39 A. L. R. 449; National Bank of the Commonwealth v. Mechanics' National Bank, 94 U. S. 437, 24 L. Ed. 176; Richmond v. Irons, 121 U. S. 27, 7 S. Ct. 788, 30 L. Ed. 864; People v. American Loan & Trust Company, 172 N. Y. 371, 65 N. E. 200; People v. Merchants' Trust Company, 187 N. Y. 293, 79 N. E. 1004; Forschirm v. Mechanics' & Traders' Bank, 206 N. Y. 745, 100 N. E. 1127; Ex parte Stockman, 70 S. C. 31, 48 S. E. 736, 106 Am. St. Rep. 741; Lamar v. Taylor, 141 Ga. 227, 80 S. E. 1085. Appellants rely upon In re Prudential Trust Company, 244 Mass. 64, 138 N. E. 702, but in so far as that case may be said to hold to the contrary, it is opposed to the great weight of authority. While the case of People v. California Safe Deposit & Trust Co., supra, was decided before the repeal of section 1917 of our Civil Code, it would seem immaterial that our general interest statute is now embodied in the so-called Usury Law (Deering's Gen. Laws 1931, Act 3757) rather than in the sections of our Codes.

The next question involves the power and duties, if any, of the Superintendent of Banks with respect to the payment of such interest. Disregarding for the moment the departmental nature of the bank in question and having in mind a nondepartmental bank with assets more than sufficient to pay the principal of all claims against such bank, I believe that the Superintendent of Banks has the power and that it is his duty to pay such interest before calling a meeting of the stockholders as provided in section 136 of the act. Such meeting is not to be called until the depositors have been paid the "full amount" of their claims, and such meeting is for the purpose of allowing the stockholders to decide whether the Superintendent of Banks shall be continued as liquidator or whether an agent shall be selected by the stockholders for the purpose of liquidating the remaining assets. The whole plan assumes that the claims of the depositors have already been fully satisfied before the calling of the stockholders' meeting, and if the depositors are entitled to interest as above indicated, that they cannot be said to have received the "full amount" of their claims unless they have been paid both the principal and interest to which they are entitled. In other words, the Bank Act contemplates a complete rather than a partial liquidation by the Superintendent of Banks between depositors and stockholders and it was not intended that the depositors should be compelled thereafter to resort to actions against the corporation or the stockholders in order to recover such interest. There is nothing to the contrary to be found in Chemical National Bank v. Bailey, 5 Fed. Cas. page 537, No. 2635. The National Bank Act there under consideration differs from our Bank Act in several details. In other ways said act is somewhat similar. The case cited recognizes the right of the depositors to interest during liquidation "not only on strict legal grounds * * * but upon considerations of equity and natural justice. * * *" It is there said: "There is nothing in the provisions of the act under which this fund is to be distributed in conflict with this general rule. While the comptroller is not directed, by express terms, to allow interest to creditors, the act contains no language which, in terms, or by implication, prohibits him from doing so." The opinion discusses the relative functions of the receiver and the comptroller and the analogy between the po-

sition of the comptroller and that of an assignee of an insolvent estate and states that interest should be paid by such comptroller as by such assignee as "the interest is an incident of the debt or claim, and to be paid before distribution of the surplus." The court then discusses the fact that the action was brought as an action in assumpsit. It held that the receiver was not liable in any form of action as he had no control over the assets except to turn them over to the Treasurer of the United States. It is further said: "If an action could be maintained against the comptroller, it would be one to enforce a proper distribution of the fund, and, for this purpose, the action of assumpsit is not an appropriate remedy." This case appears to be more favorable to respondent's contention here than to the contention of appellants. It clearly indicates that the comptroller had the power to pay interest, even though the act was silent on the subject, and also suggests that he might have been compelled to do so in an appropriate action "to enforce a proper distribution of the fund." I believe that the present action was an appropriate one for the purpose, and that the trial court properly declared the manner in which the fund should be distributed by the Superintendent of Banks. The supposed difficulty of determining the rate of interest to which various classes of claimants are entitled during liquidation is solved by the holding in People v. Merchants' Trust Company, 187 N. Y. 293, 79 N. E. 1004. See, also, Ex parte Stockman, 70 S. C. 31, 48 S. E. 736, 106 Am. St. Rep. 741.

The third question is one arising by virtue of the departmental system under which this bank was operating. Assuming that in a non-departmental bank the depositors are entitled to interest where there are sufficient assets, and further assuming that the superintendent of banks has the power and that it is his duty to pay such interest, what then are the rights of the depositors in one department of a departmental bank which department has sufficient assets to pay both the principal and interest due to the depositors in that department as against the depositors of another department of the same bank which last-mentioned department may not have sufficient assets to pay the principal of the claims of its depositors? Sections 23, 25, 26, and 27 of the act clearly indicate that each department must be treated as a separate bank at least until the depositors of said department have been fully paid. From what has been said above, such depositors have not been fully paid until they have received both principal and interest. The cases dealing with preferred and unpreferred claims against an insolvent bank do not appear to be in point.

In my opinion, the trial court correctly determined the questions before it, and the judgment should be affirmed.



139 Cal.App. 81

ROSSLOW v. JANSSEN.

Civ. 9483.

District Court of Appeal, First District, Division 2, California.

June 4, 1934.

1. Master and servant ⇨351.

Denial of motion to terminate employee's action for damages, where employer willfully failed to insure employee, on ground that petition to reopen matter was pending before Industrial Accident Commission, and that employee was insured, although employer had contended to contrary before commission, *held* proper (Gen. Laws 1931, Act 4749, § 29 (b).

2. Master and servant ⇨351.

Denial of motion to continue employee's action for damages, where employer willfully failed to insure employee, on ground that petition to reopen matter was pending before Industrial Accident Commission *held* not abuse of discretion, particularly where such petition was subsequently denied and no error was alleged to have occurred during trial (Gen. Laws 1931, Act 4749, § 29 (b).

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by A. F. Rosslow against E. A. Janssen. From a judgment for plaintiff, defendant appeals.

Affirmed.

See, also (Cal. App.) 29 P.(2d) 287.

Ivan N. Maroevich, of San Francisco, for appellant.

H. C. Burnhill and Francis Gill, both of San Francisco, for respondent.

NOURSE, Presiding Justice.

At the hearing of respondent's motion to dismiss or affirm it was stipulated that the

cause should be submitted on the merits. The appeal is from the judgment following a verdict for respondent. The appeal is presented on the judgment roll supplemented by a stipulation of facts in lieu of a bill of exceptions.

From this stipulation it appears that while the respondent was employed by appellant he was injured; that in proceedings regularly had before the Industrial Accident Commission he was awarded compensation on the basis that appellant had willfully failed to insure his employee; that a review of the order had been denied by the District Court of Appeal; that on the day before the cause was ordered to trial and a jury impaneled the appellant moved the trial court to terminate the proceedings and for a continuance; that these motions were denied upon the understanding that the cause would be tried before the jury and that judgment on the verdict would be suspended pending determination of a new proceeding before the Industrial Accident Commission. The grounds of these two motions were that a petition to reopen the matter had just been filed and was pending before the Industrial Accident Commission, and that appellant had a valid contract of compensation insurance covering respondent at the time of the injury. It further appears that at all times before the Industrial Accident Commission appellant contended that he carried no insurance covering respondent and that, in his verified petition to reopen the proceedings before the Industrial Accident Commission he alleged that he carried insurance covering the respondent, and also that respondent was not an employee covered by the insurance. After the verdict was returned the Industrial Accident Commission denied appellant's petition to reopen the proceedings, and that order became final by a denial of a review by the District Court of Appeal and by the Supreme Court. Thereafter the judgment on the verdict from which this appeal was taken was duly entered. The parties further stipulated that the original award of the Industrial Accident Commission has never been disturbed, set aside, or molested by the Industrial Accident Commission or by the courts.

Though this is an appeal from the judgment, the appellant confines his attack to the denial of his motions to terminate the proceedings and for a continuance. It should be emphasized that these are the only points raised on the appeal; that no error is assigned in the conduct of the trial, the sufficiency of the evidence, or the instructions given or refused.

[1] As to the first point, a termination of the proceedings would have been highly improper. Under section 29 (b) of the Workmen's Compensation Act (Deering's Gen. Laws, 1931, Act 4749), the injured employee was permitted to bring the action for damages in any case where the employer failed to carry compensation insurance, and this right may be exercised independently of any proceedings before the Industrial Accident Commission. Here the issue whether the employee was covered by insurance was joined in the pleadings, and it was an issue which might be determined therein irrespective of the proceeding pending before the Industrial Accident Commission.

[2] A continuance under the circumstances presented was a matter addressed to the discretion of the trial court. Appellant has not shown that he was prejudiced by the denial of his motion. From all that appears the same result would have followed in a trial conducted after the Industrial Accident Commission had refused to reopen the matter. The appellant has failed to show any prejudicial error in either ruling complained of.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



139 Cal.App. 107

TILLANDY et al. v. TITLE GUARANTEE & TRUST CO. et al.

FIRST NAT. BANCORPORATION, Limited, v. TILLANDY et al.

Civ. 9332.

District Court of Appeal, First District, Division 2, California.

June 5, 1934.

1. Mortgages ⇐270.

Evidence *held* to support finding that purchaser of note and trust deed which were obtained by fraudulent representations and were in escrow did not rely upon owner's offset statement and mortgagor's statement.

2. Mortgages ⇐260.

Makers of note and trust deed *held* not estopped from claiming note was obtained by fraud and without consideration as against

one purchasing from payee, notwithstanding mortgagor's statement and offset statement claimed to have been relied on, where purchaser did not rely on contents of either statement and makers showed that they believed note and trust deed were held in escrow and that both statements signed by them were to be delivered to escrow bank.

3. Mortgages ⇐257.

Purchaser of note and trust deed who, after being informed of infirmities in title of payee and that documents were deposited in escrow, telephoned to escrow bank to bring documents to place where it purchased them, *held* not innocent purchaser where note was obtained by fraudulent representations.

4. Appeal and error ⇐1047(3).

Refusal to strike affidavits denying genuineness and due execution of certain documents, filed after conclusion of trial, *held* not prejudicial error, where genuineness and due execution of such documents were subject of many folios of testimony during trial.

5. Pleading ⇐239(2).

Where court gave permission to amend pleadings to defendant who had made point that no affidavit denying genuineness and due execution of certain written statements had been filed, there was no error in also permitting plaintiffs to file affidavits denying genuineness and due execution of such documents, though after conclusion of trial.

6. Pleading ⇐237(4).

Allowing filing of affidavits after conclusion of trial denying genuineness and due execution of certain documents *held* permissible under rule allowing amendments to conform to proof, in action involving rights under note and trust deed alleged to have been obtained by fraudulent representations (Code Civ. Proc. § 470).

7. Appeal and error ⇐762.

Point not made in opening brief but made in reply brief may not be sustained.

8. Appeal and error ⇐762.

Point made in reply brief may not be sustained where matter was not pleaded and was not put in issue by pleadings.

9. Mortgages ⇐257.

Makers of note and trust deed obtained by fraud and placed in escrow *held* entitled to prove true facts as against pledgee and its transferee as against contention that transferee, managed by same persons as bank making loan on note as security, was entitled to rights which such bank had (Civ. Code, § 2091).

Appeal from Superior Court, Los Angeles County; Minor Moore, Judge.

Actions by Joseph Tillandy and another against the Title Guarantee & Trust Company, as trustee, and others, and by the First National Bancorporation, Limited, against Joseph Tillandy and others were consolidated. From an adverse judgment, the Title Guarantee & Trust Company, as trustee, and others and the First National Bancorporation, Limited, appeal.

Affirmed.

Andrew J. Copp, Jr., of Los Angeles, for appellants.

Brooks Gifford and Wm. E. Fox, both of Pasadena, for respondents.

STURTEVANT, Justice.

On August 16, 1930, B. P. Hargrave, as party of the first part, and Joseph Tillandy and wife, as parties of the second part, entered into an executory contract having for its object the operation of certain oil wells. As part of the same transaction, Mr. and Mrs. Tillandy executed their promissory note in the sum of $12,500 payable to Mr. Hargrave. By the terms of the note, $1,000 became due and payable on September 25, 1930. To secure that note they executed a deed of trust naming Title Guarantee & Trust Company as trustee. At the same time they agreed to open an escrow with the Citizens' State Bank of Long Beach and that the note and trust deed would be deposited with the Citizens' State Bank, together with written instructions. Mr. and Mrs. Tillandy delivered their papers into the hands of Mr. Hargrave, who promised to deliver the same into the hands of Citizens' State Bank of Long Beach. As soon as the bank received the trust deed, it forwarded the same to the recorder, and it was thereafter recorded. On October 14, 1930, Mr. Hargrave sold the note and trust deed to First National Bancorporation. After the Bancorporation purchased the note, it made a demand for payment, and, the note not being paid, it commenced proceedings to foreclose the trust deed. Thereupon, Mr. and Mrs. Tillandy commenced an action in rescission and for cancellation of the note and trust deed. The First National Bancorporation appeared and answered. It also commenced another action in which it inserted two counts. In one it sought to recover the deficiency after the sale of the property covered by the trust deed. In the other count it sought to recover directly on the promis-

sory note. In the latter action Mr. and Mrs. Tillandy appeared and answered. Mr. Hargrave answered and filed a cross-complaint. His cross-complaint was answered by both banks and by Mr. and Mrs. Tillandy. For the purposes of trial and appeal both actions were consolidated. Thereafter the trial court made findings in favor of Mr. and Mrs. Tillandy and against the First National Bancorporation. It also made findings against Mr. Hargrave. From the judgment entered thereon no appeal was taken by Mr. Hargrave. However, the First National Bancorporation appealed from the judgment and from the order denying it a new trial, and also from an order refusing to strike from the files certain affidavits. Other facts will be stated in the appropriate place as we proceed. For the purposes of this opinion Mr. and Mrs. Tillandy will be referred to as plaintiffs and the First National Bancorporation will be referred to as defendant.

The court found that, while the defendant First National Bancorporation and the defendant Banccorporation of the United States are separate entities, they are associated in the same offices and managed by the same officers, the Kronick brothers. It also found that the note and trust deed were obtained by the fraudulent representations of B. P. Hargrave; that the plaintiffs received no consideration; that with knowledge of all of these facts Banccorporation of the United States, one of the defendants, made a loan on the security of said document, and, after the maturity of the note, First National Bancorporation, the other defendant, purchased said documents from B. P. Hargrave for $1,500 in cash, $1,775 the amount of said loan, and $500 as the value of an equity in a certain lot located in Los Angeles; that at the time said loan was made both the lender and the subsequent purchaser knew said note and trust deed were held in an escrow by the Citizens' State Bank of Long Beach and knew the terms of said escrow; that until November 20, 1930, the plaintiffs were at all times acting under the belief and the representations of B. P. Hargrave that their note and trust deed were in the escrow opened with the Citizens' State Bank of Long Beach, and that both the mortgagor's statement and the offset statement were required by said escrow holder; and the plaintiffs did not know that, contrary to the terms of the escrow instructions, their note and trust deed were being pledged, sold, or delivered to any person.

In its first point the defendant contends that many of the findings are not supported by the evidence, and enumerates specifically the findings attacked. However, it frankly states that the most of the findings complained of were to the effect that the defendant had notice of the fact that Hargrave obtained the note and deed of trust from plaintiffs by fraud and without consideration. Continuing, the defendant earnestly contends that the evidence does not support those findings, but was contrary thereto. The contention has not a particle of merit in this particular case. In the first place, Mr. Howard Kronick, as the officer of the defendant corporation, took the stand and gave the evidence in its behalf. As one reads the cold print, it is apparent that on very material subjects his evidence does not give the impression of veracity. In deciding the case, the trial judge prepared a written opinion. In that document he makes it very clear that he did not believe the witness. On the other hand, the plaintiffs gave testimony which was apparently candid. Furthermore, they called to the stand Mr. Hargrave. In very short he seemed inclined to tell the facts just as they had happened and seemed desirous of making reparation for the injuries he had caused. Under these circumstances, there is an abundance of evidence in the record which, if the trial court believed it and from its findings we must assume that it did, gave entire support to the findings complained of.

[1] Further complaining of the findings, the defendant specifies those that were to the effect that it did not rely upon the owner's offset statement and the mortgagor's statement. What we have just said regarding the evidence is also applicable to this contention. However, there are these additional facts. Soon after the plaintiffs had executed the note and trust deed above mentioned, Mr. Hargrave commenced his endeavors to sell the same. He applied to Mr. Stone for assistance. Mr. Stone asked for a mortgagor's statement. Mr. Hargrave sent his agent to the Tillandys, and they executed a statement which was delivered to Mr. Hargrave. Later, when Mr. Hargrave was attempting to sell the note and trust deed to this defendant, he called at its office and held conversations with Harry B. Kronick and Howard H. Kronick, its officers. Mr. Hargrave testified that they inquired into all of the facts regarding the transaction. He testified in effect that he informed them of the contents of the escrow agreement with the Citizens' State Bank of Long Beach and of the executory agreement hereinabove mentioned. He also testified that he told them the note and trust

deed were then in the escrow with the Citizens' State Bank of Long Beach. While so carrying on those conversations, the defendant asked for an owner's offset statement. One of the officers produced a blank, wrote the last paragraph, and handed it to Mr. Hargrave. Other blanks were not filled at all. In that form Mr. Hargrave took the document to Mr. and Mrs. Tillandy, who signed it and swore to it before a notary public. Thereafter he took it back to the defendant and Mr. Kronick did the directing and Mr. Hargrave did the writing and the blanks were filled in. We have italicized the items so inserted in the blank. When the document was presented in court, excepting the italicizing, it was as follows:

"Gentlemen: In compliance with your request will say that I am the owner of the property covered by a Trust Deed executed by *Joseph Tillandy & Anna Tillandy* recorded in Book *1101, Page 367* of *Off.* Records Records of *Fresno* County, and covering *Lots 15, 16, 17, 19 Blk 14. Coalinga Fresno Co. California.* and securing note for *$12500.* executed by *Joseph & Anna Tillandy* in favor of *B. P. Hargrave* dated *Aug. 16–30.*

"That the unpaid balance of the note secured by said Trust Deed is *$12500.*

"That the interest on said note has been paid to—

"That the rate of interest is 7% per annum;

"That the makers of the note secured by said Trust received full and valid consideration therefor, and said Trust Deed and note secured thereby are valid.

"That No part of the principal or interest has been paid except as herein stated;

"That I have no offsets, claims, or defenses against said note except as stated above.

"I understand that the said note and Trust Deed is being assigned and that the assignee's name and address is *Banccorporation of U. S.*

"I make this statement for the benefit and protection of the Bank, and *Banccorporation of U. S.*, said assignee, with the understanding that you both are relying herein in the purchase and assignment of the said note and Mortgage

"Trust Deed—We hereby affidavit that the names Joseph Tillandy & Anna Tillandy, mentioned in C. T. No. 112073 is are the same persons as the undersigned.

"[Signed] Joseph Tilandy
"[Signed] Anna Tilandy

"Signed and sworn to before me this 12th day of Sept., 1930.

"[Signed] Emma L. Everest.
"Notary Public in and for Los Angeles County, State of California
"[Seal] [Notary Acknowledgment.]"

Under these circumstances, we think it is clear it cannot be said that the finding complained of was not supported by the evidence.

[2] In its next point the defendant asserts that the plaintiffs are estopped from claiming that the note in question was obtained from them by fraud and without consideration. It sets forth both the mortgagor's statement and the offset statement, and claims that it relied thereon. But, as we have just shown, the trial court made a finding that defendant did not rely on the contents of either statement. There was evidence that the defendant was not ignorant of, but was fully informed of, the true facts. Furthermore, the plaintiffs introduced evidence to the effect that at all times down to November 20, 1930, they believed their note and trust deed were held in the escrow by Citizens' State Bank and that both statements signed by them were to be delivered to that bank. Such a set of facts do not constitute an estoppel. 10 Cal. Jur. 627.

In slightly different methods of claiming an estoppel, the defendant asserts that one who permits an instrument acknowledging the priority of a lien to be recorded is thereafter precluded from contradicting it as against innocent purchasers for value. Conceding the soundness of the point, it has no application to the facts of this case, as the court found that the defendant was not an innocent purchaser but that it purchased with knowledge of all of the facts.

[3] That reply is equally applicable to the contention that, where the true owner holds out another as having power to dispose of the owner's property and innocent parties are thus led into dealing with such apparent agent, such innocent parties will be protected. Furthermore, it is difficult to understand how this defendant can claim to be an innocent purchaser. After being informed of the infirmities in the title of B. P. Hargrave to the note and trust deed and that they were deposited with the Citizens' State Bank, in escrow, it telephoned to that bank to bring those documents to Los Angeles, and there defendant purchased them.

[4-6] In its answer the defendant pleaded the execution of the mortgagor's statement and the offset statement. That answer was

filed May 8, 1931. About seven months later, and after the conclusion of the trial, the court permitted and the plaintiffs filed affidavits denying the genuineness and due execution of those documents. The defendant moved to strike out the affidavits. The motion was denied. From the order denying the motion a separate appeal was taken. We see no reversible error in the order. During the trial, without objection the genuineness and due execution of said documents were the subject of many folios of testimony. After the trial had been completed, under the facts of this record, it was an idle act to file the affidavits, and the order refusing to strike them could not prejudice this defendant.

In what we have just said about the belated order, we have assumed that it was error. However, we think that certain facts show it was not. In its supplemental argument the defendant asked permission to amend its pleadings. During other portions of the argument, a point had been made that no affidavit had been filed denying the genuineness and due execution of the said written statements. As a part of its written opinion rendered in deciding the actions, the trial court gave the defendant permission to amend as requested, and, as a part of that order and in effect as a condition therein, it gave permission to the plaintiffs to file the affidavits. The court did not err. 21 Cal. Jur. 191. Furthermore, the order last named was in the nature of allowing amendments to conform to the proof, and under that theory it was also permissible. Code Civ. Proc. § 470.

[7-9] In its reply brief the defendant asserts that in any event it is entitled to the rights which Banccorporation of United States had. The point was not made in the opening brief, and for that reason it may not be sustained. It was not pleaded and was not put in issue by the pleadings, and for that additional reason it may not be sustained. Finally, on the facts the same conclusion must be reached. In one office the business of several banks is conducted. Kronick brothers are managing officers of all of those banks. When B. P. Hargrave applied for a loan tendering the note as security, the Kronick brothers, acting for Banccorporation of United States, one of said banks, made the loan. When Hargrave offered to sell the note, his offer was taken up by Kronick brothers as officers of this defendant, the First National Bancorporation. The loan was applied for September 4, 1930. It was finally granted September 15, 1930. In the meantime Kronick brothers had been informed of all of the facts and the Citizens' State Bank had been induced to transfer the note and trust deed to Security Title Insurance & Trust Company of Los Angeles, with whom an escrow was opened for the purpose of making the loan. Such facts in no way prevent the Tillandys from proving the true facts as against the claims of the pledgee (Civ. Code, § 2991) and this defendant as its transferee.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



2 Cal.App.(2d) (Supp.) 751

PEOPLE v. McCLAIN.

C. A. 1030.

Appellate Department, Superior Court, Los Angeles County, California.

June 2, 1934.

1. Druggists ⇐12.

Complaint charging defendant with permitting sale of drugs and medicine by unregistered person at store of which defendant was "manager" *held* not defective for failure to allege defendant was "proprietor," since store manager can be properly charged with violating statute (St. 1933, p. 2198, § 12).

2. Druggists ⇐5.

Aspirin is "drug or medicine" sale of which is covered by Pharmacy Act prohibiting sale of drugs and medicines by unregistered persons (St. 1933, p. 2198, § 12).

[Ed. Note.—For other definitions of "Drug or Medicine," see Words & Phrases.]

3. Druggists ⇐5.

To bring article within exception of Pharmacy Act provision that act does not apply to registered, trade-marked, or copyrighted proprietary medicines registered in United States Patent Office, such article must be "proprietary medicine" and must be registered, trade-marked or copyrighted, registered in United States Patent Office (St. 1933, p. 2198, § 12).

"Proprietary medicine" is one which maker has exclusive right to manufacture, and which is labeled or otherwise marked

with his name. This does not mean that composition of medicine itself must be patented, but it must either be made by secret formula, or maker must have some exclusive process of manufacture, by which exceptional virtues are imparted to his product as distinguished from other preparations of same sort.

[Ed. Note.—For other definitions of "Proprietary Medicine," see Words & Phrases.]

4. Druggists ⇐12.

In prosecution for violating Pharmacy Act by permitting sale of aspirin by unregistered person in store of which defendant was manager, question whether aspirin is proprietary medicine within exception stated by statute is of evidentiary nature, requiring for solution more than mere statement of name or chemical composition of substance (St. 1933, p. 2198, § 12).

5. Druggists ⇐12.

In prosecution for violating Pharmacy Act by permitting sale of aspirin by unregistered person, evidence *held* not to show that aspirin sold was proprietary medicine within exception stated by statute (St. 1933, p. 2198, § 12).

Evidence showed that "Bayer's Aspirin" and "St. Joseph's Pure Aspirin Tablets" were sold, that they had been advertised for years, and that different manufacturers differed in method of manufacture and percentage of ingredients going to make up tablets, and boxes of tablets sold were introduced in evidence. On boxes containing Bayer Aspirin Tablets was printed statement that "Aspirin is the trademark of Bayer manufacture of Monoaceticacidester of Salicylic acid."

6. Criminal law ⇐419, 420(12).

Statements on boxes containing aspirin tablets could not be regarded as proof of facts stated in determining whether article was proprietary medicine within exception in statute prohibiting sale of drugs and medicines by unregistered persons, since such statements were hearsay (St. 1933, p. 2198, § 12).

7. Druggists ⇐12.

While two provisions of Pharmacy Act regarding proprietary and trade-marked aspects of medicines excepted from operation of statute are independent so that proof of either might be offered without first producing the other as foundation, both must be proved to show exception (St. 1933, p. 2198, § 12).

8. Druggists ⇐12.

In prosecution for violating Pharmacy Act by permitting sale of drugs and medicines by unregistered persons, burden is on defendant to show that article sold was proprietary medicine within statutory exception (St. 1933, p. 2198, § 12).

9. Criminal law ⇐1170(1).

Where, in prosecution for violating Pharmacy Act by permitting sale of drugs and medicines by unregistered person, evidence was not sufficient to show that medicines sold were proprietary within statutory exception, exclusion of evidence as to their trade-marked character was harmless (St. 1933, p. 2198, § 12).

10. Criminal law ⇐330.

Where subject-matter of negative averment in indictment, or fact relied on by defendant as justification or excuse relates to him personally, or otherwise lies peculiarly within his knowledge, general rule is that burden of proof as to such averment or fact is on him.

11. Druggists ⇐12.

In prosecution for violating Pharmacy Act by permitting sale of drugs and medicines by unregistered person at store of which defendant was manager, defendant had burden to show that person selling articles was registered pharmacist or assistant pharmacist (St. 1933, p. 2198, § 12; St. 1905, p. 539, § 10; St. 1933, p. 2199, § 17).

BISHOP, J., dissenting.

Appeal from Justice's Court of San Jose Township; U. E. White, Justice.

J. H. McClain was convicted of violating the State Pharmacy Act, and he appeals.

Affirmed.

Raymond F. Body, of Los Angeles, for appellant.

Leonard Comegys, of Los Angeles, for respondent.

SHAW, Presiding Judge.

This case, like People v. Garcia, 32 P.(2d) 445, and People v. Arthur, 32 P.(2d) 1002, recently decided by us, arises under the State Pharmacy Act (St. 1905, p. 535), as amended in 1933 (St. 1933, p. 2192). The complaint here contains three counts, each charging that the defendant permitted the sale of "drugs and medicines, to-wit: aspirin," by an unregistered person, at a store or shop of which defendant "was the manager."

[1] Attack is made on the complaint because it does not allege that defendant was the proprietor of the store where the sale

occurred. The same point was considered in People v. Arthur, supra, where we upheld the complaint on the ground that the manager of a store can be properly charged with violating section 12 of the act, as amended by St. 1933, p. 2198, which makes it unlawful for any person to permit the sale of drugs and medicines "in his or her store" by unregistered persons. We are satisfied with that decision and adhere to it.

[2, 3] The article sold here was aspirin. This is a drug or medicine, and its sale is covered by the Pharmacy Act. People v. Garcia, supra. Defendant contends that the aspirin sold in this case was shown by the evidence to be a proprietary medicine, and therefore excepted from the act by section 12. The question what evidence is necessary to show that a medicine is proprietary was not decided in People v. Garcia, but its solution is required by the record here. The provision of section 12 of the act as amended, on which defendant relies, reads as follows: "Nor does this act apply to registered, trade-marked, or copyrighted proprietary medicine, registered in the United States Patent Office, but does apply to the sale by or through any mechanical device, of drugs, medicines and proprietary medicines registered or trade-marked in the United States Patent Office. Nor does this act apply to the sale of proprietary medicines, when manufactured under the supervision of a registered pharmacist in the State of California, for which trade-marks may have been filed with the Secretary of State of California, by merchants possessing a license issued by the Board of Pharmacy as described in section 16 of this act." The last sentence of this quotation is important here only because it indicates that the words accompanying the term "proprietary medicine" in the sentence first quoted were not intended to define that term, but to impose additional limitations on the articles described by the exception. To bring an article within the exception stated by this first sentence, two things are necessary: (1) It must be a proprietary medicine, and (2) it must be "registered, trade-marked, or copyrighted, * * * registered in the United States Patent Office."

The term "proprietary medicine" has received considerable attention from the courts. Its first appearance in a statutory provision seems to have been in the United States revenue laws. The case of Ferguson v. Arthur, 117 U. S. 482, 488, 6 S. Ct. 861, 29 L. Ed. 979, involved a tariff on imported medicinal preparations "recommended to the public as proprietary medicines, or prepared according to some private formula or secret art as remedies or specifics for any disease," and related to a preparation designated by its manufacturers as "Henry's Calcined Magnesia." These words were blown in the bottle and printed on a label which also named the manufacturer, referred to the contents as "their calcined magnesia," and stated that certain named persons were the sole agents for its sale. Accompanying the bottle was a circular which extolled the medicinal virtues of the product and stated it was made by an improved process of manufacture. The court held that this preparation was dutiable under the statute, although it appeared that calcined magnesia was a well-known medicinal preparation which in its ordinary form sold for much less than Henry's, saying: "We cannot doubt that this was an article recommended to the public as a proprietary medicine, within the statute. It may fall within that clause, without being prepared according to some private formula or secret art, as a remedy for disease. The statute is in the alternative. * * * It was undoubtedly to reach just such medicinal preparations as this—the monopoly of a particular person, commanding a price due to a special mode of manufacture, sold in bottles, having a name attached identifying the manufacturer as the proprietor of all that imparted the special merit and produced the special price—that the special revenue tax was laid." The court also quoted the dictionary definitions of proprietary as "belonging to ownership" or "belonging or pertaining to a proprietor," "relating to a certain owner or proprietor." There are several cases in the lower federal courts following this case, one of which goes so far as to hold that labeling plasters as "Johnson's Belladonna Plasters" amounted to a holding out to the public that they were proprietary, because "Johnson's" plasters necessarily belong to Johnson. Johnson & Johnson v. Herold (C. C.) 161 F. 593, 605. The rulings in all of these cases are distinguishable here on the ground that the statute to which they related required only that the preparation be recommended or held out as a proprietary medicine, and their effect is merely that the manufacturer does this if he claims them as proprietary, whether his claim be true or not. Here, under the Pharmacy Act, we are not concerned with the manufacturer's claims, but with the question whether the medicine is proprietary in fact. However, the language we have quoted from Ferguson v. Arthur, clearly implies that to be proprietary a medicinal preparation must

be a monopoly, that is, some person must have the exclusive right to its manufacture, but this may be true even though the article is similar to those made by others, if it has a special merit by reason of some special and exclusive mode of manufacture of which the manufacturer is the owner. The definition of proprietary medicine in this case has been referred to with approval in cases dealing with pharmacy statutes which contain provisions excepting proprietary medicines from their operation. State v. F. W. Woolworth Co., 184 Minn. 51, 54, 237 N. W. 817, 818, 76 A. L. R. 1202; Tiedje v. Haney, 184 Minn. 569, 575, 239 N. W. 611, 613; State v. Jewett Market Co., 209 Iowa, 567, 570, 228 N. W. 288, 289. In State v. F. W. Woolworth Co., the court referred to the facts that the preparation sold bore no distinctive name, was labeled as a U. S. P. preparation, and came within the U. S. P. formula, as showing that it was not a proprietary medicine, although there was testimony that it was of superior quality and made by a special secret process. In Tiedje v. Haney, the court said that a medicine cannot be considered as proprietary unless the manufacturer's name is on the package containing it. In McHenry v. Royal Neighbors, 211 Mo. App. 230, 236, 242 S. W. 147, 149, where it was claimed that an applicant for life insurance had falsely answered a question as to his use of proprietary medicines, the court quoted with approval a definition of proprietary articles as "manufactured articles which some persons have an exclusive right to make and sell." In Riggs v. Hot Springs, 181 Ark. 377, 381, 26 S.W. (2d) 70, 72, the court was considering an ordinance imposing a license tax on manufacturers of patent medicines, and declared that where a medicine "is prepared from a secret formula and is placed in containers * * * for sale, to be used without further preparation, and is labeled so that it may be for immediate use, it is a matter of common knowledge that such remedies are called 'patent' or 'proprietary' medicines."

From all these authorities and the usual meaning of the words, we conclude that a proprietary medicine is one which the maker has the exclusive right to manufacture and which is labeled or otherwise marked with his name. This does not mean that the composition of the medicine itself must be patented, but it must either be made by a secret formula or the maker must have some exclusive process of manufacture by which exceptional virtues are imparted to his product as distinguished from other preparations of the same sort.

[4] In State v. Jewett Market Co., 209 Iowa, 567, 228 N. W. 288, and State v. Zotalis, 172 Minn. 132, 214 N. W. 766, it was held, apparently with scant, if any, consideration of the evidence, that aspirin is not a proprietary medicine, under pharmacy statutes containing exceptions similar to that we are considering. But we regard the question as one of an evidentiary nature, requiring for its solution more than a mere statement of the name or chemical composition of the substance.

Here the testimony showed that "Bayer's Aspirin" and "St. Joseph's Pure Aspirin Tablets" were sold; that the former had been advertised and sold to the public for "many years," and the latter for "several years." A witness stated that different manufacturers differed in the method of manufacture and the percentage of other ingredients which go to make up the tablet. The boxes of tablets sold were also introduced in evidence. On the tablets of Bayer manufacture was stamped the mark "Bayer"; on the boxes containing them was printed "Bayer-tablets of Aspirin Genuine," with directions for use, a reproduction of the marks on the tablets and the statement "Aspirin is the trademark of Bayer manufacture of Monoaceticacidester of Salicylic acid. Made in U. S. A. The Bayer Company, Inc., 170 Varick St., N. Y." Inside of each box was a leaflet containing directions for use, a representation of the box top and of the marks on the tablets, and the words "Bayer tablets and capsules of aspirin. Look for the Bayer cross. Unless you see the name Bayer on tablets you are not getting the genuine Bayer product prescribed by physicians since 1899." On the St. Joseph's aspirin tablets was stamped the word "Aspirin." On the box was printed "St. Joseph's Genuine Pure Aspirin St. Joseph Company New York-Memphis" and inside was a leaflet containing "Directions St. Joseph's Pure Aspirin."

[5, 6] All this falls short of a showing that the aspirin sold was a proprietary medicine within the meaning which we have placed upon that term, even if we accept the statements on the boxes and leaflets as true. But those statements were introduced merely to show the articles sold, and cannot be regarded as proof of the facts stated, being, for that purpose, purely hearsay. Such statements had a different standing in Ferguson v. Arthur, supra, because there the question was merely whether the medicine was held

out as a proprietary medicine, not whether it actually was one. The labels here are of interest only to the extent that they show that the maker's name was on the product sold.

[7-9] The defendant sought to introduce evidence of certain trade-marks pertaining to the brands of aspirin sold, and this evidence was excluded on his statement that he had no further showing to make regarding the proprietary character of these articles than that which we have above stated. While the two provisions of section 12, as amended, regarding the proprietary and the trademarked aspects of the medicines excepted from the operation of the act are independent, so that proof of either might be offered without first producing the other as a foundation, yet both must be proved to show an exception. The burden of proof in this matter was on defendant, and in view of the fact that there was not evidence sufficient to show that the medicines in question were proprietary, no harm could have been done by the exclusion of evidence as to their trademarked character.

[10, 11] In each count it is charged that defendant permitted the sale of drugs and medicines by a person "not a registered pharmacist or assistant registered pharmacist." The prosecution produced no evidence to show that this person was not a registered pharmacist or assistant pharmacist, and the defendant offered no evidence upon the subject. The defendant now contends that the burden of proving the fact in this matter was upon the prosecution, although he concedes that if the question had been as to his own personal status, the burden would have been upon him to show that he was registered. The rule on this subject is thus stated in 16 Corpus Juris 530: "Where the subject matter of a negative averment in the indictment, or a fact relied upon by defendant as a justification or excuse, relates to him personally or otherwise lies peculiarly within his knowledge, the general rule is that the burden of proof as to such averment or fact is on him." A similar statement is found in 8 Cal. Jur. 30, and this rule has been approved in many California cases, some of which are People v. Boo Doo Hong, 122 Cal. 606, 55 P. 402; People v. Quarez, 196 Cal. 404, 409, 238 P. 363; People v. Osaki, 209 Cal. 169, 191, 286 P. 1025; People v. T. Wah Hing, 47 Cal. App. 327, 331, 190 P. 662; People v. Ross, 60 Cal. App. 163, 167, 212 P. 627; People v. Moronati, 70 Cal. App. 17, 22, 232 P. 991; People v. Velasquez, 70 Cal. App. 362, 367, 233 P. 359. In all of the California cases which we have examined, the question related to the personal status of the defendant; but the rule is not limited to such matters. It extends to all matters peculiarly within his knowledge. In People v. Nedrow, 16 Ill. App. 192, 196, this rule was applied to a case where the charge was that the defendant, not being or having in his employ a registered pharmacist, kept a pharmacy in violation of the Illinois Pharmacy Law, the court saying: "If the defendant was a registered pharmacist, or employed, and placed in charge of his pharmacy or store, a registered pharmacist, it was a matter peculiarly within his knowledge and could have been very easily proved by him by the production of the certificate of registration which the law required him to obtain before he could retail, compound, or dispense drugs, medicines or poisons. Not having produced such a certificate, the averment of the complaint, of the defendant not being, or having in his employ, a registered pharmacist, is taken as true."

The provisions of our pharmacy law show that this rule should be applied here. It provides for the examination and registration of pharmacists and assistant pharmacists by the state board of pharmacy and for the issuance of certificates of such registration to the persons found qualified, which must be annually renewed. The secretary of the board is required to keep a book in which shall be entered a record of all persons registered under the act. Section 10 of the act (St. 1905, p. 539) requires that "every person upon receiving a certificate of registration under this act, or who has heretofore received a certificate of registration in this state, shall keep his last receipt for re-registration, conspicuously exposed in his place of business." In section 17, as amended by St. 1933, p. 2199, there is a provision that "it shall be the duty of the owner or manager of any drug store or other store retailing drugs, medicines or poisons when called upon by an officer, or by a member of the Board of Pharmacy, or a duly authorized inspector, to furnish said officer, member of the Board of Pharmacy or duly authorized inspector with the names of the owner or owners or manager or managers and employees together with a brief statement of the capacity in which said persons are employed in said stores." In view of these provisions of the law, it is clear that if any of defendant's employees are registered, the fact must be peculiarly within his knowledge. Their certificates of registration are always before him in his store, so that he can easily ascertain all data necessary to make proof of their

registration. While the prosecution might also learn and prove the fact by means of the record of the state board, yet its burden would be greater because of the necessity of making a complete search of the records of the board to establish the nonexistence of the registration. Moreover, the same situation as to defendant's own registration does not prevent the application of the rule to him, as pointed out in People v. Velasquez, supra.

The judgment and order appealed from are affirmed.

FOX, J., concurs.

BISHOP, Judge (dissenting).

I dissent. Borrowing the words from State v. Donaldson (1889) 41 Minn. 74, 42 N. W. 781, 784, the question before us is "Whether the term 'patent and proprietary medicines' is to be understood in a strict and technical sense, as limited to those in the preparation of which there is an exclusive right of property in some proprietor * * * or whether it is used in a popular and more extended sense, as including all preparations prepared and sold throughout the country in original packages, as patent medicines are." I am persuaded that our statute uses the term in the popular and more extended sense, because (see State v. Donaldson, supra) some thirty states have statutes so similar to ours that it is evident they are cut by a common pattern, and in the following cases the validity of the statutes has been weighed with "proprietary medicines" in the scale, employed not in the technical, but in the popular sense: State v. Donaldson, supra; Tiedje v. Haney (1931) 184 Minn. 569, 239 N. W. 611; Noel v. People (1900) 187 Ill. 587, 58 N. E. 616, 52 L. R. A. 287, 79 Am. St. Rep. 238; Kentucky Board of Pharmacy v. Cassidy (1903) 115 Ky. 690, 74 S. W. 730; State v. Wood (1927) 51 S. D. 485, 215 N. W. 487, 54 A. L. R. 719, and State v. Childs (1927) 32 Ariz. 222, 257 P. 366, 54 A. L. R. 736.

Had I any doubt as to the meaning properly to be given the term as it appears in this penal statute, I would resolve the doubt in favor of that construction which did not bring it within the statute. The English language is so rich in words that the Legislature can easily define a crime and a person should not be held to be a lawbreaker on doubtful interpretation. Here, to my mind, both the doubt and the most acceptable interpretation bring us to the same result. I am of the opinion the judgment should be reversed.

1 Cal.(2d) 131

In re PUETT'S ESTATE.

WILSON v. CLOTFELTER.

L. A. 14396.

Supreme Court of California.

June 22, 1934.

1. Wills ⇐466.

Particular words, phrases, and provisions in will should be subordinated to testator's testamentary scheme or general intention.

2. Wills ⇐572.

Testamentary gift of "all personal property" in apartment *held* exclusive of notes and stamp and coin collection usually kept in apartment during testator's lifetime, where express purpose of gift was to provide furnished home for legatee and notes and collection were not in apartment at testator's death.

3. Wills ⇐490.

Evidence in proceeding for distribution of property under will giving legatee all personal property in testator's apartment sustained finding that notes and stamp and coin collection were not in apartment at time of testator's death.

4. Wills ⇐572.

Will giving testator's personal property in apartment to legatee *held* referable to property in apartment at date of testator's death.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Proceedings by U. T. Clotfelter, as executor of the last will and testament of William J. Puett, deceased, for an order of ratable distribution of the estate, in which Lillian M. Wilson petitioned to have certain personal property turned over to her. From an order denying the petition, petitioner appeals.

Affirmed.

Chase, Barnes & Chase, of Los Angeles, for appellant.

Richard Hartley, of Los Angeles, for respondent.

WASTE, Chief Justice.

William J. Puett died testate on January 13, 1932. At the time of his death he was the owner of an apartment in an "own-your-own" or commonly designated "community" apartment house. Through the medium of an holographic will, of which the respondent is the duly appointed and acting executor, the testator made several specific bequests and, in addition, disposed of the residuum of his estate to designated persons. Among the objects of his bounty is the appellant, a sister of his predeceased wife. The fifteenth paragraph of his will reads as follows: "To provide a furnished home for Lillian M. Wilson [appellant] of Elizabeth, New Jersey, I give and bequeath to her all my right, title and interest in the 'Mira Monte Terrace,' a corporation, my certificate of membership therein Number nine (9) Apartment 'R,' in the building owned by that Company *and all the personal property in said apartment 'R.'*"

The present controversy centers about the interpretation to be given to the italicized portion of the foregoing provision. However, before proceeding to a discussion of the issue, it should be stated that during the course of probate the respondent executor petitioned for and procured an order of ratable distribution under which order, as amended, nunc pro tunc provision was made, in accordance with the terms of the will, for the distribution to appellant of apartment "R" and "all the personal property in said apartment R."

[1, 2] Contending that the phrase "all the personal property in said apartment R" should be so construed as to include a tin box containing two promissory notes, aggregating $5,500, and a stamp and coin collection usually kept in the apartment during the testator's lifetime, the appellant petitioned the probate court for and procured an order directing the respondent executor to show cause why he should not turn over said personal property to appellant. Upon return to and after hearing had on the order to show cause, the probate court, in accordance with the contention of the respondent executor, concluded, in effect, that the testator's intent as disclosed by the opening phrase of the particular bequest here involved, to wit, "to provide a furnished home for" the appellant, suggested and required a construction of the closing and italicized phrase of the bequest limiting the same to "furnishings" found in the apartment at the time of the testator's demise. Such a construction of necessity excludes from the operation of the bequest the tin box and the notes therein contained and the stamp and coin collection. We are satisfied from a reading of the particular bequest here involved that it was the testator's desire and intention, as evidenced by the language employed, to provide the appellant with "a furnished home," and that, in view of this clearly expressed intention, the concluding language of the bequest should be so inter-

preted as to cover only the furnishings and bric-a-brac incidental to the maintenance of the apartment. Such a construction is consistent with and does no violence to the testator's expressed intention. It is generally recognized that a testamentary instrument is to be examined with a view to discovering the decedent's testamentary scheme or general intention, and that the apparent meaning of particular words, phrases, and provisions is to be subordinated to this scheme, plan, or dominant purpose. The technical import of words should not prevail over the obvious intent of the testator. In Estate of Koch, 8 Cal. App. 90, 96 P. 100, 101, a bequest covering, in part, "all my belongings" was held not to include money in view of the apparent intent of the testatrix to dispose of furniture, clothes, pictures, jewelry, and things which she ordinarily used for her personal comfort.

In Andrews v. Schoppe, 84 Me. 170, 24 A. 805, where the will disposed of certain enumerated household articles, furniture, beds, and "all other articles of personal property," it was held that the latter words must be read and construed in connection with the words preceding them, and that, when so read and construed, the words did not include promissory notes found among the effects of the decedent.

It was held in Tallman v. Tallman, 3 Misc. 465, 23 N. Y. S. 734, that, in view of other bequests in a will, a bequest of "all my personal property" referred only to household effects.

In Bills v. Putnam, 64 N. H. 554, 15 A. 138, where a bequest was made to two daughters of all the decedent's "wearing apparel, household furniture, and personal property of every name, nature, and description," it was held that the words personal property were used in their restricted sense and did not include everything except real property.

We fully appreciate that the interpretation to be given a particular testamentary instrument must turn upon the language peculiar thereto and that decisions passing upon instruments of varying terminology can be of little assistance other than to announce the rules of construction. The cited authorities are of present value in that they indicate the propriety of applying to the phrase "all the personal property" a limited and restricted meaning and operation consistent with the testator's evident intention.

[3] However, even if we concede, without deciding, that the quoted phrase is sufficiently comprehensive to include personal property other than furnishings and other things common to a household, the result would be the same. The testator very definitely limited the bequest to the appellant to personal property "in said apartment R." There is no evidence in the record indicating that either the promissory notes or the stamp and coin collection were in the apartment at the testator's death, the time whereof his will speaks. The executor testified that "a number of months before Mr. Puett's last illness he told me that he had a tin box and some things in it, and took me up to the apartment and showed me the box and where he kept it * * * then he said to me, 'In case I ever become seriously ill or have to be removed to a hospital, I want you to promise me that you will get this box, take it out of the apartment and keep it in some safe place for me' "; that the testator said, "he didn't want it in the apartment house at the time he died under any circumstances"; that late in December, 1931, a few weeks prior to the testator's demise, and when he was about to be taken from the apartment to a hospital, he said to the witness, "don't forget that box when you leave here. I think this is the last"; that the witness thereupon, and at the testator's request, removed the box and its contents from the apartment, and that at the time of the testator's death they were in a safe in the office of the witness.

As to the stamp and coin collection the respondent executor testified that it never had been in his possession; that he had seen it but once, on an occasion subsequent to the testator's demise; that it was then in the possession of the testator's former housekeeper, who brought it to his office and presented satisfactory proof that it did not belong to the estate, but had been "given [to] her by Mr. Puett long before he died."

While there are some conflicts in the evidence, the foregoing is amply sufficient to support the lower court's finding that the promissory notes and stamp and coin collection were not included in the bequest to appellant because they were not "in said apartment" at the time of the testator's demise. This, together with the reason first above mentioned, viz. that the words "personal property," appearing in the bequest, were used in a limited and restricted sense with the apparent intention of excluding said promissory notes and stamp and coin collection from the operation thereof, substantiates the lower court's ruling.

[4] We have examined appellant's contentions and the authorities cited in support thereof. They do not suggest a different con-

clusion. We are not inclined to follow the several authorities cited from other jurisdictions to which appellant refers us in support of the proposition that the will speaks from the date of its execution in so far as the properties to pass thereunder are concerned. The cases are distinguishable and each turned on its own peculiar facts. Here the place of location of the bequeathed property, designated in the will as "in said apartment R," was not merely descriptive but, in our opinion, constituted a limitation on the property to pass at the time of the testator's demise. It was within the testator's power to remove any portion of his property from the apartment and thus preclude it from passing under the particular bequest here involved. Such removal does not, as appellant urges, constitute the making of an oral will.

For either or both of the above reasons the order or "judgment" appealed from is affirmed.

We concur: SHENK, J.; LANGDON, J.; CURTIS, J.; PRESTON, J.



1 Cal.(2d) 145

SAN DIEGO COUNTY ex rel. WHELAN, Dist. Atty., v. DAVIS et al.

L. A. 14653.

Supreme Court of California.

June 26, 1934.

Taxation ⇐79.

Property tax against owner of automobile must be levied on registered owner and not on finance company which was legal owner under conditional sale contract, but which had neither use nor control of automobile, and whose title was for security only (Gen. Laws 1931, Act 5128).

In Bank.

Appeal from Superior Court, San Diego County.

Action by San Diego County, on the relation of Thomas Whelan, District Attorney of San Diego County, against A. Leaman Davis, doing business under the fictitious firm name and style of the U. S. Finance Company, and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

Thomas Whelan, Dist. Atty., and Edward W. Goodman, Deputy Dist. Atty., both of San Diego, for appellant.

Hillyer & Boldman, of San Diego, for respondents.

PER CURIAM.

This action is brought to collect a property tax on an automobile from the person shown by the records of the California motor vehicle department to be the "legal owner." The lower court sustained a general demurrer to plaintiff's complaint, and judgment for defendant was entered accordingly.

Prior to March, 1933, a dealer sold the automobile to a buyer under a conditional sale contract, and, in accordance with the provisions of the California Vehicle Act (Deering's Gen. Laws 1931, Act 5128), the dealer was noted as the "legal owner" and the purchaser as the "registered owner." The dealer assigned the contract to defendant, a finance company, and defendant was then noted as the legal owner. The buyer at all times subsequent to the sale had possession and control of the property. On the first Monday in March, 1933, the car was assessed for taxes in the sum of $22.15; the assessment being against the "owner" of the car. The single question before us is whether the legal owner or the registered owner is the party liable for such tax. Plaintiff county contends that the assessor may, in his discretion, impose the liability upon either party, and that his choice of the legal owner, rather than the registered owner, cannot be attacked as double taxation in spite of the fact that the conditional seller is subjected to a tax on the "solvent credit" represented by his contract.

The trial court determined that the registered owner was the party liable for the tax, and that the legal owner was not liable. This holding follows the established practice throughout the state, and is both sound and practical. The imposition of personal liability for the tax on finance companies which have no use or control over the car, instead of on the party having the beneficial use, finds no justification in the statutes. The tax must be levied on the owner of the property, but this does not necessarily mean the holder of the legal title. In a conditional sale, the title in the seller is for security only, to assure the payment of the purchase price.

It carries with it none of the ordinary incidents of ownership. The buyer has the possession and use of the property to the complete exclusion of the seller, subject only to the seller's remedies in case of default. Both in a practical and a legal sense the buyer is the beneficial owner. See Walker v. Houston, 215 Cal. 742, 12 P.(2d) 952, 87 A. L. R. 937.

The precise question at issue in this case was before the Alabama court in Ex parte State, 206 Ala. 575, 90 So. 896. The court there said: "* * * When a statute requires that property be assessed to the owner, we think it means the general and beneficial owner—that is, the person whose interest is primarily one of possession and enjoyment in contemplation of an ultimate absolute ownership—and not the person whose interest is primarily in the enforcement of a collateral pecuniary claim, and does not contemplate the use or enjoyment of the property as such."

The judgment is affirmed.



1 Cal.(2d) 143

RILEY et al. v. DUNBAR et al.

L. A. 14023.

Supreme Court of California.

June 26, 1934.

1. Limitation of actions ⇐29(1).

Action by holder of certificates of interest in unincorporated syndicate to declare void certain certificates and to recover for syndicate dividends paid thereon, on theory that such certificates were issued in violation of permit from corporation commissioner, *held* barred by limitation where not brought until ten years after acts complained of, in absence of allegation excusing delay if complaint was based on fraud.

2. Limitation of actions ⇐103(1).

Right of action, if based on breach or repudiation of trust, accrued when fraudulent acts were first committed, as respects limitation.

In Bank.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Guy S. Riley and another against Hooper C. Dunbar, G. B. Morris, and others. From an adverse judgment, plaintiffs appeal.

Affirmed.

W. R. Law and August Weymann, both of Los Angeles, for appellants.

Neil S. McCarthy, Earl L. Banta, and Howard P. Hall, all of Los Angeles, for respondent.

PER CURIAM.

This is an action to declare void certain certificates of interest in a trust, and to recover dividends paid thereon. A general demurrer was sustained to the complaint, and plaintiffs, electing to stand upon it, permitted judgment to go against them and brought this appeal. The question is whether the complaint states a cause of action, and involved in this is the question whether the right of action is barred by the statute of limitations; this defense having also been raised by demurrer.

[1] The complaint alleges that Bellview Oil Syndicate is an unincorporated association, formed by a declaration of trust dated January 20, 1922; that its trustees at all times mentioned in the complaint were defendant Dunbar, C. C. Horton, and defendant Morris; that a permit was issued by the corporation commissioner on January 30, 1922, to sell certificates of beneficial interests under the declaration of trust; that the permit authorized sale of certificates at $100 each, for cash, and not more than $5,000 aggregate par value to any person or company; that in April, 1922, defendant Morris offered to purchase 150 units for $12,000, at a discount of 20 per cent., together with a bonus of 37 units, and upon condition that he be made a trustee and be allotted other units; that this offer was accepted, and 150 units were issued, but only 50 were taken in the name of defendant Morris, and the other 100 were taken in the names of two persons as dummies; that this was knowingly done by defendant Morris for the purpose of evading the provisions of the permit; that the interests thus issued were void, and that Morris and his dummies did not become unit holders of the trust; that Morris and his assignees received as dividends on these units the sum of $55,000. It is further alleged that plaintiffs are holders of certificates of interest in the trust; that they have been unable to secure redress of these wrongs from the trustees; that a demand upon the trustees to sue on behalf of the trust would be useless because of their participation in the wrongful acts; and that

plaintiffs sue on behalf of the trust and all unit holders thereof who may come into the action.

[2] Whether these allegations state a cause of action need not be determined, for the complaint shows on its face that the statute of limitations has run. The complaint is dated June 6, 1932, ten years after the acts complained of. If the complaint is based upon fraud, no pleading to excuse late discovery of the facts is made. If it is based upon breach or repudiation of trust, this took place at the time the fraudulent acts were first committed. Plaintiff's brief offers us no tenable theory upon which the bar of the statute may be avoided.

The judgment is affirmed.



1 Cal.(2d) 61

In re INVESTIGATION OF CONDUCT OF EXAMINATION FOR ADMISSION TO PRACTICE LAW.

Misc. 1280.

Supreme Court of California.

May 28, 1934.

1. Attorney and client ⇐7.

Report of committee of bar examiners of State Bar on August, 1933, examination was affirmed as against complaints of unsuccessful applicants seeking determination that, notwithstanding report of bar examiners, petitioners were qualified to practice law within state.

The substance of petitioners' charges was that committee of bar examiners had arbitrarily, unjustly, and in a discriminatory manner determined in advance number of applicants who should be permitted to pass examinations, and had selected questions to be propounded to applicants of such nature that, rated on arbitrary, unreasonable, and abstract scale of 100 per cent., it was possible to pass or reject at will any number of applicants taking examination, and that committee had refused to consider all of qualifications of petitioners for admission to practice of law.

2. Attorney and client ⇐7.

Where formal applications were filed by unsuccessful applicants for admission to bar, court will re-examine entire record of particular proceeding of bar examiners complained of; review not being limited to scope of writ of certiorari (St. 1931, p. 1909, § 38).

3. Attorney and client ⇐7.

Upon review, burden is on complaining petitioners to show wherein decision of bar examiners was erroneous or unlawful (St. 1929, p. 1257, § 26).

4. Attorney and client ⇐7.

If any dissatisfied applicant can show he was denied passage of state bar examinations through fraud, imposition, or coercion, or that he was prevented from fair opportunity to take examinations, court will listen to his complaints, but inability to pass examinations which are successfully passed by other applicants will not be inquired into (St. 1929, p. 1257, § 26; St. 1931, p. 1909, § 38).

5. Attorney and client ⇐4.

General qualifications of applicant are not to be substituted for requisite knowledge of law which one must possess in order to be admitted into legal profession.

6. Attorney and client ⇐7.

Right to practice law is not absolute right derived from law of nature, but is creature of statute, and, when license is issued and official oath taken which authorizes attorney to exercise right, it confers but statutory privilege subject to control of Legislature (St. 1931, p. 1761, § 24).

In Bank.

In the matter of an investigation of the conduct of the examination for admission to practice law.

Report of committee of bar examiners affirmed, and various petitions for review and motions for admission to bar discharged.

Joseph F. Ferrea, of San Francisco, William F. Peters, of Oakland, and Edward Hale Julien, for petitioner.

Philbrick McCoy, of Los Angeles, H. C. Wyckoff, President, State Bar of California, of Watsonville, Alfred L. Bartlett, of Los Angeles, and Francis Price, of Santa Barbara, for respondent.

WASTE, Chief Justice.

[1] Immediately following the announcement by the committee of examiners of the State Bar of California of the result of the August, 1933, examinations of applicants for admission to practice law, there were filed in this court by unsuccessful applicants a number of petitions for writs of review, in which the petitioners alleged that they had met the standards set by the State Bar for the exam-

inations. They therefore prayed that the court order the production before it of the particular examination papers of the respective petitioners, together with the records of the examiners showing the markings each had received, and other records and papers which the court might deem necessary for the purpose of ascertaining and determining that, notwithstanding the report of the bar examiners, petitioners were qualified to practice law in this state.

The substance of petitioners' charges was that the committee of bar examiners had arbitrarily, unjustly, and in a discriminatory manner determined in advance the number of applicants who should be permitted to pass the examinations, and had selected questions to be, and which were, propounded to the applicants, of such nature that, rated on an arbitrary, unreasonable, and abstract scale of 100 per cent., it was possible to pass or reject at will any number of applicants taking the examinations, and that the committee had refused to consider all of the qualifications of the petitioners for admission to the practice of law.

[2, 3] The formal applications were filed by the petitioners under the provisions of section 38 of the State Bar Act (St. 1927, p. 44, § 38, as amended by St. 1931, p. 1909), which this court has construed to be a special enactment, not limiting the review to the scope of a "writ of certiorari" as defined in the Code of Civil Procedure, but permitting a reexamination of the entire record of the particular proceeding complained of. In re Shattuck, 208 Cal. 6, 279 P. 998. Upon review, the burden is on the petitioner to show wherein the decision of the board or authorized and acting committee is erroneous or unlawful. State Bar Act, § 26 (St. 1927, p. 41, § 26, as amended by St. 1929, p. 1257).

Almost coincident with the filing of the formal petitions referred to, the court received a flood of communications from applicants who failed to pass the examinations. Members of the bar and others importuned the court in behalf of the rejected applicants. Many of these communications from applicants were, we feel, based upon a mistaken conception as to the "right to practice law." Many of them seemed to be of the view that they had a "vested right" to practice law, and were, in their own minds, firmly convinced that this court should forthwith exercise its inherent power and make its order admitting them to such privilege, notwithstanding the recommendation of the State Bar.

[4, 5] The charges made concerning the results of the August, 1933, examinations were not the first of that nature to be considered by the court. In the case of one Callinan, who failed to pass the bar examination on a previous occasion, the court formulated and announced the policy it would adhere to in considering such complaints, as follows: "The attitude of this court is that if any dissatisfied applicant can show that he was denied passage of the state bar examinations through fraud, imposition, or coercion, or that in any other manner he was prevented from a fair opportunity to take the examinations, this court will be willing to listen to his complaint. Inability to pass the examinations, which are successfully passed by other applicants, will, of course, not be inquired into by the court. Also, as you have no doubt found out, one's general qualifications are not to be substituted for the requisite knowledge of law which one must possess in order to be admitted into the legal profession."

The report of the results of the August, 1933, bar examinations disclosed that of the 831 applicants taking the examinations only 263 or 31.6 plus per cent. were passed and recommended to this court for admission to practice law. The small percentage of successful applicants, and the number of those who had failed to pass one or more previous examinations, seemed to call for an explanation; and, so great was the insistence with which the present claims were urged, that the court deemed it proper to enter into a consideration of the situation to ascertain, if possible, why an increasingly large number of applicants were unable to pass the bar examinations. Accordingly, such an inquiry was ordered. A hearing on the formal petitions and the return of the State Bar was ordered, at which hearing all the unsuccessful applicants were permitted to appear, and at which many of them, in open court, personally stated their views, a few presenting their individual contentions relative to the examinations. Other than from the State Bar, but little contention was advanced or argument offered at the hearing that did not appear in the formal petitions and communications, and with which the justices of this court were already familiar. Speaking generally, these contentions were that the examinations were "very hard"; the questions were an unfair test of the necessary qualifications for the practice of the law; the method of marking or grading the answers was unfair, arbitrary, and discriminatory; the applicants' answers, if properly graded, would have resulted in the required percentage and

in a passing grade entitling the applicants to a recommendation to be admitted to practice law. Charges of unfairness, arbitrariness, fraud, and dishonesty in the marking and grading of answers were made by some of the applicants. These charges may be disregarded, for nothing has been developed or shown to substantiate them.

The State Bar, through its board of governors and committee of bar examiners, made its return, and not only put in issue the allegations of the petitions filed, but also challenged the many accusations and charges contained in the petitions and made by other unsuccessful applicants. The method of examining applicants adopted by the State Bar and the conduct of the examinations was fully explained. The court requested, and the State Bar has transmitted, the entire record pertaining to the August, 1933, bar examinations, including the papers of many applicants taking the tests. The justices of the court have carefully inspected the record, giving particular attention to the questions and answers and to the markings or gradings of many of the applicants.

When the August, 1933, examination was given, the rules governing the State Bar, approved by this court, prevented many of those failing to pass that examination from taking the next ensuing examination (February, 1934), and some could not take the second ensuing examination. Following the hearing and the inspection of the record by the court, it ordered that all applicants who failed at the August, 1933, examination, and who received a credit of 50 per cent. or more in that examination, but less than 70 per cent. and who failed to pass a previous bar examination, be permitted to take the examination in February, 1934, without regard to the provisions of rule V, subdivision e, of the State Bar.

The court also requested of the State Bar that the answers of all those applicants who received 60 per cent. or more, but less than 65 per cent. and who failed to be recommended for admission, be re-read by the reviewers regularly employed by the board of bar examiners who re-read the papers of those applicants at said examination receiving between 65 per cent. and 70 per cent., provided that such re-reading and review be without prejudice to a re-reading and review, if that be deemed necessary by the court, by a committee of the bar selected by the court. As it appeared from the record that, after the "readers" had completed their examination of the papers of the applicants, the papers of 129 of the applicants rated by the readers between 65 per cent. and 70 per cent. were examined by the "reviewers," who increased the percentages of 114 sufficiently to permit them to pass, the court also called for the answers of the remaining 15 of the applicants who failed to pass after such review, for the purpose of examining and checking their answers. The full set of books of each of these applicants was referred to the members of the committee of bar examiners for personal examination and review by them. The court is now in receipt of the report on the various steps ordered by it or undertaken by the State Bar or its committees. We have also the report of the result of the examination of applicants had in February, 1934.

The 15 sets of papers referred to the members of the committee of bar examiners were personally and carefully reviewed by individual members of the committee, who, after such review, came to the unanimous conclusion that no one of the 15 applicants could be given a mark which would justify the committee in recommending his admission to the bar. As a further result of this review and the information secured by them, the members of the committee came to the conclusion that the regular board of review, in examining the books assigned to it, had given a passing grade when it could be conscientiously done, and that the applicant, when there was a doubt, had been given the benefit of that doubt, and that the previous review had been a liberal one.

The board of review completed its examination of the books of the applicants who received original grades of 60 per cent. or more, and less than 65 per cent., conducting such review in the customary manner, and applying the usual standards. The board reported to the committee that it had not found that any applicants were entitled to have the original marks assigned to them raised sufficiently to entitle them to pass the examination. We deem it unnecessary to subject these papers to a further re-reading. Of the 557 applicants who took the examination in February, 1934, 159, or 28.5 per cent., passed the tests imposed. Of the 557 applicants, 147 took the examination for the first time. The remaining 410 were repeaters, 214 having failed one previous examination, and 196 having failed two or more previous examinations.

[6] Under the present system of examining and admitting applicants to practice law in this state, we do not see what more can be done for the applicants who failed to attain a grade entitling them to a recommendation

for admission to practice. It has been the rule in this state, recognized and adhered to by bench and bar from the early days of the state's existence, that "The right to practice law is not an absolute right, derived from the law of nature. It is the mere creature of the statute, and when the license is issued and the official oath taken, which authorizes the attorney to exercise the right, it confers but a statutory privilege, subject to the control of the Legislature." Cohen v. Wright, 22 Cal. 293, 319. The power of the Legislature to provide for the admission of persons to practice law in this state has been continuously exercised. Until the enactment of the present State Bar Act (Stats. 1927, c. 34, p. 38), the law governing the subject has been found in the Code of Civil Procedure. It is now to be found in section 24 of the Bar Act, as amended (Stats. 1931, c. 861, p. 1761). By its provisions, the board of governors of the State Bar has the power to fix and determine the qualifications of applicants for admission to practice law in this state, and to constitute and appoint an examining committee to examine applicants for admission, to administer the requirements for admission to practice, and to certify to this court for admission those applicants who fill the requirements and successfully pass the examinations. It is not shown in these proceedings that any detail in the mechanics provided by the governors of the State Bar in the process of admitting applicants to practice has been omitted. Stripped of much incompetent, irrelevant, and immaterial matter, the allegations of the various petitions and the charges and statements in the many communications received by the court narrow down to a charge that the examination of August, 1933, was unnecessarily hard and, even so, did not properly tend to determine the qualifications of the applicants to practice law. Every petition and every communication emphasizes the charge that the marking of the answers to the questions and the grading of the applicants were unduly and excessively strict. It was because of these direct charges that the court determined to, and has, inquired into the examination and its results. We have found nothing that permits of any interference by the court with what appears to have been a duly authorized and conducted examination. Those applicants who failed to pass the examination did not satisfy the bar examiners, by their answers to the questions asked, that they possessed sufficient knowledge to entitle them to practice law.

In the days when the "older generation" of attorneys sought admission to practice law in this state, a short oral examination conducted in person by the justices of the Supreme Court, and later by the justices of the District Courts of Appeal, was deemed a sufficient opportunity for the court to determine the qualifications of those seeking admission to practice. The justices were inclined to, and did, give considerable consideration to what, for a better name, was called "the background" of the applicant's preparation. His opportunity for, and the extent of, his education, his ability and aptitude developed in meeting the oral test, the circumstances and surroundings attending his legal studies and preparation to practice law—these and like matters were taken into consideration by the examiners. Even the personal appearance and other phases of the personality of the applicant were known to have turned the scale in favor of one who was within a narrow margin of failure or success. Such an examination no doubt had its defects, but it afforded one opportunity to which we are willing to subscribe as an essential feature in examining applicants for admission to practice law—a personal contact between the applicant and the examining authority, with the resulting opportunity of supplementing the examination in subjects strictly legal with an inquiry along lines of common sense and with regard to the ordinary activities of life, which may well add to the applicant's other qualifications, and, in connection with those, actually demonstrate that the applicant is qualified to enter the practice of law.

We venture to suggest that our present method of examining applicants for admission to practice is not perfect. One defect is the lack of personal contact just discussed. Another, but possibly contained in the first, is that bar examinations are not a complete test of the qualifications of an applicant. In this connection, we quote from "Notes on Legal Education," issue of November, 1933: "The bar examination is an auxiliary mechanism which in two or three days attempts to find out how much has been learned in three or four years. Examiners themselves are the first to admit that it does not function accurately in testing the mental ability and the qualities required of a lawyer. It is only one factor in a system which the majority of the bar has agreed should also include a certain amount of general education and a definite minimum quantity of good law school training." The examinations by the justices in former times cannot now be conducted by them or by others. No court can so examine more than five hundred, or nearly a thousand, applicants and conduct its regular business.

We appreciate the difficulties and burdens cast upon boards of governors and examining committees by the State Bar Act. They are men of experience and standing in the legal profession, who devote their time and effort to the laborious work assumed by them without compensation beyond the reward that attends the realization of a service well performed. The examination made by the court into the conduct of the August, 1933, bar examination has not brought to light anything discrediting them or the assistants employed by them in the conduct of the examination. So much must be positively and unequivocally stated. We are of the view, however, that more can be accomplished in the way of giving greater consideration to the cases of those students who, on first marking of their answers, are graded within a small per cent., sometimes only a fraction of 1 per cent., of passing the examination. The committee has been liberal in this regard, as witness the reexamination of the papers of, and the final passing of the 114 "border line" applicants at the August, 1933, examinations, already referred to. While it is not within the record of this hearing, we are informed that the same practice was had following the recently completed February, 1934, examinations. The papers of some 140 applicants who attained a grade of 65 per cent.—70 per cent., inclusive, on first reading were reviewed, and 37 were accorded a passing grade. More can be done in this connection, we believe, by working out a plan of personal contact along the line we have discussed, without in any way departing from the advanced standards to which the State Bar of California has subscribed, with the full approval of the people of the state.

For these reasons, the report of the committee of bar examiners of the State Bar on the August, 1933, examinations is affirmed. The various petitions for review and motions for admission to the bar are discharged.

We concur: SHENK, J.; PRESTON, J.; IRA F. THOMPSON, J.

LANGDON, Justice (concurring).

I concur in the conclusion reached by the court, but desire to state my view on an issue raised in many of the petitions and not herein considered. The rules regulating admission to practice law prohibit an applicant who has twice failed in the examination from taking the following examination, and further provide that, upon three failures, the applicant must allow two examinations to intervene. The purpose of this rule is, no doubt, to discourage unsuccessful applicants, but I am unable now to perceive its value or its reasonableness. A student who, after failure, engages in further study, should not, I believe, be prevented from presenting himself again for the examination. I am of the opinion that the rule should be modified to permit students to take examinations subsequent to failure, upon a showing of continuous additional study satisfactory to the committee of bar examiners.



1 Cal.(2d) 789

Harold P. BALLF v. BAR EXAMINERS
(two cases).

John R. ASHER v. SAME.
GERETY v. SAME.

Application of J. A. BRIED for Admission.
S. F. 15041, 15040, 15058; L. A. 14567; S. F. 15118.

Supreme Court of California.
May 28, 1934.

In Bank.

Harold P. Ballf, in pro. per.

John R. Asher, of Oakland, in pro. per.

Donald Mitchell Kitzmiller, of Los Angeles, Charles R. Collins, of San Francisco, and Stanley B. Fish, of Los Angeles, for petitioner Gerety.

J. A. Bried, of San Francisco, in pro. per.

Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

On the authority of In the Matter of an Investigation of the Conduct of the Examination for Admission to Practice Law (Cal. Sup.) 33 P.(2d) 829, the petitions for writs of review in the above-entitled matters and the motion for admission to the bar in S. F. 15118 are discharged.

1 Cal.(2d) 76

CITY OF LOS ANGELES v. AGARDY et al.

L. A. 14513.

Supreme Court of California.

May 31, 1934.

1. Eminent domain ⇐265(5).

Statute entitling condemnee to attorney's fees when condemnor abandons action *held* inapplicable where city, after entry of judgment assessing damages, involuntarily abandoned condemnation action because of permanent injunction against further proceedings under ordinance (Code Civ. Proc. § 1255a; St. 1903, p. 376, as amended).

2. Eminent domain ⇐160.

Statute giving condemnor 30 days to pay award *held* inapplicable to proceedings under 1903 Street Opening Act, making awards payable when special assessment fund is sufficient (Code Civ. Proc. § 1251; St. 1903, p. 376, as amended; p. 385, § 31).

3. Eminent domain ⇐160.

Statute allowing condemnor one year to pay award if "bonds of state or public corporation" must be sold, means state's or city's general obligation bonds, and hence excludes bonds issued under 1903 and 1911 Street Opening Acts (Code Civ. Proc. § 1251; St. 1903, p. 376, as amended; St. 1911, p. 1192, as amended).

4. Eminent domain ⇐197, 265(5).

Where city involuntarily abandoned condemnation action, condemnees *held* entitled to dismissal and to ordinary costs, excluding any allowance for expert witness fees except statutory amount for witnesses generally (St. 1903, p. 376, as amended).

In Bank.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Condemnation action by the City of Los Angeles against John Agardy, Jennie Riley, William L. Riley, and others. From a judgment of dismissal and an order amending judgment in favor of Jennie and William L. Riley, the City appeals.

Reversed.

Prior opinion in 24 P.(2d) 915.

Ray L. Chesebro and Erwin P. Werner, City Attys., Frederick von Schrader, Asst. City Atty., and Arthur W. Nordstrom, Deputy City Atty., all of Los Angeles, and C. N. Perkins, Deputy City Atty., of Riverside, for appellant.

Edward Brody and A. H. Swallow, both of Los Angeles, for respondents.

PER CURIAM.

The city of Los Angeles appeals from a judgment of dismissal and the order amending judgment entered in the above-entitled action in favor of Jennie and William L. Riley. The facts are undisputed and are as follows:

[1, 2] The city in 1923 commenced the above-entitled action for the purpose of condemning for street purposes certain parcels of real property. The action was instituted under the provisions of the Street Opening Act of 1903 (Stats. 1903, p. 376, as amended). Among the numerous defendants in that action were respondents herein, Jennie and William L. Riley, owners of part of the property sought to be condemned. After the usual proceedings in such actions an interlocutory judgment assessing the damages of respondents was made and entered on August 17, 1925. The damages so assessed were never paid. On August 6, 1926, in another action in the same court entitled Blackburn v. City of Los Angeles, to which action respondents were not parties, the city was permanently enjoined from further proceeding under the ordinance authorizing the improvement. The judgment in this action has long since become final. Subsequently the city council of Los Angeles, by resolution, authorized the city attorney to present to the council an ordinance abandoning the entire proceeding. No further steps were taken by the council in reference to the proposed ordinance of abandonment. Apparently, some time later, new proceedings were commenced involving the same improvement. On June 14, 1930, respondents Riley filed a notice of motion to dismiss the original action on the ground that it had been abandoned, and for a judgment of dismissal and for costs and attorneys' fees pursuant to the provisions of section 1255a of the Code of Civil Procedure. Both parties filed affidavits, the defense of the city being predicated on the Blackburn injunction. The trial court ruled that the city had abandoned the action within the meaning of section 1255a of the Code of Civil Procedure, and that respondents were entitled to recover their costs including attorneys' fees. The Rileys thereafter filed their cost and disbursement bill for over $8,000, and appellant moved to tax costs, challenging the various items as excessive and unlawful. In January, 1931, there was entered a minute order of the trial court taxing costs of respondents in the sum of $4,335. The award was made in a lump sum without specifying the items thereof. The city appeals.

It is our opinion that the legal problems

presented on this appeal have been determined adversely to respondents by the recent decision of this court in City of Los Angeles v. Abbott, 217 Cal. 187, 17 P.(2d) 993. In the Abbott Case it was held in a proceeding under the identical act here involved (Street Opening Act of 1903, supra) that when the city is permanently enjoined from proceeding, it is not such an abandonment as is contemplated by section 1255a of the Code of Civil Procedure, which purports to allow the condemnee to recover his attorney fees when the condemnor abandons. The only difference between the Abbott Case and the instant case is that in the Abbott Case the permanent injunction was issued prior to the entry of the interlocutory judgment, while in the present case such injunction issued a little less than a year thereafter. That fact, however, does not make inapplicable to the present case the rule of law enunciated in the Abbott Case. The holding in the last-named case was that section 1255a does not apply to an involuntary abandonment; that since the right to attorneys' fees is purely statutory and since that section is the only section allowing attorneys' fees, no such fees can be recovered in case of an involuntary abandonment. See, also, City of Los Angeles v. Abbott, 129 Cal. App. 144, 18 P.(2d) 785. The abandonment in the instant case was clearly involuntary. Respondents, recognizing the legal effect of the Abbott Case, seek to avoid its application by the contention that since more than thirty days elapsed after the interlocutory judgment before the injunction was issued, under section 1251 of the Code of Civil Procedure, their right to attorneys' fees became "vested." This contention of respondents is wholly illogical. If anything became "vested" after the lapse of thirty days after the interlocutory judgment was rendered it would be the right to the entire amount assessed, and not merely the right to attorneys' fees. If the right to the entire amount assessed became "vested" at that time we would then be presented with an incongruous situation where the special fund to pay the judgment could not be raised because of the injunction, but respondents would be entitled to the full amount of the judgment. This clearly illustrates the inapplicability of section 1251 of the Code of Civil Procedure to proceedings under the Street Opening Act of 1903. So far as pertinent here that section provides: "Time of paying assessment. The plaintiff must, within thirty days after final judgment, pay the sum of money assessed. In case the plaintiff is the state of California, or is a public corporation, and it appears by affidavit that bonds of said state or public corporation must be issued and sold in order to provide the money necessary to pay the sum assessed, then such sum may be paid at any time within one year from the date of such judgment; provided, further, that if the sale of any such bonds cannot be had by reason of litigation affecting the validity thereof, then the time during which such litigation is pending shall not be considered a part of the one year's time in which such payment must be made."

It is true that in the Abbott Case it was held that section 1255a of the Code of Civil Procedure was applicable to proceedings under the 1903 act, but it does not follow that all of the sections of the Code of Civil Procedure, applicable to eminent domain proceedings, apply to proceedings under the 1903 act. In fact, it was only because the 1903 act was entirely silent as to what constituted an abandonment that section 1255a was held applicable. The Abbott Case distinctly recognizes that where the 1903 act has provisions contrary or inconsistent with the general provisions of the Code, the act governs. This is the rule long established by the cases. Frank v. Maguire, 201 Cal. 414, 257 P. 515; City of Los Angeles v. Oliver, 110 Cal. App. 248, 294 P. 760; City of Los Angeles v. Oliver, 102 Cal. App. 299, 283 P. 298. Section 31 of the Street Opening Act of 1903 (St. 1903, p. 385, § 31) provides that the awards allowed condemnees under that act shall be paid when there is sufficient money in the special assessment fund to pay them. That time cannot possibly occur until the assessments are paid or the assessment bonds sold—a minimum period, it is conceded, of seven or eight months. These provisions are totally inconsistent with section 1251 of the Code of Civil Procedure providing for the thirty-day period, and therefore that section is inapplicable.

[3] It should also be mentioned that the one-year exception found in section 1251 in reference to bonds has no reference to bonds issued under the 1903 act. The bonds referred to in that section are "bonds of said state or public corporation"—that is, general obligation bonds of the state or city. The bonds issued under the 1903 act or the Auxiliary Street Opening Bond Act of 1911 (Stats. 1911, p. 1192, as amended) are not such bonds. See Brooks v. City of Oakland, 160 Cal. 423, 117 P. 433. Under the 1903 and 1911 acts the issuance of the bonds and the determination of the amount thereof are deferred until after the assessments levied have become delinquent. It is obvious therefore that no portion of section 1251 of the Code of Civil Procedure

has any application to proceedings under the 1903 act.

Such a holding does not mean, as respondents contend, that a condemnee in such a case is entirely at the mercy of the condemnor as to when his judgment will be paid. We do not mean to hold that a city, after an interlocutory judgment has been entered in proceedings under the 1903 act, could deliberately refuse to further proceed by the levying and collection of assessments and the issuance of bonds, and so fail to create the special fund with which the judgment is to be paid. Any such unreasonable delay, under a proper state of facts, could be interpreted by the trial court as a voluntary abandonment entitling the condemnee to a judgment of dismissal and an award of attorneys' fees under section 1255a of the Code of Civil Procedure. But in the instant case respondents took no steps to protect their rights until after the city had been enjoined from further proceeding. As already held, that was too late. The abandonment then became involuntary and no attorneys' fees can be recovered.

Respondents contend that the Blackburn injunction did not declare the ordinance involved void, and is thus to be distinguished from the injunction involved in the Abbott Case. A reading of the two decrees indicates that in fact the Blackburn decree is broader than the decree involved in the Abbott Case. The injunction here involved decreed: "That ordinance No. 45,575 (New Series), and all proceedings under said ordinance are hereby restrained and enjoined from paying out any money of said city * * * for any costs or expenses incurred in connection with the improvements provided by said ordinance No. 45,575 (New Series)," and further that the city and its employees "are forever enjoined and restrained from proceeding under the said assessment or from taking any action thereunder." The decree effectually restrained the city from further proceeding under the ordinance.

[4] Appellant also contends that although respondents are entitled to their usual costs they are not entitled to any allowance for expert witness fees except the statutory amount for witnesses generally. This is undoubtedly correct, but it does not appear whether the trial court made any such allowance, the costs allowed being awarded in a lump sum. For the guidance of the trial court it should be added that although it is true, as respondents claim, that section 1871 of the Code of Civil Procedure in reference to expert witness fees has no application to this case, having been passed after the trial of this action, under the decision of the Abbott Case all that respondents are entitled to is their ordinary costs, which do not include expert witness fees.

The respondents are entitled to a dismissal of the action with ordinary costs of suit. Inasmuch as it cannot be ascertained what the ordinary costs are, the award being in a lump sum, the judgment and order appealed from will have to be reversed. It is so ordered. Both sides to bear their own costs on this appeal.



1 Cal.(2d) 158

SMITH et ux. v. SCHUTTPELZ et al.

L. A. 14042.

Supreme Court of California.

June 28, 1934.

1. Banks and banking ⇐90.

In purchasers' action for fraudulent representations as to title by vendor and bank as vendor's agent, evidence supported finding that bank through its president acted as agent for vendor.

2. Principal and agent ⇐14(1).

Agency does not depend upon express appointment and acceptance thereof, but it may be implied from words and conduct of the parties and surrounding circumstances.

3. Fraud ⇐36.

Where purchasers and predecessor in interest had no defense to action by trust owner, giving of quitclaim deeds did not bar purchasers' action against vendor and his agent for fraudulent representations concerning title.

In Bank.

Appeal from Superior Court, Los Angeles County; Dailey S. Stafford, Judge.

Action by Louis H. Smith and Mable M. Smith, his wife, against Paul Schuttpelz and others. From a judgment for plaintiffs, defendant First National Bank of East San Gabriel appeals.

Affirmed.

Michael G. Luddy, of Los Angeles, for appellant.

William T. McNeely, of Los Angeles, for defendant C. C. Threlkeld.

Laughlin & Laughlin and H. Sidney Laughlin, all of Los Angeles, for respondents.

WASTE, Chief Justice.

This is an appeal by the defendant bank from a money judgment entered in favor of the plaintiffs in the sum of $3,575.63 and costs.

The complaint sounds in damages for fraud. In the first cause of action it is alleged, in substance, that plaintiffs entered into an agreement in writing under the terms of which they were to purchase certain real property from the defendant Schuttpelz who, upon completion of the stipulated payments, was to execute and deliver a good and sufficient deed thereto; that plaintiffs executed the contract and made payments thereunder in reliance upon cerain representations made to them by the defendant Threlkeld and the defendant bank, alleged agents of Schuttpelz; that the defendant Threlkeld, as president of the defendant bank, represented that Schuttpelz was the owner of the property and it would not therefore be necessary to go through escrow or to have a title search; that in fact the defendant Schuttpelz did not have title to the property; that the property was owned by and the title thereto was in one Faris; that the only interest which defendant Schuttpelz had in the property was that of a vendee under a contract of purchase entered into with Faris; that the defendant Threlkeld at the time of making the representations above set forth had actual knowledge of the condition of the title to the property; that in reliance upon such representations the plaintiffs executed the written agreement, entered into possession of the property, erected improvements thereon, and completed their payments under the agreement, which payments were made at the defendant bank; that defendant Schuttpelz was unable and failed to transfer title as agreed; and that plaintiffs thereupon duly rescinded the agreement.

A further cause of action for all material purposes is substantially the same, the plaintiffs being therein designated as the assignees of a contract procured under similar circumstances and covering a separate parcel of property. The defendant Schuttpelz defaulted.

At the conclusion of the trial the court below found in substantial compliance with the allegations of the complaint and gave judgment for the plaintiffs in the sum above mentioned. As already indicated, the bank alone has appealed, contending that the findings generally are without support in the evidence and, specifically, that if and when the defendant Threlkeld made the representations complained of he was speaking and acting in his individual capacity and not as an authorized officer and agent of the bank. It is also urged that the record is destitute of evidence tending to establish an agency relationship between the bank and Schuttpelz.

[1, 2] It would serve no useful purpose to review the evidence at length in an effort to point out wherein it supports the several findings of fact assailed by the appellant. Suffice it to say that there is substantial evidence in the record to support the findings material and essential to a recovery by the plaintiffs. The record is replete with evidence indicating that the nonappealing defendant Threlkeld had, contrary to the facts of which he had actual knowledge, represented to the plaintiffs and to their predecessor in interest under the contract referred to in the second cause of action that title to the respective parcels was in the defendant Schuttpelz and that it was not therefore necessary to go through escrow or to have a title search. The findings that the defendant bank and Threlkeld were acting as the agents of Schuttpelz and that Threlkeld, when making the representations, was acting as an officer of the bank and not in his individual capacity, are equally substantiated by the record. There is evidence to the effect that the plaintiffs and their predecessor in interest first became interested in the respective properties through a real estate agent; that said real estate agent had been theretofore informed by Schuttpelz to negotiate any sale of the properties "through this [defendant] bank of his"; that the real estate agent thereupon referred plaintiffs and their predecessor in interest to the defendant bank to negotiate the purchases; that the respective contracts were prepared at the bank and submitted to the prospective purchasers by the defendant Threlkeld, president of the bank; that they were executed by plaintiffs and their predecessor in interest at the bank after the making of, and solely in reliance upon, Threlkeld's representations; that payments under the contracts were made at the defendant bank; and that the defendant bank was compensated by Schuttpelz for the collection of such installment payments. Throughout their testimony the plaintiffs and their predecessor in interest declared that they relied upon the representations of the "bank" when they executed the contracts. This evidence, together

with certain written communications, introduced in evidence, which passed between the purported purchasers and the bank as to future delivery of the deeds by Schuttpelz, definitely indicates that the defendant bank, speaking and acting through its president, the defendant Threlkeld, negotiated for the sale of these properties as the agent of the defaulting defendant Schuttpelz. Under the circumstances, plaintiffs and their predecessor in interest were warranted in accepting the bank as such agent. The relation of agency need not depend upon express appointment and acceptance thereof, but it may be, and frequently is, implied from the words and conduct of the parties and the circumstances of the particular case.

[3] The fact that plaintiffs and their predecessor in interest subsequently executed quitclaim deeds of their interest, if any, in the properties to the true owner, did not serve to deprive them of their right to recover damages for the fraud practiced upon them by the defendants. Prior to the execution of these quitclaim deeds the true owner had commenced actions to foreclose and declare forfeited certain prior contracts of purchase and to foreclose all rights of certain named defendants, among them being the plaintiffs herein and their predecessor in interest, in and to the properties here involved. To this action the plaintiffs and their predecessor in interest had no defense inasmuch as they claimed under the defaulted contracts being forfeited and foreclosed. In consideration for the execution and delivery of the quitclaim deeds, partial compensation was made for the improvements theretofore placed on the properties by plaintiffs and their predecessor in interest. Plaintiffs did not thereby lose their right to recover damages for the fraud of the defendants.

Contrary to the appellant's contention, mathematical computation discloses that the court below in determining the amount of the judgment made due allowance for the reasonable rental value of the properties for the period of occupancy by the plaintiffs and their predecessor in interest, and also made due allowance for the sums received from the true owner for the improvements placed on the properties.

We find nothing in the record warranting a reversal.

The judgment is affirmed.

We concur: CURTIS, J.; PRESTON, J.; LANGDON, J.; SHENK, J.

139 Cal.App. 195

NICOLL v. FIRST NAT. TRUST & SAVINGS BANK OF SAN DIEGO.

Civ. 1117.

District Court of Appeal, Fourth District, California.

June 9, 1934.

1. Appeal and error ⇐102.

Appeal cannot be taken from order sustaining demurrer (Code Civ. Proc. § 963).

2. Appeal and error ⇐801(1).

Where motion to dismiss appeal was made on sole ground that appeal was taken from order sustaining demurrer, but it was actually taken from such order and the judgment entered in pursuance thereof, motion must be denied (Code Civ. Proc. § 939).

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Clara H. Nicoll against the First National Trust & Savings Bank of San Diego. From an order sustaining a demurrer without leave to amend, and from the judgment entered in pursuance thereof, plaintiff appeals and defendant moves to dismiss the appeal.

Motion denied.

W. S. Staley, of San Diego, for appellant.

James G. Pfanstiel and John A. Hewicker, both of San Diego, for respondents.

MARKS, Justice.

[1] Respondent has moved to dismiss this appeal upon the sole ground "that said attempted appeal from the 'Order sustaining Demurrer without leave to amend' is not an appealable order."

An examination of the record discloses that the complaint contains three causes of action; that a general demurrer to the first and third causes of action was sustained without leave to amend and overruled as to the second cause of action.

The notice of appeal contains a notice that it was taken "from the 'Order Sustaining Demurrer Without Leave to Amend,' dated January 4th, 1934, and entered in Minute Book 117, at page 387, Department four (4) of the above entitled court. This appeal is taken from the said Order Sustaining defendant's demurrer without leave to amend, to plaintiff's First and Third Causes of action, and from the whole of the said Order and any

and all Orders, and/or judgments made and entered in pursuance thereof."

It is well settled that an appeal cannot be taken from an order sustaining a demurrer. Section 963, Code Civ. Proc. Here the appeal was also taken from the judgment made and entered in pursuance of the order.

[2] An appeal from a judgment cannot "be dismissed on the ground that it was taken after the rendition of such judgment or order and before formal entry." Section 939, Code Civ. Proc.

As the motion to dismiss is made on the sole ground that the appeal was taken from the order sustaining the demurrer and it was actually taken from this order and the judgment, the motion must be now denied, reserving the right to dismiss the attempted appeal from the order when the case is considered on its merits. It is so ordered.

I concur: BARNARD, P. J.

JENNINGS, J., being absent, does not participate herein.

139 Cal.App. 411

CRUTCHETT v. LAWTON.

Civ. 5159.

District Court of Appeal, Third District, California.

June 22, 1934.

Hearing Denied by Supreme Court Aug. 20, 1934.

Contracts ⇐117(2).

Contract by physician and surgeon, upon sale of office equipment, medical business, and good will, not to engage in practice of medicine and surgery in designated counties for period of five years, *held* valid (Civ. Code, §§ 1673, 1674).

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Action by William L. Crutchett against F. B. Lawton. From a judgment in favor of the plaintiff, the defendant appeals.

Affirmed.

Ray Manwell and Homer Lingenfelter, both of Marysville, for appellant.

Rich, Weis & Carlin, for Marysville, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an action restraining defendant from practicing medicine and surgery in the counties of Sutter and Yuba. An injunction as prayed for was issued by the trial court, and an appeal therefrom brings the matter before us for consideration.

The cause of action is based upon a contract entered into between Dr. F. B. Lawton and Dr. William L. Crutchett, wherein, for a valuable consideration, Dr. Lawton, the appellant herein, sold to Dr. Crutchett, the respondent, all of his office equipment, medical business and fixtures, including the good will of the business, and further covenanted and agreed that he would not for a period of five years immediately following the execution of the agreement, open offices within the counties of Sutter or Yuba, for general or special practice of medicine or surgery. For over a year appellant ceased to practice his profession in the counties named, but thereupon he again opened an office in the city of Marysville, county of Sutter, for the practice of medicine and surgery, and was so doing at the time of the filing of the complaint.

At the hearing appellant admitted all of the allegations of the complaint, but claimed and now claims the covenant above mentioned was and is void under section 1673 of the Civil Code. Section 1673 and section 1674 of the Civil Code, which pertain to contracts in restraint of trade, read as follows:

"1673. Every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent void.

"1674. One who sells a good-will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or a part thereof, so long as the buyer, or any person deriving title to the good-will from him, carries on a like business therein."

It is conceded by appellant that the word "business" in its general sense is broad enough to include any activity for profit or gain that engages one's time and therefore would include a profession, but claims that the Legislature in stating the rule in section 1673 of the Civil Code referred to "profession, trade, or business," whereas the exception as set forth in section 1674 deliberately limited its effect solely to "business." However, the Supreme Court in the case of Rags-

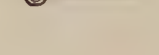
dale v. Nagle, 106 Cal. 332, 39 P. 628, 630, had this question before it, and there held adversely to appellant's contention. In that case both Ragsdale and Nagle were engaged in the conveyancing and the abstracting of titles in the county of Sonoma, and for a valuable consideration Nagle transferred to Ragsdale the personal property used by him in his business, together with the good will thereof, and covenanted that he would not carry on the business of searcher of records in Sonoma county nor the business of conveyancing in the city of Santa Rosa as long as Ragsdale should carry on a like business in said county. The trial court found in favor of plaintiff, and the defendant on appeal argued, as does appellant here, that the Legislature was, in the section above quoted, distinguishing between business and profession.

Counsel in their brief presented the question in the following language, which we quote in order that it may be seen that the issue was directly presented to the Supreme Court upon appeal: "Section 1673 of the Civil Code says that every contract by which one is restrained from exercising a 'lawful profession, trade or business' otherwise than is provided in section 1674 is to that extent void. Now section 1674 says that one who sells the good will of 'a business' may agree with the buyer 'to refrain from carrying on a similar business,' but it does not say that one who sells the good will of a lawful 'profession' or 'trade' may agree with the buyer to refrain from carrying on a 'profession' or 'trade.' The law has drawn a distinction between 'business' and 'profession' or 'trade.' The work of a searcher, abstracter or conveyancer is a profession or trade and not a business. The evidence in this case clearly shows that skill and ability are required in the work of a searcher, conveyancer or abstracter, and therefore these terms are properly classed under the head of 'trade' or 'profession' and not the more general term 'business.' Laws in restraint of trade are to be strictly construed, and their terms will not be given greater latitude by construction." California Supreme Court Records, vol. 2307, p. 193.

In answering this argument, the court, through Mr. Justice Garoutte, said: "Section 1674 of the Civil Code says that one who sells the good will of a 'business' may agree with the buyer to refrain from carrying on a similar 'business.' It is now claimed that abstracting is not a business, but a profession or trade; and that, therefore, the provisions of the Code do not apply to the present case. It is sufficient to say the section is broad enough to bring the present case within its scope. As to the meaning of the word 'business,' see 2 Am. & Eng. Enc. Law, p. 699." Ragsdale v. Nagle, supra.

Upon the authority thereof the orders are affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.



139 Cal.App. 239

Ex parte KOLBE.

Cr. 1804.

District Court of Appeal, First District, Division 2, California.

June 13, 1934.

Habeas corpus ⇐55.

Where, though habeas corpus petition alleged there was no evidence that document sold was security within Corporate Securities Act, transcript of preliminary hearing, alleged to be incorporated in petition, was not attached to petition and was not brought up, court could not determine whether there was probable cause, and writ was therefore discharged (Gen. Laws 1931, Act 3814, § 2(a) 7).

Habeas corpus proceeding by Raymond G. Kolbe against the Sheriff of the City and County of San Francisco.

Writ discharged.

Marcus L. Samuels, Thomas Pierce Rogers, and William E. Kidd, all of San Francisco, for petitioner.

Leo A. Cunningham and Leslie C. Gillen, Asst. Dist. Atty., both of San Francisco, for respondent.

STURTEVANT, Justice.

In this habeas corpus proceeding, the petitioner claims that he is being unlawfully restrained by the sheriff of the city and county of San Francisco. In that behalf he asserts that by an order of the municipal court of said city he has been held to answer on a charge of violating section 2 (a) 7 of the Corporate Securities Act (2 Deering's Gen. Laws, p. 1926, Act 3814). In this connection it is claimed that there was no reasonable or probable cause. He states in his petition that

there was no evidence that the document which it is claimed he sold was a security under the provisions of the Corporate Securities Act. He states in his petition that the transcript of the hearing is incorporated in his petition as if fully set forth and that it does not show that a crime has been committed nor that the petitioner committed a crime. The transcript of the preliminary hearing is not attached to the petition and has not been brought up; it is merely referred to as above stated. The petition does not purport to set forth the contents of the document which it is claimed he sold nor give any further information of its contents. In due time the sheriff made his return and therein set forth two commitments—one based on a purported sale to Jessie V. Hare on October 21, 1932, and another based on another purported sale on the 4th day of November, 1932. Assuming that the petition be treated as a traverse to the return, it is perfectly clear that the record contains no facts from which this court can determine whether there was or was not evidence of reasonable or probable cause.

It follows that the writ should be discharged. It is so ordered.

We concur: NOURSE, P. J.; SPENCE, J.



139 Cal.App. 395

CARVER v. DONIN et al.

Civ. 9676.

District Court of Appeal, Second District, Division 1, California.

June 22, 1934.

Hearing Denied by Supreme Court Aug. 20, 1934.

Infants ⇐111.

Minor defendant who, raising no question regarding minority, participated in trial without guardian, *held* not entitled to vacation of adverse judgment where minor attained majority after trial and before judgment, and her attorneys, after she attained majority and before decision of cause, presented additional points and authorities to court (Code Civ. Proc. § 372).

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Grant Carver against Abe Donin and Cora Cirino. Judgment for plaintiff. From an order denying a motion by the last-named defendant to vacate the judgment, such defendant appeals. Motion to dismiss the appeal or affirm the order.

Order affirmed.

A. G. Ritter, of Los Angeles, for appellant.

E. E. Sawyer and Syril S. Tipton, both of Los Angeles, for respondent Donin.

Charles L. Nichols and Carleton B. Wood, both of Los Angeles, for respondent Carver.

CONREY, Presiding Justice.

In an action to recover damages for personal injuries caused by negligence of the defendants, judgment was entered against the defendants.

The judgment was entered on January 8, 1934. On January 11, appellant, Cirino, duly and regularly filed in said action a document entitled disaffirmance of judgment, wherein she stated that she thereby disaffirmed the judgment "on the ground that at the time of the trial of said action said defendant was a minor of the age of twenty years, and that said defendant did not become of the age of twenty-one years until December 25, 1933, and that at the time of the trial of said action said minor was not represented by any guardian or guardian ad litem." On the same day, January 11, defendant served and filed notice of motion to vacate the judgment on the same grounds above stated. This motion was made upon the records and files of the action and the affidavit of appellant attached to the notice of motion. In the affidavit appellant stated that she was born on December 25, 1912; that she was not represented at the trial of the action by any guardian or guardian ad litem; that at the time of the trial, and also in a deposition given prior to the trial, she testified that she was of the age of 20 years; that plaintiff at all times had knowledge of said facts through his attorney and took no steps to have any guardian or guardian ad litem appointed for said defendant; that for said reasons affiant was desirous of having the judgment set aside.

The said motion having been duly presented and heard by the court in accordance with the notice and without any counter affidavits on the part of the plaintiff, the motion was denied. The present appeal is from the order denying said motion. Appellant having filed her brief on appeal, the plaintiff now moves that the appeal be dismissed, or the or-

der affirmed, on the ground that the appeal is without merit and that the questions on which the decision of the cause depends are so unsubstantial that they need no further argument.

From the bill of exceptions it further appears that the action was brought to trial on December 21, 1933, and was submitted for decision on December 22, and so remained until findings of fact and conclusions of law were filed on January 5, 1934, followed by entry of judgment on January 8; that the appellant was not represented by any guardian or guardian ad litem; that after December 25, 1933, and before the decision of the court or entry of judgment the attorneys of record for appellant communicated additional points and authorities on behalf of appellant to the court, and to counsel for plaintiff, and at such time duly represented the appellant as her attorneys in said action; that at all times up to and including January 8, 1934, appellant did not raise any question as to her minority; that the only reference thereto was the statement of her age in response to a question propounded therefor; that she attended throughout the trial of said action, and aided and assisted her said counsel, both as a witness and in marshaling other witnesses.

It is provided by section 372 of the Code of Civil Procedure that, when an infant is a party, he must appear either by his general guardian or by a guardian ad litem appointed by the court in which the action is pending. Appellant relies upon various decisions which establish the rule that a judgment against an infant in an action in which no guardian or guardian ad litem had ever been appointed may be disaffirmed by the infant after reaching majority provided he acts promptly and without laches, but that the judgment is not void. Johnston v. Southern Pacific Co., 150 Cal. 535, 539, 89 P. 348, 11 Ann. Cas. 841. The subject is reviewed at some length in King v. Wilson, 116 Cal. App. 192, 2 P.(2d) 833. There the defendant, Ralph Wilson, was a minor at the time of the trial, and, we assume, down to the date of entry of judgment there was no guardian and no guardian ad litem appointed for him. The court held that under the circumstances shown by the record appellant suffered no loss of substantial rights, and the judgment was affirmed. The facts in that case were very similar to those presented in the case at bar, although we have here the additional facts that the decision was not filed and the judgment was not entered until after appellant attained her majority, and that, after appellant became of age and prior to the decision of the cause, attorneys properly representing her acted in her behalf by presenting to the court additional points and authorities upon the matters submitted, which matters did not include any item relating to the minority of appellant.

From the foregoing it plainly appears that the ground of appeal relied upon by appellant is without merit, and that the question presented required no further argument.

The order is affirmed.

We concur: HOUSER, J.; YORK, J.



139 Cal.App. 318

PEOPLE v. BOWDEN.

Cr. 167.

District Court of Appeal, Fourth District, California.

June 18, 1934.

Criminal law ⇐1071.

Appeal should be dismissed, in absence of substantial compliance with statutory requirements that appellant file statement of grounds of appeal or points relied on and application designating portion of reporter's notes necessary to present points (District Court of Appeals Rule 2, § 7).

Appeal from Superior Court, Tulare County; K. Van Zante, Judge.

Frank E. Bowden was convicted of violations of the Corporate Securities Act, and he appeals. On the People's motion to dismiss the appeal.

Motion granted, and appeal dismissed.

N. Lindsay South, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The appellant was charged in two counts of an indictment with separate violations of the Corporate Securities Act (St. 1917, p. 673, as amended). After a trial he was convicted on both counts and judgment was pronounced

imposing a fine of $100 on each count, with the provision that if the fine was not paid he should be imprisoned in the county jail of Tulare county one day for each $2 of the fine remaining unpaid. On the day judgment was pronounced oral notice of appeal was given. The record discloses that the appellant did not file within five days after giving notice of appeal, or at all, any statement of the grounds of the appeal or the points upon which the appellant relied, as required by section 7 of rule II of the rules governing this court, and no application was filed designating what portion of the reporter's notes it would be necessary to have in order to present the points relied upon.

The respondent has moved to dismiss the appeal on the ground that the required application and statement were not filed within the time specified in the rule.

It has frequently been held that an appeal should be dismissed in the absence of any substantial attempt to comply with the requirements referred to. People v. Pierce, 89 Cal. App. 290, 264 P. 519; People v. Davis, 103 Cal. App. 318, 284 P. 516; People v. Riga, 104 Cal. App. 477, 285 P. 1069; People v. Schroeder, 112 Cal. App. 550, 297 P. 105; People v. Rutledge, 114 Cal. App. 728, 300 P. 828; People v. Vincent, 116 Cal. App. 211, 2 P.(2d) 460.

The motion is granted, and the appeal is dismissed.

We concur: MARKS, J.; HAINES, Justice pro tem.



139 Cal.App. 7

PEOPLE v. BROWN.

Cr. 2538.

District Court of Appeal, Second District, Division 2, California.

May 29, 1934.

As Modified on Denial of Rehearing June 12, 1934.

Burglary ⊂⊃41(1).

Evidence *held* sufficient to sustain conviction for burglary.

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Frank H. Brown was convicted of burglary, and he appeals.

Affirmed.

Louis P. Russill, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

ARCHBALD, Justice pro tem.

An amended information was filed by the district attorney of Los Angeles county charging the defendant with the crime of burglary and also with having suffered a prior conviction. Trial by jury was waived, and defendant was found guilty as charged. From the judgment of conviction entered and from an order denying his motion for a new trial he has appealed.

The contention of appellant is that the evidence does not show a crime was committed.

Jack K. Lawson, the complaining witness, and defendant lived in the same apartment house; Lawson in apartment No. 108, with one John Skou, and defendant in No. 106. Lawson left his apartment at 10 a. m. on the day in question, and a certain radio and an alarm clock, both belonging to him and introduced in evidence, were then in his rooms. Shortly before midnight, Ladocia Shuck, who lived on the third floor of the apartment house and on the opposite side thereof from the apartment of defendant and Lawson, heard glass breaking, which she thought might be "a couple of automobiles," went to the window to look out, and saw a lady on the ground floor calling the night watchman. She later went up on the roof and from there saw a man "come out of the window at 106 and enter the window of 108," after which "he put on the light." This was shortly before midnight. Approximately five or ten minutes later the officers arrived. They found no one in Lawson's apartment, but did find one rear window ajar. Proceeding to apartment 106, they knocked, but no one answered. After two or three minutes a woman came to the door and asked what was wanted, to which they responded that they were officers and wanted to come in. The woman told them in answer to a question that there was no one in the apartment excepting a sick baby and herself. She finally opened the door slightly and one of the officers blocked it open with his foot. After a short conversation, the officers went in, finding defendant sitting on a bed, in his pajamas. The woman said they had not been out of the apartment. It was

not then known that the radio and clock had been taken from Lawson's apartment. Lawson and Skou returned at about 2 o'clock a. m. and discovered that such articles were missing. Lawson also noticed some "muddy footprints" starting "at the window" and leading out "the door of the apartment and to the door of the next apartment." He also saw tracks outside the window which "led from the window of the apartment next to this one." The glass of the window "was cracked" and "it looked like the window had been pried open." Police officers were called, and with Lawson went to defendant's apartment, where the radio and clock were found in a cupboard in the kitchen.

Defendant denied knowing anything about the articles, stating that he had been away all evening and that a sailor friend of his and a girl had been there. It is to be noted that this statement conflicts with the story told the first officers by the woman in defendant's presence and not then denied by him. Defendant also testified that he was away all evening and did not return until about 9:30 p. m., and that the sailor and girl were there during such absence. In view of the fact that he made no claim that the sailor was there after 9:35 p. m., and the fact that there is evidence from which one might well conclude that the actual entry and taking occurred at midnight, the court evidently disbelieved the story about the sailor and treated it as an attempt to shift all responsibility from defendant for the presence of the radio and clock in his apartment. We are of the opinion that there was ample evidence to sustain the implied finding that the crime charged was committed and that defendant was the actor.

Appellant urges that, inasmuch as defendant on the offense charged as a prior conviction was put on probation without sentence imposed, the question is open for this court to decide if it constitutes a prior conviction for a felony. Apparently the trial judge did not take such conviction into consideration in imposing sentence, as he recommended a minimum sentence, and it was apparently pleaded in the information so that it might be considered in connection with the subsequent offense charged if conviction resulted, as to whether defendant was entitled to probation. People v. Acosta, 115 Cal. App. 103, 108, 1 P.(2d) 43. The former offense being a violation of section 146 of the California Vehicle Act (St. 1923, p. 564) is made a felony by the terms of the act itself, and under section 1203 of the Penal Code the court was powerless to grant probation.

Judgment and order affirmed.

We concur: STEPHENS, P. J.; CRAIG, J.



139 Cal.App. 379

MONTALBANO v. RAINBOW GARDENS, Limited.

Civ. 9474.

District Court of Appeal, Second District, Division 1, California.

June 21, 1934.

Appeal and error ⇐786.

Appeal on ground that special police officer was not servant of proprietor of dance hall acting within scope of employment when he assaulted plaintiff cannot be dismissed because ground of appeal was so unsubstantial as not to require further argument (Rules of District Court of Appeal, rule 5, § 3).

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by Charles B. Montalbano against the Rainbow Gardens, Limited, a corporation. From the judgment, defendant appeals, and plaintiff files a motion to dismiss the appeal or affirm the judgment.

Motion denied.

Joseph Musgrove, of Los Angeles (Thomas H. Cannan and Fred O. McGirr, both of Los Angeles, of counsel), for appellant.

Bernstein & Spizer, of Huntington Park, for respondent.

PER CURIAM.

Appellant Rainbow Gardens, Limited, having filed its brief on appeal from the judgment, respondent has presented his motion, under section 3 of rule V, to dismiss the appeal or affirm the judgment.

Respondent contends that the grounds of appeal are so unsubstantial as not to require further argument. But appellant has presented for discussion a question which should not be settled without further consideration. In appellant's statement of questions involved, it asks for decision upon its claim

that under the given statement of facts the special police officer, who committed the assault, was not a servant of the proprietor of the dance hall acting within the scope of his employment as such servant. The authorities cited by appellant, and particularly the case of Maggi v. Pompa, 105 Cal. App. 496, 287 P. 982, give to this question an importance which, no doubt, will be recognized in respondent's brief.

The motion to dismiss or affirm is denied.



139 Cal.App. 250

BRANDT et al. v. RILEY, State Controller.

Civ. 5152.

District Court of Appeal, Third District, California.

June 13, 1934.

Hearing Denied by Supreme Court Aug. 9, 1934.

1. Taxation ⇐542.

Where taxes are illegally collected by means amounting to duress, they may be reclaimed, in absence of statute to contrary, without proof they were paid under written protest.

2. Taxation ⇐543(1).

Under Constitution, action for recovery of taxes illegally collected may be brought against state only in such manner and in such courts as is directed by law (Const. art. 20, § 6).

3. Taxation ⇐543(1).

Statute authorizing maintenance of action against state to reclaim taxes illegally collected must be substantially complied with (St. 1933, p. 2490).

4. Automobiles ⇐102.

Payment of taxes under written protest by truck owners *held* prerequisite to maintenance of action for reimbursement because statute so required and also because petition showed that neither state officer nor taxpayers knew tax was illegal (St. 1933, p. 2490).

5. Statutes ⇐225.

In determining procedure on allowing claims for refunds of taxes against special fund created for such purpose by statute, such statute should be construed with statute relating to approval of claims by state controller (St. 1933, p. 2490; Pol. Code, § 664, as amended by St. 1933, p. 2618, and § 665, repealed and re-enacted by St. 1927, p. 452).

6. States ⇐138.

Warrants upon treasurer for payment of claims upon special fund created by statute for refund of taxes illegally collected may not be drawn except upon audit of state controller (St. 1933, p. 2490; Pol. Code, § 664, as amended by St. 1933, p. 2618, and § 665, repealed and re-enacted by St. 1927, p. 452).

7. Automobiles ⇐102.

Approval, by two members of board of control, of claims of truck owners for refund of taxes illegally collected, was unauthorized, where taxes were not protested in writing and controller properly refused to audit claims or draw warrant in payment thereof (St. 1933, p. 2490; Pol. Code, § 663, as amended by St. 1931, p. 843, § 664, as amended by St. 1933, p. 2618, and § 665, repealed and re-enacted by St. 1927, p. 452).

Petition by Arnold C. J. Brandt and another, copartners, against Ray L. Riley, as Controller of the State of California, for a writ of mandamus.

Writ denied.

Harry A. Encell, of San Francisco, for petitioners.

U. S. Webb, Atty. Gen., and R. L. Chamberlain, Deputy Atty. Gen., for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is a petition for a writ of mandamus to compel the state controller to draw a warrant upon the treasurer of the state of California in payment of two claims for reimbursement of taxes from a special fund created by chapter 968 of the Statutes of 1933, p. 2490, which taxes were previously inadvertently levied and collected from the petitioners pursuant to article 13, § 15, of the Constitution on the erroneous theory that they were operating a trucking system as common carriers.

The petitioners are engaged as copartners in the business of transporting freight over the highways of California by means of automobiles. Their principal place of business is at Los Angeles. It is alleged their business of transporting freight is not conducted over a regular route or between fixed termini, and that it therefore does not constitute the business of a common carrier. Erroneously assuming that petitioners were transporting freight as common carriers, the board of equalization of the state of California illegally levied and collected from them, under the pro-

visions of article 13, § 15, of the Constitution and the enacting statutes therefor, including sections 3664aa, 3670bb, and 3670cc of the Political Code, as added by St. 1927, p. 17, and § 3664aa, amended by St. 1929, p. 1553, the sum of $1,344.74 in the year 1930 and the further sum of $1,460.46 in the year 1931. These payments were not made under written protest. In December, 1933, the petitioners filed with the board of control of the state of California their verified claims for allowance and repayment of said sums under the provisions of chapter 968, supra. These claims were presented and allowed in part by two members of the board of control, as provided by the terms of the statute last mentioned. The state controller, who is the third member of the board of control, rejected the claims on the ground that they were not paid by the petitioners under written protests as required by the statute.

The petitioners contend that written protests were not necessary as a prerequisite to the allowance or payment of their claims for reimbursement of taxes illegally collected, for the reason that they were levied and collected by means which constitute duress on the part of the state, and that the requirement of written protests was waived by the board of control by its allowance of the claims by a majority of the members thereof.

We are of the opinion the petitioners' claims for reimbursement of taxes from the special fund which was created by chapter 968 of the Statutes of 1933, p. 2490, were not and could not legally be allowed in the absence of proof that the taxes were originally paid to the state under written protests. That statute specifically creates a special fund of $500,000 which was appropriated from the "Motor Vehicle Fund" to be disbursed by the state board of control in refunding taxes which were erroneously and illegally levied and collected pursuant to article 13, § 15, of the Constitution. That act limits the conditions under which the board of control may allow or pay claims from that special fund. It is therein provided that such claims for reimbursement must be presented within six months after the act became effective, and that "No such claim shall be examined by the board unless the claimant at the time of payment to the State of the amount claimed protested in writing such payment." Moreover, the statute permits the return of only 75 per cent. of the amount collected by the state.

[1-3] There is no doubt that justice requires the reimbursement of taxes which are illegally levied and collected by the state. When taxes are illegally collected by means which amount to duress or coercion, they may be reclaimed, in the absence of a statute to the contrary, without proof that they were paid under written protest. Whyte v. State of California, 110 Cal. App. 314, 294 P. 417; Grimes v. County of Merced, 96 Cal. App. 76, 273 P. 839; 26 R. C. L. 459, § 414; 61 C. J. 985, §§ 1263–1267; 2 Cooley on Taxation (3d Ed.) p. 1487; 64 A. L. R. 26, note; 34 A. L. R. 976, note. But a suit for the recovery of taxes which have been illegally collected may be brought against the state only "in such manner and in such courts as shall be directed by law." Const. art. 20, § 6; 2 Cooley on Taxation (3d Ed.) p. 1487; Bekins Van & Storage Co. v. State of California (Cal. App.) 28 P. (2d) 61. The statute which authorizes the maintenance of a suit against the state to reclaim taxes which have been illegally collected constitutes a limitation of the extent of recovery and prescribes the conditions under which the action may be maintained, which must be substantially complied with. In 2 Cooley on Taxation, supra, it is said, regarding the right to reimbursement from the state of taxes which have been illegally levied and collected: "The state is trustee of the money for the use of the persons paying it; but whether they can bring suit against the state therefor must depend upon the provision of law which it may have made for the purpose."

At page 1503 of the same volume it is further said in regard to the necessity of conforming to the statutory requirement of making a written protest as a prerequisite to the right of recovery: "Statutes in some states have changed the rule somewhat, and have allowed a recovery in all cases of illegal tax, provided that at the time of payment formal protest was made as the statute prescribes. In respect to such statutes it is only necessary to say that a party relying upon them must be careful to bring his case within their provisions. The protest will not be effective unless made within the time required by the statute. Where the statute requires a written notice of protest, an oral protest, * * * is not sufficient."

In 61 C. J., p. 993, § 1272, it is said in that regard: "By force of statute in some of the states, illegal taxes may be recovered back in an action at law when their payment was accompanied by a formal protest against the validity of the taxes and against being compelled to pay them. Such statutes are valid, and are distinct from, and in derogation of, the common-law rule as to voluntary payments, their effect being to make payment of

an illegal tax under protest involuntary, irrespective of any question of compulsion or duress within the rules of the common law. While the taxpayer must bring himself within, and substantially comply with, the terms of the statute, the statute should be liberally construed if necessary to reach and decide the merits."

The statutory requirement of making a written protest against the collection of an illegal tax as a prerequisite to the maintenance of an action against the state for reimbursement of the money paid is intended not only to furnish proof that the payment was involuntarily paid, but also to warn the tax collector that the tax is claimed to be illegal. Meek v. McClure, 49 Cal. 623, 627. In the case last cited, wherein the property owner sought to recover taxes alleged to have been illegally levied and collected under written protest, the court says with relation to the purpose of the protest: "The purpose and effect of the protest is not satisfactorily defined in any of those cases. In one of them it is said that one purpose of the protest is to take from the payment its voluntary character; but it is manifest that it is involuntary only, because of the coercion, the duress, or the undue advantage exercised or possessed by the party to whom the payment is made. * * * The only purpose of the protest was to give the officer notice that the money was not legally due, and thus to enable the officer to protect himself against the consequences of an action to recover the money back from him. The officer is thereby put on inquiry as to whether the money is legally due; and if he finds that the demand is illegal, he may protect himself by refusing to receive the money; or, if he finds that it is of doubtful legality, he may take the proper steps to avoid, or protect himself against responsibility. If the officer has notice of the matter which renders the demand illegal, another notice in the form of a protest would be useless; but if he has no knowledge of such matter, he ought not to be subjected to the costs and consequences of an action to recover the money from him."

[4] In the present case the payment of the taxes under written protest is a necessary prerequisite to the maintenance of an action for reimbursement, not only because it is a statutory requirement, but also for the reason that it affirmatively appears from the petition that the payments were made through mutual mistake and that neither the state officer nor the petitioners then knew that the tax was illegal.

[5-7] The allowance of the petitioners' claim under the provisions of chapter 968 of the Statutes of 1933, p. 2490, by two members of the board of control does not entitle them to a warrant upon the treasurer in payment thereof, in the absence of the approval of the state controller. The board of control consists of three members as provided by section 663 of the Political Code, amended by St. 1931, p. 843. These members are designated as the director of finance, the chief of the division of service and supply of the department of finance, and the state controller. That section does state that the concurrence of a majority of the members of the board "shall be deemed to be the finding, opinion and order of the board." It is contended by the petitioners that the approval of the claim in this matter by a majority of the members of the board renders the allowance of the claim final and conclusive without the approval of the state controller, for the reason that chapter 968, supra, gives the board the exclusive right to audit, allow, and disburse the funds of that special appropriation. The statute provides in part: "Out of the 'net receipts' of the motor vehicle fund, * * * there is hereby appropriated the sum of five hundred thousand ($500,000) dollars, or so much thereof as may be necessary, to be disbursed by the State Board of Control upon claims filed with the State Controller for the purpose of refunding to persons, firms, associations and/or corporations moneys paid by virtue of invalid demands by State of California, pursuant to the provisions of section 15, Article XIII of the Constitution of California. The State Board of Control shall promulgate rules and regulations for the presentation, examination and allowance of any such claims; provided, however, * * * that no such claim shall be examined by the board unless the claimant at the time of payment to the State of the amount claimed protested in writing such payment, * * * and the State Controller is hereby instructed to set up the appropriation hereby made accordingly for the purpose of apportioning the said net receipts."

Section 664 of the Political Code, as amended by the Statutes of 1933, c. 1027, p. 2618, authorizes the allowance of claims against the state and the drawing of warrants in payment therefor only upon the approval and audit of the state controller. It reads in part: "The board [of control] by a majority vote shall adopt general rules and regulations, limiting the amount of expenses and allowances to be paid, * * * and governing the presentation and audit of claims against the

State for which an appropriation has been made or for which a State fund is available. In accordance with such general rules and regulations of said board, the State Controller shall audit such claims before drawing his warrant therefor as prescribed by law. * * *"

So also section 665 of the same Code (repealed and re-enacted by St. 1927, p. 452) provides:

"If the state controller approve such claim under and in accordance with said rules and regulations, he shall draw his warrant for the amount so approved in favor of the claimant.

"If the state controller disapprove of any claim, the same shall be filed with the records of the board of control in such manner as may be prescribed in the general rules and regulations of said board for the presentation and audit of claims, together with a statement showing such disapproval and the reasons therefor."

In determining the procedure necessary to the allowance and payment of claims against the special fund which was created by the provisions of chapter 968, supra, that statute should be read and construed in connection with sections 664 and 665 of the Political Code. There appears to be nothing in chapter 968, supra, inconsistent with the general provisions of law requiring the audit of the state controller of all such claims as a prerequisite to the drawing of his warrant for the payment thereof. We are of the opinion that warrants upon the treasurer for the payment of claims upon that special fund may not be drawn except upon the audit of the state controller. It is the duty of the state controller, under the provisions of subdivision 17 of section 433 of the Political Code, to refuse to draw his warrant in payment of any claim against the state unless the allowance of the claim is "authorized by law." In the present proceeding the petitioners' claims were not authorized by law, since the payments were not protested in writing as the statute requires. The approval of these claims by the two members of the board of control was therefore in conflict with law, unauthorized and ineffectual. For that reason the controller properly refused to audit the claims or draw his warrant upon the treasurer in payment thereof.

For the foregoing reasons, the writ of mandamus is denied.

We concur: PULLEN, P. J.; PLUMMER, J.

139 Cal.App. 380

PEOPLE v. RAMIREZ.

Cr. 261.

District Court of Appeal, Fourth District, California.

June 21, 1934.

1. Criminal law ⇐1141(2).

Appellant must produce record disclosing occurrence of error relied on.

2. Criminal law ⇐998.

Denying motion to vacate judgment, which had become final, because fixing crime as first degree burglary without any evidence of degree thereof, *held* not error, where it appeared that evidence before trial court showed second degree burglary, and hence judgment, though erroneous, was not illegally pronounced without evidence.

3. Criminal law ⇐1023(12).

Order denying motion to vacate judgment which is merely erroneous and not void or illegally entered is not reviewable, when same points might have been presented on appeal from judgment.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Tim Ramirez was charged with burglary, and judgment was entered on a plea of guilty. From an order denying a motion to vacate the judgment, defendant appeals.

Affirmed.

See, also, 30 P.2d 577.

Tim Ramirez, in pro. per.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

In an information filed on July 10, 1930, the defendant was charged with the crime of burglary. After a plea of guilty, judgment was pronounced, and he was ordered confined in a state penitentiary. On October 28, 1933, he filed a motion to vacate the judgment on the ground that the same was void and that the court had no jurisdiction to make and enter the same for the reason that the trial court, without any evidence before it to show the degree thereof, fixed the crime as burglary in the first degree. From an order denying this motion, this appeal is taken.

The sole contention here made is that the judgment was void and the court was without jurisdiction to enter the same for the reason given above, and that, as a result

thereof, the appellant has been sentenced without due process of law and has been given a punishment greater than that warranted by the facts.

It may be conceded that, where a judgment is void upon its face, it may be attacked by a motion to vacate the same, and that under such circumstances an appeal will lie from an order refusing to set the same aside. People v. Bowles (Cal. App.) 27 P.(2d) 411. A similar procedure was followed and approved in the case of People v. Paraskevopolis, 42 Cal. App. 325, 183 P. 585, where it was held that judgment had not been legally pronounced since the court took no evidence as to the degree of the crime and made no determination thereof. A somewhat similar holding is found in People v. Stratton, 133 Cal. App. 309, 24 P.(2d) 174, where it appeared that no evidence was before the court upon the question of the degree of the crime, and none to show whether the offense was committed through torture or at a time when the defendant was armed with a deadly weapon.

[1, 2] The record now before us fails to disclose a situation coming within the scope of the cases just mentioned. The judgment here was not void on its face, and there is nothing to substantiate the claim that the degree of the crime was fixed in the absence of any evidence upon the subject. It is well settled that an appellant must produce a record which discloses that the error relied on has in fact occurred. People v. Ferguson, 124 Cal. App. 221, 12 P.(2d) 158, 960. The clerk's transcript contains copies of the information and of an amended commitment filed December 5, 1930, but purporting to have been signed on July 22, 1930, which recites that the appellant had been duly convicted of second degree burglary. The original judgment is not set forth, and no affidavits in support of the motion appear to have been filed. The reporter's transcript discloses that at the hearing of this motion the court stated that the testimony, as far as it went, showed that the building entered by the appellant was not inhabited. The court also read from what appears to be a record of what occurred at the time the amended commitment was ordered filed, at which time the trial judge stated as follows: "I have gone through the record of both the preliminary and the record as taken here in court and I find that the building was not an inhabited building and the defendant was not armed with a dangerous weapon, either when he entered the building or during the time when he was in the building, and that no assault was made and nothing was taken. The entry was made probably, the evidence shows, during the night time just before daylight, just before sun-up, on or about June 27, 1930. * * * My attention has been called to this by a letter from the defendant himself, who is serving time in Folsom, and after receiving the letter I went through the records and I am satisfied the court was wrong in making the findings of burglary in the first degree; it should have been burglary in the second degree, and for that reason the record will be amended and changed so as to show the finding of burglary in the second degree, and the sentence will be amended so that there will be stricken out the words 'burglary in the first degree' and substituted therefor 'burglary in the second degree.' And an amended commitment will be issued and sent to the authorities at Folsom."

While the record before us is most unsatisfactory, the situation appears to be that judgment was pronounced upon the appellant in July, 1930, at which time the court fixed the crime as burglary in the first degree, and that in December, 1930, the trial court attempted to make a correction by issuing an amended commitment in which it was recited that the appellant had been convicted of burglary in the second degree. So far as there is any record before us, there is no indication that when judgment was first pronounced there was no evidence before the court indicating the degree of the crime. On the contrary, all that we have here indicates that at that time there was evidence in the record showing the crime to be second degree burglary rather than first degree burglary. If that be true, while the judgment was erroneous, it was not illegally pronounced in the absence of any evidence as to the degree of the crime. No appeal was taken from the judgment, and the same was allowed to become final. So far as appears from the record, the showing made upon the motion was not sufficient to warrant the trial court in setting aside or vacating the judgment. People v. Rhodes (Cal. App.) 30 P.(2d) 1026.

[3] A further consideration is that, where a judgment is not void or illegally entered, but is merely erroneous, an order denying a motion to vacate the same is not reviewable when the same points might have been presented upon an appeal from the judgment. De la Montanya v. De la Montanya, 112 Cal. 101, 44 P. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165; People v. Davis, 187 Cal. 750, 203 P. 990; People v. Brattingham, 91 Cal.

App. 527, 267 P. 120; People v. Van Buren (Cal. App.) 25 P.(2d) 32; People v. Bowles (Cal. App.) 27 P.(2d) 411. While at first blush it may seem unjust to refuse to consider an appeal where a mistake has apparently been made, it must also be remembered that opportunity existed for an appeal from the judgment and that the orderly administration of justice requires that the time for taking an appeal be limited and that judgments should eventually become final. And a defendant is not without other remedies where the circumstances warrant other relief.

A motion to dismiss this appeal was heretofore denied [People v. Rameriz (Cal. App.) 30 P.(2d) 577] for the reason that the form of the motion, as noticed, was not then considered sufficient to warrant that action and because we were then under the impression that the record disclosed that no evidence concerning the degree of the crime was before the court. While it seems best to now affirm the order appealed from rather than to dismiss the appeal, nothing herein should be taken as authority against the latter procedure under a similar state of facts.

The order appealed from is affirmed.

We concur: MARKS, J.; HAINES, Justice pro tem.



139 Cal.App. 311

HAMBURGER et al. v. ELLINGSON et al.

Civ. 9343.

District Court of Appeal, First District, Division 2, California.

June 18, 1934.

1. Appeal and error ⇐909(3).

On appeal from judgment requiring that property of purchaser, who had agreed to pay mortgage, be first looked to for satisfaction of any deficiency judgment on foreclosure before property of original mortgagors, court will assume, where record shows nothing to contrary, that holders of note and mortgage received payments of principal and interest from such purchaser with notice of purchase.

2. Mortgages ⇐283(1).

As between mortgagor and grantee, the grantee becomes primarily liable for the debt and mortgagor becomes a surety, and mortgagee is bound to respect rights of surety after receiving notice of assumption of mortgage debt, though he may treat both parties as debtors, and enforce liability against either.

3. Mortgages ⇐559(7).

Where holder of note and mortgage with knowledge of purchase received payments of principal and interest from purchaser who had agreed to pay mortgage debt, judgment in foreclosure proceeding requiring that property of purchaser be first looked to for satisfaction of any deficiency judgment before property of original mortgagors *held* proper and not prohibited by statute limiting power to stay execution (Code Civ. Proc. § 681a).

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Action by D. A. Hamburger, individually, and D. A. Hamburger, as executor of the estate of M. A. Hamburger, deceased, against G. E. Ellingson and others. From an adverse judgment, plaintiffs appeal.

Affirmed.

Mitchell, Silberberg & Knupp, Guy Knupp, and James W. Mack, all of Los Angeles, for appellants.

O'Connor, Divet & Mulvane, J. F. T. O'Connor, A. G. Divet, and C. J. Mulvane, all of Los Angeles, for respondents.

STURTEVANT, Justice.

From a judgment in favor of plaintiffs foreclosing a mortgage, they have appealed from the last paragraph of the judgment and have brought up the judgment roll only.

On the 16th day of March, 1926, the defendants G. E. Ellingson, Herbert W. Schmidt, Mary L. Schmidt, his wife, I. Pelsner and May Pelsner, his wife, executed their note to Martin T. Sayre and Josie D. Sayre. To secure the payment of that note, they also executed a mortgage on real estate in Los Angeles county. On the 18th day of February, 1928, the note and mortgage were assigned to the plaintiffs. On the 11th day of November, 1927, I. Pelsner and May Pelsner, his wife, and G. E. Ellingson, being the record owners of the real estate, conveyed it to Equitable Realty Company, a corporation. The deed recited among other things: "Subject to a mortgage of record securing a note for $32,000 (the note in suit) which said mortgage the grantee herein by the acceptance of this deed assumes and agrees to pay." The Equitable Realty Company did accept the deed. On September 8, 1931, there had been paid on the principal $3,750. The in-

terest had been paid down to March 16, 1931, otherwise the payments of principal and interest were in default and the plaintiffs commenced this action. On the 9th day of May, 1931, the plaintiffs executed a partial release. In their complaint the plaintiffs named the mortgagors as defendants, and they also named the grantee of the mortgagors. In the prayer of their complaint, among other things, they asked, "* * * That plaintiffs have judgment and execution against defendants G. E. Ellingson, Herbert W. Schmidt, Mary L. Schmidt, I. Pelsner, Mary Pelsner, and Equitable Realty Company, a corporation, and each of them for any deficiency which may remain after applying the proceeds of the sale of such mortgaged property. * * *" In its findings the trial court found all of the allegations of the complaint of the plaintiffs to be true. The last paragraph of the judgment which is the subject of the attack on this appeal is as follows: "It is further ordered, adjudged and decreed that the deficiency judgment, if any, entered herein, upon and after the sale of said real property, shall first be satisfied from the property of the defendant Equitable Realty Co., to the extent that such property shall be sufficient for such purpose and that no execution for said deficiency judgment or any part thereof shall issue against the property of the defendants G. E. Ellingson, I. Pelsner and/or May Pelsner unless the property of the said defendant Equitable Realty Co. shall be insufficient to satisfy said deficiency judgment, in which event the plaintiffs may have execution against the property of said defendants G. E. Ellingson, I. Pelsner and May Pelsner, or either of them, for any part of said judgment remaining unsatisfied."

The plaintiffs freely concede, and in their brief they state: "It has been frequently held that the assumption of a mortgage by the mortgagor's grantee renders the grantee the principal debtor and the mortgagor his surety to pay the debt. Williams v. Naftzger, 103 Cal. 438, 37 P. 411; Hopkins v. Warner, 109 Cal. 133, 41 P. 868. The assumption of the debt obligates the mortgagor's grantee to hold the mortgagor harmless. Beach v. Waite, 21 Cal. App. 304, 131 P. 880; Tompkins v. Powers, 106 Cal. App. 464, 289 P. 685." Nevertheless they contend: "In the case at bar, the court below attempted to compel appellants, assignees of the mortgagees, first to exhaust their remedies against the grantee of the mortgagors, who assumed the mortgage, and this was made a condition precedent to the enforcement of the deficiency judgment against the mortgagors. This clearly denies to the mortgagees their right unconditionally to enforce their contract with the mortgagors. No fact exists justifying the imposition of this burden upon the mortgagees or their assigns. The principles summarized herein indicate that the imposition of such conditions is inconsistent with the rights of appellants to enforce the mortgage given by respondents; also, that such conditions negative the very conclusion of the court that appellants are entitled to a deficiency judgment against the respondents. It was therefore error to include in the judgment the provisions of the last paragraph thereof."

In support of their contention they cite no authority that is directly in point. While in our examinations we have not found numerous authorities, those that we have found do not sustain the contention of the plaintiffs. In 50 C. J., at page 225, the author states as follows: "Where a judgment has been obtained against both the principal and the surety, the creditor, in the absence of a contrary provision of the statutes, may, at law, levy upon the property either of the surety or of the principal, but in chancery the property of the principal should be subjected first to the discharge of the obligation. * * *" In the same book, at page 224, the same author states: "A decree in equity should provide for first exhausting the estate of the principal, unless he is utterly insolvent." In 1 Pomeroy's Equitable Remedies, § 12, the author states: "In the infancy of the court of chancery while the chancellors were developing their system in the face of a strong opposition, in order to avoid a direct collision with the law and with the judgments of law courts, they adopted the principle that their own remedies and decrees should operate in personam upon defendants, and not in rem." In the leading case Horton et al. v. Bond, 28 Grat. (69 Va.) 815, a decree in equity which failed to direct the manner in which the execution should issue was reversed. On page 825 of 28 Grat. (69 Va.), the court said: "The court is further of opinion that if a sale was proper at all, the said decree of the county court is also erroneous in ordering a sale of all the lands of the sureties uno flatu, and in vesting the commissioner with discretionary power as to the order in which said lands should be sold. While it is true that the sureties as well as their principal are all bound by the complainant's judgment, and he has the undoubted right to resort for satisfaction to the property of each and all of them, yet, in equity, in a suit in which all the parties are alive and before

the court, the court will respect the equities of the parties inter sese, and administer them upon the principles peculiar to the forum, as far as that can be done without too great delay and without prejudice to the rights of the creditor. The principal debtor's lands should be first subjected to the exoneration of the lands of the sureties." In the case of Boughton v. Bank of Orleans, 2 Barb. Ch. (N. Y.) 458, at page 462, the court said: "But the principle of equity is well established that the property of the principal debtor is primarily liable, and should be first resorted to. And if the sheriff, with a full knowledge of the facts, wilfully violates the principle of equity in this respect, the surety certainly is not without remedy. For if he cannot recover in an action upon the case against the sheriff, this court ought, unquestionably, to grant him relief, upon a bill filed for that purpose." In the case entitled Patton's Adm'r, etc., v. Patton's Heirs, 3 B. Mon. (42 Ky.) 160, commencing on page 161, the court said: "But as Wm. Patton was the principal in the guardian bond, his whole estate, real and personal, should be first made liable to the payment of the whole demand due to the wards. It would be subjecting the estates of the sureties to an unnecessary and oppressing burthen, to subject them first to the payment of the demand due to the wards, and afterwards to sell the estate which has devolved upon them from their father, the principal, for the indemnification of the sureties. The estate, real and personal, of the guardian, which can be had, should be first sold, and the amount which can be made, ascertained, and a decree rendered against the representatives of the sureties for the residue." See, also, Womack v. Glasgow, 84 Va. 9, 5 S. E. 550; Wytheville Crystal Ice & Dairy Co. v. Frick Co., 96 Va. 141, 30 S. E. 491; Beckham v. Duncan (Va.) 9 S. E. 1002.

[1-3] In support of the judgment, there being nothing showing to the contrary, this court is bound to assume that from the time these plaintiffs became the owners and holders of the note and mortgage they received payments of interest from the Equitable Realty Company and received a payment of principal, $3,750, also from it; and that these plaintiffs had notice of the assignment of the real estate to the Equitable Realty Company. From the time that they had such notice the rule applicable to them is stated in 3 Pomeroy's Equity Jurisprudence, § 1206, as follows: "As between the mortgagor and the grantee, the grantee becomes the principal debtor primarily liable for the debt, and the mortgagor becomes a surety, with all the consequences flowing from the relation of suretyship. As between these two and the mortgagee, although he may treat them both as debtors and may enforce the liability against either, still, after receiving notice of the assumption, he is bound to recognize the condition of suretyship, and to respect the rights of the surety in all of his subsequent dealings with them." It follows that the contention made by the plaintiffs is without merit.

In their next point the plaintiffs state: "The stay of execution upon the judgment for the deficiency against the respondents is (a) burdensome and inequitable to the appellants and (b) unauthorized under the provisions of section 681a of the Code of Civil Procedure." Instead of being burdensome and inequitable, we have shown above that the judgment was entirely equitable. If it was burdensome, it was not unlawfully burdensome. Section 681a limits a stay of execution. It is perfectly clear that this case does not come within the purview of that section. The trial court did not stay the execution, but properly limited the manner of its use.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



139 Cal.App. 15

CARTER v. CARR et al.

Civ. 1295.

District Court of Appeal, Fourth District, California.

May 29, 1934.

1. Sales ⇐52(7).

In action to rescind, for alleged fraud, a contract for purchase of cattle which proved to be diseased, evidence *held* to warrant finding that defendant had made false representations respecting condition of cattle.

2. Sales ⇐38(7).

Where owner's representation was in effect that cattle which prospective buyer expected to examine had been blood-tested, such buyer was entitled to rely thereon, as respects right to rescind contract when cattle were discovered to be diseased.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

3. Principal and agent ⇐23(1).

In action to rescind cattle purchase, evidence, *held* to warrant inference that individual defendant acted as codefendant's agent in the sale to plaintiff.

4. Principal and agent ⇐22(1).

Alleged agent's extrajudicial statements respecting existence of agency are inadmissible to prove fact of agency.

5. Principal and agent ⇐23(2).

Agency may be established by circumstantial evidence.

6. Evidence ⇐121(17).

In action to rescind cattle purchase for fraud, declarations of individual defendant and his agent to cattle buyer that individual defendant represented corporate codefendant *held* properly admitted as part of res gestæ.

7. Evidence ⇐269(1).
Witnesses ⇐379(2).

In action to rescind cattle purchase for fraud, evidence that individual defendant and his agent had made statements that individual defendant represented corporate codefendant *held* properly admitted as impeaching individual defendant's testimony that he was not agent of corporation and as tending to show that plaintiff, in dealing with individual defendant, understood he was dealing with him as agent.

8. Corporations ⇐432(6).
Evidence ⇐271(18).

In action against individual and corporation to rescind cattle purchase for fraud, in which issue was whether individual was corporation's agent, individual's financial statements addressed to corporation *held* properly excluded as immaterial and as self-serving declarations.

9. Appeal and error ⇐1056(1).

In action to rescind cattle purchase, in which issue was whether individual defendant was corporate codefendant's agent, exclusion of corporation's ledger sheets allegedly showing debtor-creditor relationship instead of agency *held* not prejudicial error, since sheets were self-serving statements of corporation and covered time about 2½ years before execution of sale contract, and since evidence was cumulative.

10. Fraud ⇐31.

One induced by fraud to enter into agreement may, on discovery of fraud, rescind contract by restoring or offering to restore everything of value received on condition that other party shall do likewise, or may affirm contract, perform conditions imposed, and sue for damages, but may not pursue both remedies (Civ. Code, § 1691).

11. Fraud ⇐59(2).
Sales ⇐130(4).

In action for rescission of contract, plaintiff may recover consideration given upon restoration, or offer of restoration, of that which he received, and is entitled also to recover compensation for consequential damages suffered through having entered into contract, whereas, in simple action for damages for fraud, plaintiff is entitled to difference between actual value of property and value of property as represented plus legitimate expenditures.

12. Sales ⇐130(3, 3½).

In action to rescind cattle purchase for fraud and recover consequential damages, admission of evidence as to actual value of cattle and value as represented and as to difference between actual milk production and amount which sound cattle would have produced, and instruction permitting recovery of such differences, *held* erroneous as applying improper measure of damages.

13. Sales ⇐130(4).

In buyer's action to rescind purchase for fraud, loss of profit is not proper element of damages.

14. Appeal and error ⇐1178(6).

In action for rescission of cattle purchase for fraud, where judgment for plaintiff required reversal because of application of improper measure of damages, but record contained evidence which would support a verdict for plaintiff, cause was remanded only for retrial of single issue of amount of damages.

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Action by Maud Carter, as administrator of the estate of J. C. Carter, deceased, against S. G. Carr and the Seaboard Dairy Credit Corporation. Judgment for plaintiff, and defendants separately appeal.

Reversed and remanded, with directions.

See, also, 27 P.(2d) 940.

Julius Hansen, of Fresno, for appellant Carr.

Walter J. Little, of Los Angeles, and W. Eugene Craven and Sutherland, Dearing & Jertberg, all of Fresno, for appellant Seaboard Dairy Credit Corporation.

Gallaher & Ozias and Samuel F. Hollins, all of Fresno, for respondent.

JENNINGS, Justice.

Plaintiff instituted this action to recover from defendants certain sums of money al-

leged to have been paid to them in compliance with the provisions of a written contract for the sale of cattle entered into between plaintiff and the defendant S. G. Carr, which contract was alleged to have been rescinded by plaintiff because of certain false and fraudulent representations made to plaintiff by Carr and by Carr's employee and agent, one Rutledge. The complaint alleged that plaintiff gave notice of rescission and offered to surrender possession of the cattle purchased and demanded return of the money paid by him under the contract together with incidental damages within a few days after he had discovered the fraud which had been practiced upon him by Carr. The complaint further alleged that Carr, in making the sale of the cattle to plaintiff and in executing the contract, acted as the agent for the defendant Seaboard Dairy Credit Corporation. The prayer of the complaint was for a judgment for the various sums of money paid by plaintiff under the contract and interest thereon from the dates of payment and for specified sums of money which plaintiff claimed as compensation for damages alleged to have been sustained by him by reason of the sale and delivery of the cattle to him. When the action was called for trial, the defendants objected to the impanelment of a jury on the ground that the action was strictly equitable in character, being one for rescission of a written contract. The trial court overruled the objection and ordered that a jury be impaneled for the purpose of determining the amount of damages which plaintiff might be entitled to receive if the court should decide that plaintiff was entitled to the remedy of rescission. Upon the conclusion of the trial the issue of damages was submitted to a jury, which returned a verdict in favor of plaintiff against both defendants and assessed damages in the amount of $6,325.25. The trial court subsequently made findings of fact which adopted this figure as the amount which plaintiff was entitled to receive as compensation for the false and fraudulent representations which the court found the defendants had made to plaintiff. Judgment was accordingly rendered by which it was decreed that the contract be rescinded and canceled and that plaintiff should have and recover from defendants the said sum of $6,325.25. From the judgment thus rendered the two defendants have prosecuted separate appeals.

The record herein, which is presented in the form of a bill of exceptions, shows that the following facts were developed by the evidence adduced during the trial: On March 6, 1930, plaintiff took possession of a 40-acre ranch near the town of Clovis in Fresno county. It was his intention to operate a dairy on the property, and he thereupon made certain improvements with this purpose in view. At some time during the month of March, 1930, plaintiff called upon C. C. Brewer, who was then the manager of the Seaboard Dairy Credit Corporation for the Fresno district, and stated to Brewer that he wished to purchase some Guernsey cows. Brewer referred plaintiff to two men near Bakersfield. On April 10, 1930, one Roy Rutledge called at plaintiff's ranch. Rutledge stated that he was a cattle buyer for S. G. Carr and that Carr represented the Seaboard Dairy Credit Corporation. Rutledge told plaintiff that he had heard from Brewer that plaintiff was in the market for some Guernsey cows. Rutledge again visited plaintiff's ranch about one week subsequent to his first visit, and on this second occasion stated to plaintiff that he had received a letter from a man in Oregon who had a herd of choice Guernsey cows for sale. At the conclusion of this conversation it was agreed that Rutledge would endeavor to purchase this herd of cows for plaintiff. On May 20, 1930, the defendant S. G. Carr came to plaintiff's ranch and stated that he was the man for whom Rutledge was buying cows, that he expected to hear from Rutledge in a few days and would advise plaintiff when he heard from him. On May 26, 1930, Carr again visited plaintiff's ranch and stated that he had received a wire from Rutledge advising him that the cattle which Rutledge had purchased in Oregon would arrive in Roseville, Cal., on the following day. It was then arranged that plaintiff and his wife would accompany Carr to Roseville on the next day for the purpose of inspecting the cattle. The trip was made as planned, and plaintiff and his wife testified that during the journey the defendant Carr made certain representations with respect to the particular locality in Oregon from which the cattle they expected to inspect had come and the freedom of this locality from such cattle diseases as tuberculosis and infectious abortion. The cattle arrived in Roseville on May 28, 1930. At the time of their arrival plaintiff again saw and talked with Rutledge, who arrived on the same train which transported the cattle. Rutledge told plaintiff that he had been unable to buy the herd of Guernsey cattle which he had previously described to him, but that he had procured some very choice Guernsey cows. Plaintiff and his wife then inspected the cattle and milked a number of them. It was finally agreed that plaintiff would purchase from Carr 54 Guernsey and Jersey cows

and one bull. Pursuant to this arrangement the cattle were shipped to plaintiff's ranch. Two days after the cattle arrived at the ranch, plaintiff signed a contract in writing whereby he agreed to buy the cattle from Carr for the sum of $8,791.80. At the time the contract was signed, plaintiff gave Carr a check for $1,000 and on October 15, 1930, he delivered to the Seaboard Corporation a promissory note payable to Carr for the same amount and as security for its payment assigned to the corporation a certain contract for the sale of real estate, whereby plaintiff as seller had agreed to sell and the purchaser had agreed to buy certain land for a stated consideration. The contract for the sale and purchase of the cattle provided that plaintiff should pay the balance of the purchase price amounting to $6,791.80 at the rate of $290 per month beginning on July 15, 1930. It subsequently developed that a number of the cattle thus purchased by plaintiff from the defendant Carr were affected with infectious abortion. Plaintiff made a number of payments on his contract, but the returns from the dairy did not meet his expectations, and he fell behind in his payments, with the result that the Seaboard Dairy Credit Corporation, assignee of the contract, took possession of the cattle. Prior to the corporation taking possession of the cattle, plaintiff gave to S. G. Carr and the Seaboard Dairy Credit Corporation written notice that he rescinded the contract between Carr and himself by which he had agreed to purchase the cattle, tendered delivery of the cattle, and demanded payment of the money which he had paid under the contract, together with interest and the sum of $6,100 as compensation for the loss sustained by him by reason of diminished production of dairy products and the infection of his property and dairy equipment due to the presence of the disease among the cattle.

[1, 2] Appellant S. G. Carr maintains on his appeal that no evidence was submitted during the trial of the action which tended to show that he or his agent Rutledge had made any false or fraudulent representation with respect to the cattle. This contention is adopted by the appellant Seaboard Dairy Credit Corporation. It may properly be first considered herein. Obviously, if it is correct, the judgment must be reversed without consideration of the various other contentions advanced by appellant Seaboard Dairy Credit Corporation.

Analysis of the evidence which the record discloses was produced relative to representations made by Carr and Rutledge impels the conclusion that the aforesaid contention may not be sustained. Respondent Carter and his wife testified that, during the course of the journey from Fresno to Roseville, appellant S. G. Carr stated to them that the cattle which they then expected to inspect at Roseville had come from Josephine county in the state of Oregon, which county "is 100%." This testimony also showed that he said that all cattle coming in or going out of Josephine county were required to be "T. B. blood tested," and that the railroad had to be furnished with a certificate of the test. Appellants seek to avoid the effect of this testimony by pointing to the fact that, when the cattle arrived at Roseville, it was discovered that the particular cattle which Rutledge had purchased and which formed the shipment which respondent and his wife inspected and later purchased had not come from Josephine county, and that no false representation with respect to the condition of these cattle was made either by Carr or Rutledge. However, it must be conceded that whatever representations were made by appellant Carr during the journey from Fresno to Roseville referred to the cattle which respondent and his wife and Carr expected to examine at Roseville. The fact that it was later discovered that the cattle which respondent purchased were not the cattle which he had expected to obtain and that they did not come from Josephine county, Or., cannot relieve appellants from the effect of these representations if it appeared that any false representation respecting the condition of the cattle was made. The evidence showed that the cattle which respondent examined at Roseville had been tested for tuberculosis in Oregon, but that this test was not a blood test, and that the only cattle disease for which a blood test is made is the disease of infectious abortion, and that the only test which discloses the presence of this disease in cattle is a blood test. There was evidence that the cattle which respondent purchased had not been blood-tested. The above-mentioned testimony showed that the effect of the representation of appellant Carr was that the cattle which respondent expected to examine at Roseville had been blood-tested. This was a false representation upon which, under the circumstances shown by the evidence, respondent was entitled to rely and did rely. It developed that, shortly after the cattle were delivered at respondent's ranch, the presence of the disease became apparent, and a blood test, which was made by a veterinarian in the month of December, 1930, showed that among the cattle purchased from Carr by respondent there were eleven cows that were so affected by the disease as to be classified

as positive reactors and four others that were classified as suspicious.

In addition to the foregoing evidence, respondent's wife, Mrs. Maud Carter, testified positively that after the cattle had been delivered at respondent's ranch, but before the written contract was executed, Roy Rutledge, the admitted agent of appellant S. G. Carr, who had purchased the cattle in Oregon, stated to her in the presence of Dr. John Hoop that all of the cattle had been blood-tested. Another witness, Dr. John Hoop, testified that, within a day or two after the cattle had arrived at respondent's ranch he was called to the ranch for the purpose of examining some of the cattle and that Roy Rutledge stated to him that the cattle "were blood tested and T. B. tested and one hundred per cent clean." We think, therefore, that the record discloses that there was evidence that false representations regarding the condition of the cattle were made by appellant Carr.

[3] One of the principal contentions advanced by appellant Seaboard Dairy Credit Corporation, on its appeal is that no evidence tending to prove that appellant S. G. Carr acted as the corporation's agent in the sale of the cattle to respondent was produced during the trial. If this contention is correct, it is obvious that the judgment, in so far as it affects the corporation, must be reversed, since the corporation could properly be held liable only if the evidence showed that S. G. Carr acted as the corporation's agent in the sale of the cattle to respondent.

In this connection various officers of the corporation and the appellant Carr testified that Carr was not at any time an agent or employee of the corporation, but that on the contrary he was an independent dealer in cattle who was merely financed in his operations by the corporation. On the other hand, certain evidence which was entirely circumstantial tended to show that, in purchasing the cattle which were sold by Carr to the respondent, Carr acted as an agent of the appellant corporation. The most important evidence which was produced in this regard by the respondent consisted of a number of sight drafts drawn upon Seaboard Dairy Credit Corporation on different dates in the month of May, 1930, by Roy Rutledge. To each draft was attached a bill of sale. The evidence respecting these drafts showed that they were given by Rutledge in payment for cattle which were purchased by him in Oregon during May, 1930, and that from the cattle thus purchased respondent selected the herd of cattle mentioned in the contract which he and Carr executed on May 31, 1930. These instruments showed that the money which paid for the cattle purchased by Rutledge was furnished by appellant Seaboard Dairy Credit Corporation and showed also that the seller in each instance executed a bill of sale whereby he transferred title to the cattle described in the bill of sale to the Seaboard Dairy Credit Corporation. No evidence was produced which showed that the corporation at any future time conveyed title to Carr, although the contract sought to be rescinded was made between Carr and respondent and by this contract Carr agreed to sell to respondent the same cattle covered by the heretofore mentioned bills of sale. It is a circumstance of some significance that on the very date on which the contract was executed Carr assigned his interest in the contract to the Seaboard Dairy Credit Corporation. The most significant fact demonstrated by the above-described evidence is that the owners of cattle in Oregon who sold their cattle to Rutledge immediately signed instruments which conveyed title not to Rutledge nor to Carr, but to the Seaboard Dairy Credit Corporation. As heretofore pointed out, appellant corporation produced evidence both direct and circumstantial which tended to show that Carr was an independent cattle dealer and that the only part played by the corporation consisted in the furnishing of financial backing to Carr in his operations. The execution of the various bills of sale by the owners of cattle was thus readily explainable as the giving of security by Carr for the payment of money loaned to him by the corporation. Nevertheless, we cannot declare that the triers of fact may not have inferred from this circumstance that in purchasing the cattle in Oregon Carr was acting as an agent for the corporation and that such an inference would be entirely unreasonable.

The appellant corporation particularly complains of the admission of certain evidence offered by respondent and of the rejection of certain other evidence offered by this appellant.

Over the objection of the appellant corporation the respondent was permitted to testify that Rutledge, on the occasion of his first visit to respondent's ranch, made the statement that "Mr. Carr represented the Seaboard Dairy Credit Corporation." Appellant corporation, in support of its contention that the court erred in admitting this evidence, relies on the familiar rule that the fact of agency may not be established by proof of an admission or declaration of an alleged agent. The admission by the trial court of other evidence of similar tenor is attacked on the same

ground. A particular additional example is specified in certain statements which the respondent and his wife testified were made by appellant Carr after the cattle had been tested in December, 1930, and it had been discovered that a number of them were diseased. Both respondent and his wife testified that during the course of a conversation between them and Carr the latter stated that the cows "are Seaboard cows." Respondent Carter also testified that Carr made the following statement to him: "I think the Seaboard should have the cows treated and attach the expense on the tail of the contract."

[4-7] It must, we think, be conceded that the fact of agency may not be established by proof of purely extrajudicial statements of one who assumes or pretends to act as an agent and that evidence of such statements is incompetent and inadmissible for such purpose. Spoon v. Sheldon, 27 Cal. App. 765, 768, 151 P. 150. It does not follow, however, that evidence of such statements is inadmissible for any purpose. It has been decided, for example, that, when it has been shown that a person was given actual or ostensible authority to act for another in a particular matter, any declarations made by the agent at the time of the transaction of the business intrusted or apparently intrusted to him, and relating to such business, is admissible as a part of the res gestæ. Hubback v. Ross, 96 Cal. 426, 430, 31 P. 353. It is settled that agency may be established by circumstantial evidence. Bergtholdt v. Porter Bros. Co., 114 Cal. 681, 688, 46 P. 738. It often occurs that direct proof of the fact of agency is impossible. This was true in the instant case. Both appellants denied under oath that Carr was the agent of the Seaboard Dairy Credit Corporation. There were circumstances, nevertheless, which tended to show that Carr was in fact the agent of the corporation and that in dealing with the respondent he acted as the agent of the corporation although he made the contract in his own name. It is nowhere contended that Rutledge was not the agent of Carr. The manner of payment for the cattle purchased by Rutledge in Oregon was a circumstance which pointed strongly to the fact that Rutledge's principal was in fact the agent of the corporation. So far as we can see, the declarations of Carr and those of his admitted agent with reference to the fact that Carr represented the corporation stand on the same footing and were properly admitted as part of the res gestæ. Furthermore, evidence that Carr and Rutledge had made statements to the effect that the former was the agent of the corporation was properly admitted as impeaching Carr's testimony that he was not the agent of the corporation and as tending to show that respondent, in his dealings with Carr, understood that he was dealing with Carr as an agent and not as a principal. Lawson v. Steinbeck, 44 Cal. App. 685, 186 P. 842. Finally, it should be observed that this is not a case where the only evidence which tended to show that Carr was the agent of the corporation consisted of the evidence under consideration. There was other evidence competent and material which pointed strongly to the fact of agency. It was wholly circumstantial. The various conversations which occurred between Rutledge and the respondent and between Carr and the respondent were part of the entire circumstantial background of the case which the triers of fact were required to examine for the purpose of discovering whether any liability could properly be fastened upon the corporation because of the representations made to the respondent by Carr and his agent Rutledge.

[8, 9] The evidence which it is contended the trial court improperly rejected consists of certain financial statements prepared by appellant Carr, bearing his signature, addressed to appellant Seaboard Dairy Credit Corporation, and of certain sheets taken from the ledger of the Seaboard Dairy Credit Corporation which purported to show the account between the corporation and Carr. As to the financial statements, it is our opinion that they were properly excluded. They were obviously immaterial to the questions involved in the instant case and were clearly self-serving declarations. As to the ledger sheets, while it is conceded that they were likewise immaterial, it is contended that they showed that the relationship which existed between Carr and the corporation was purely that of debtor and creditor, thus negativing any suggestion of agency. Although this latter evidence might perhaps have been admitted as part of the entire factual background of the case, we are by no means convinced that its rejection constituted reversible error. The ledger sheets offered purported to show the account between the corporation and Carr from August 5, 1927, to November 6, 1927. They contained no reference to the cattle which were the subject of the contract sought to be rescinded. They were plainly self-serving statements of the corporation. Furthermore they showed the state of the account which existed between the corporation and Carr at a time approximately 2½ years prior to the execution of the contract which formed the basis of the present action. Finally, the

effect of this evidence was entirely cumulative. The appellant corporation was permitted to show by other evidence that the relationship between itself and Carr was that of creditor and debtor. Certain of its officers and agents and the appellant Carr unequivocally denied that Carr was the agent of the corporation. We think therefore that, even if it be conceded that the proffered evidence might properly have been admitted, no error prejudicial to the appellant corporation was accomplished by its rejection.

The final contention which is advanced by both appellants on this appeal is that the trial court erred in admitting certain evidence relating to the question of damages, and that the jury in assessing damages applied an improper measure in determining the amount of damages which respondent was entitled to recover, assuming that he was entitled to rescind the contract.

[10, 11] It is the established rule in California that one who has been induced by fraud to enter into an agreement has a right to seek one of two affirmative remedies. Upon discovery of the fraud, he may rescind the contract by restoring, or offering to restore, to the other party to the agreement everything of value which he has received under the contract "upon condition that such party shall do likewise." Section 1691, Civ. Code. The alternative remedy is to affirm the contract, perform the conditions imposed thereby, and sue for the recovery of such damages as he may have suffered by reason of the fraud. House v. Piercy, 181 Cal. 247, 251, 183 P. 807; Paxson v. Margulis-Stulman Co., 127 Cal. App. 94, 96, 15 P.(2d) 191. It is obvious that the party who claims to have been defrauded may be entitled to one of the above-mentioned remedies but that he may not have both. Connelly v. J. D. Millar Realty Co., 131 Cal. App. 67, 70, 20 P.(2d) 781. This must be true, since the two remedies are inconsistent. The remedy of rescission necessarily involves a repudiation of the contract. The remedy afforded by an action for the recovery of damages suffered because of fraud involves an affirmance of the contract. The measure of damages recoverable in an action for rescission is essentially different from that which is applicable in a simple action for damages caused by fraud. In the former action, a plaintiff is entitled to recover the consideration which he gave upon restoration or offer of restoration of that which he received. He is also entitled to recover compensation for whatever consequential damages he may have suffered by reason of having entered into the contract. In the latter case, a plaintiff is entitled to recover the difference between the actual value of the property and its value if the property had been as represented plus whatever amount he may have paid out by way of legitimate expenditures. Hines v. Brode, 168 Cal. 507, 143 P. 729; Divani v. Donovan, 214 Cal. 447, 6 P.(2d) 247; Crystal Pier Amusement Co. v. Cannan (Cal. Sup.) 25 P.(2d) 839; Jackson v. Deauville Holding Co. (Cal. Sup.) 27 P.(2d) 643.

Since the action which was instituted by respondent was clearly one whereby he sought to rescind a written contract on the ground of fraud and to recover consequential damages, it is apparent that the measure of damages applicable was that which prevails in actions for rescission.

[12, 13] Over the objection of appellants, respondent was permitted to introduce evidence that the cattle which he had agreed to purchase would have had a value of more than $150 per head if they had been sound dairy cattle, whereas, by reason of the presence of infectious abortion in the herd they had a value of only $25 or $30 per head for beef purposes. Over the objection of appellants, respondent was also allowed to present evidence which showed that the cows would have produced from $325 to $350 more per month in milk if they had been free from the above-mentioned disease than they did produce.

In advising the jury, the trial court, at respondent's request, gave the following instruction: "You are instructed that in determining the amount of damages suffered by the plaintiff, you will also find from the evidence in this case, the amount of loss, if any, suffered by the disease known as infectious abortion. This loss, if any, is the difference between the reasonable market value of said cattle at the time they were received by the plaintiff, and their reasonable market value if they had been free from said disease and as represented to be."

In another instruction the court advised the jury that, in determining the loss, if any, suffered by respondent because the cows produced less milk, if the jury found that less milk was produced because of the disease, the jury should subtract the reasonable market value of milk and dairy products actually produced from the reasonable market value of such products which would have been produced if the cattle had been free from the disease of infectious abortion. The reception of the above-mentioned evidence and the giving of the aforesaid instructions is assigned as erroneous, in that it permitted and advised

the jury to apply an improper measure of damages in arriving at the amount which respondent was entitled to recover assuming that the recovery of any amount was justified. With this contention we are impelled to agree. Since the action was one for rescission and the recovery of consequential damages, the measure of damages was that which has been established in actions of this character. The element of loss of profit which is a proper element in actions where a purchaser who affirms a contract and seeks merely to recover damages caused by fraud is not a proper element in an action where the purchaser disaffirms and repudiates his contract and seeks to recover the consideration which he has paid, together with compensation for such consequential damage as he has suffered.

[14] The trial court's findings show that the court found that respondent had paid on account of the contract a total consideration of $3,907.93. If the evidence showed that the remedy of rescission was proper, he was entitled to recover the above-mentioned consideration and in addition to recover compensation for any special damage which he had suffered by reason of the fraud practiced upon him. The trial court, however, found that the difference in the market value of the cows as delivered and their value as represented was $6,791.80 and that the difference in the value of milk actually produced and the value which would have been produced if the cows had been sound amounted to $2,700. The court also found that respondent had suffered special damages in the cost of feed for the cattle and the cost of labor required to care for the cattle, reasonable rental value of the corral where the cattle were inclosed for a period of six months, cost of labor and material used in disinfecting the corral, and decrease in value of manure produced by the cattle, and that the total amount of such damages was $8,590. The addition of the amounts allowed for special damages and for the loss in market value of the cattle and for loss of milk production shows that the trial court found that the sum of $18,081.80 represented the total amount of damage suffered by respondent. The court further found that during the time the respondent had possession of the cattle he had received $6,268.03 from the sale of dairy products and calves. Since the court found that the respondent had paid $3,907.93 on account of the purchase price of the cattle and further found that he had received $6,268.03 from the sale of dairy products and calves, it follows that he received $2,360.10 more than he had paid out. The findings must therefore show that respondent suffered special damage amounting to $8,685.35 in order to support the judgment of $6,325.25 which was rendered in favor of respondent. The total amount of the various items of consequential damage, including the improper item of $75 for decrease in value of manure, is only $8,590. It is impossible to discover from the verdict what amount the jury allowed for these consequential damages, but the trial court evidently assumed that it allowed the full amount, including the above-mentioned sum of $75 for decrease in value of manure, since the court made a finding which specifically found that, by reason of the presence of the disease among the cattle, respondent had been obliged to make certain expenditures and had sustained certain financial loss, the total of the various items of which amounted to the sum of $8,590. It is obvious, therefore, that the jury must also have made some allowance for the decrease in value of the cattle by reason of the presence of the disease in the herd and that the trial court in adopting the jury's estimate of the damage suffered by respondent fell into the same error. Because, therefore, the jury was incorrectly advised that it might apply an improper measure of damages and because evidence was received which formed the basis for the application of such improper measure of damages and further because the trial court has evidently in its findings applied the same improper measure, we entertain the opinion that the judgment must be reversed. However, since the record herein contains evidence which would support a verdict in respondent's favor, the single issue which demands a retrial is the issue of damages. Pretzer v. California Transit Co., 211 Cal. 202, 209, 294 P. 382.

The judgment is therefore reversed, and the cause is remanded for a new trial of the single issue of the amount of damages, and the trial court is directed to render judgment in respondent's favor for the amount of damages which shall be so found upon a determination of that issue.

We concur: BARNARD, P. J.; MARKS, J.

139 Cal.App. 121

RHOADES v. TOWNSEND et al.

Civ. 7921.

District Court of Appeal, Second District, Division 1, California.

June 6, 1934.

1. Corporations ⇐217.

Constitutional and statutory provisions for stockholders' liability, as they existed prior to changes effective in 1930 and 1931, *held* applicable to stockholders of foreign corporation authorized to do business in state, notwithstanding stock structure provided for different par values for stock authorized.

2. Corporations ⇐216.

Stockholders of foreign corporation doing business in California are liable for debts of corporation (Const. art. 12, § 3).

3. Corporations ⇐225.

Liability of stockholders of foreign corporation having dual stock structure *held* computable upon monetary basis, divided against stock in proportion to nominal par value of shares (Const. art. 12, § 3).

4. Corporations ⇐217.

Computation of liability of stockholders of foreign corporation having dual stock structure on basis of nominal par value of shares *held* not violative of constitutional provision that each stockholder be liable in proportion that "amount of stock" owned by him bears to whole subscribed capital stock; "amount" denoting a sum in dollars as well as a numerical total of things (Const. art. 12, § 3).

[Ed. Note.—For other definitions of "Amount," see Words & Phrases.]

5. Licenses ⇐39.

Holders of stock in Maine corporation issued to transferors in Maine and transferred in California *held* subject to stockholders' liability, notwithstanding transfer in California was made without permit from commissioner of corporations (Deering's Gen. Laws 1931, pp. 1925, 1928, Act 3814).

6. Appeal and error ⇐907(3).

On appeal, on judgment roll alone, from judgment against defendants in action to enforce stockholders' liability, reviewing court was required to assume that defendants' stock was lawfully in hands of parties who transferred stock to defendants, and that finding as to number of shares owned by each defendant was supported by evidence.

7. Corporations ⇐268(1).

Judgment against defendants in action to enforce stockholders' liability *held* sustainable, notwithstanding complaint did not specify number of each defendant's shares, but alleged that exact amount was unknown to plaintiff and that plaintiff would ask leave to amend complaint to set forth exact amount when it became known, and notwithstanding that plaintiff failed to move for permission to amend after amount was ascertained (Const. art. 6, § 4½).

8. Constitutional law ⇐24.

Repeal of constitutional provision for stockholders' liability *held* not to affect right to enforce stockholders' liability theretofore accrued, although not reduced to judgment before repeal (Const. art. 12, § 3).

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by F. C. Rhoades against A. R. Townsend and another. From the judgment, defendants appeal.

Affirmed.

Rohe, Dottenheim & Weikert, of Los Angeles, for appellants.

G. C. De Garmo and W. M. Crane, both of Los Angeles, for respondent.

HAHN, Justice pro tem.

This appeal comes to us from a money judgment rendered against each of the defendants in an action to enforce a stockholders' liability for an alleged indebtedness owing by the Metals Refining Company, a corporation, in which defendants were stockholders at the time the indebtedness was incurred.

The points involved in the appeal, as stated by appellants in their brief, are as follows: "1. There can be no stockholders' liability in a corporation having a dual stock structure. 2. Stock of a Maine corporation, issued in Maine, and transferred in California, without a permit from the commissioner of corporations, is void, and no liability can be founded upon such stock. 3. Judgment cannot be entered upon a complaint for stockholders' liability when the complaint contains no allegation of the number of shares issued to the defendants, or either of them, or of the proportion which the shares, alleged to be owned by them, bears to the whole of the capital stock outstanding at the time the debt, sued for, was incurred."

The following findings of fact are pertinent to a consideration of the points raised:

The Metals Refining Company was a corporation, organized under the laws of the state of Maine, and duly authorized to transact

business in the state of California. The authorized capital provided for 10,000 shares of preferred stock of the par value of $100 per share, and 1,000,000 shares of common stock at the par value of one cent per share. During the period when the debt was incurred by the corporation, there was subscribed, issued, and outstanding all of the common stock and 1,416 shares of the preferred stock. Defendant Townsend was the owner of 336⅔ shares of preferred stock and 268,000 shares of common stock, and defendant Forderer owned 239⅔ shares of preferred, and 115,750 of common, stock.

All of the stock owned by defendants was originally issued by the corporation in the state of Maine to other parties who subsequently transferred this stock to defendants. The stock then was reissued to defendants at the office of the corporation in California. No permit was ever obtained by the Metals Refining Company from the commissioner of corporations in California authorizing said corporation to reissue this stock to defendants.

[1-4] Appellants' first point involves the question as to whether or not the provisions of the Constitution and statutes of California relating to stockholders' liability, as they existed prior to the changes that became effective in 1930 and 1931, were applicable to foreign corporations authorized to do business in this state, whose stock structure provided for different par values for the stock authorized.

In urging a negative answer to this question, appellants contend that the stockholders' liability laws of California were fashioned on the basis of all corporations having stock of the same par value; that, because no method is provided by our laws whereby the stock liability may be equitably distributed upon stocks of different par value, the liability provisions of our Constitution and statutes must be held to be ineffective as to foreign corporations with a dual stock structure. In support of this contention, appellants cite the case of Film Producers, Inc., v. Jordan, 171 Cal. 664, 154 P. 605, 606, and also Del Monte L. & P. Co. v. Jordan, 196 Cal. 488, 238 P. 710, 713.

In the Film Producers, Inc., Case petitioner sought a writ of mandate to compel the respondent as secretary of state to file petitioner's original articles of incorporation which provided for preferred and common stock issues, each issue to have a different par value. In the Del Monte Case petitioner desired to file amended articles of incorporation, providing for preferred stock, of $100 par value per share, and common stock of no par value.

In the Film Producers, Inc., Case the court in denying the writ of mandate predicated its conclusion on the basic premise that "our statutes were framed, and our decisions under them based, upon a capitalization represented by shares of a single par value."

In 1923 (St. 1923, p. 621), subsequent to the decision in the Film Producers, Inc., Case, the Legislature added to the Civil Code sections 290b, 290c, 290d, 290e, and 290f, whereby for the first time provision was made for the organization of corporations under the California laws with both par value and non-par value stock. Petitioner in the Del Monte L. & P. Co. Case, supra, in order to avoid the effect of the Film Producers decision, contended that the amendments to the Civil Code operated to modify or repeal sections 307 and 322 of the Civil Code, which the author of that opinion cited as a basis for the conclusion arrived at in that case. The court, however, denied the writ on the ground that, notwithstanding the new sections added to the Civil Code, the same difficulties pointed out in the Film Producers, Inc., v. Jordan Case affecting the voting of the stock and also the stock liability still existed, because of the provisions of sections 3 and 12 of article 12 of the Constitution of California, which sections were in nowise affected by the legislative enactment of the new sections to the Civil Code. In closing the discussion of the considerations which determined its conclusion refusing the writ prayed for, the court declares: "We only conclude in this decision that it was the intent of the framers of our state Constitution in inserting the provisions thereinabove referred to touching the relative voting influence and proportional liability of the stockholders of corporations to require that corporations organized thereunder should have their capitalization represented in shares of a single par value, and that such must be required of those seeking to organize corporations or to amend the articles of corporations already organized in this state so long as the aforesaid provisions of our state Constitution remain unchanged."

In the case of Land Development Co. v. Jordan, 198 Cal. 346, 245 P. 187, 188, the sole question determined was the right of petitioner to file its articles of incorporation where the authorized stock was all non-par value. The respondent contended that under the decisions in Film Producers, Inc., v. Jordan, supra, and Del Monte L. & P. Co. v. Jor-

dan, supra, the refusal of respondent to file the articles of incorporation in question was justified. The court, in granting the writ of mandate compelling respondent as secretary of state to accept and file the proposed articles of incorporation, held that there was nothing in the statutes or state Constitution that militated against a corporation having all non-par stock. This for the reason that there was an equality of interest in each stockholder, in that his right to vote his stock was maintained as provided in section 12, art. 12, of the Constitution, while nothing in the stock structure conflicted with the application of the provisions of section 3, article 12, of the Constitution, relating to stock liability.

It will be noted that the foregoing cases all involved domestic corporations.

In the case of Commonwealth Acceptance Corporation v. Jordan, 198 Cal. 618, 246 P. 796, 801, petitioner was a corporation organized under the laws of Delaware. Its articles of incorporation provided for preferred stock at the par value of $10 per share, class A common stock at the par value of $10 per share, and class B stock without nominal or par value. Respondent, as secretary of state, defended his refusal to file the certified copy of petitioner's articles of incorporation on the grounds which formed the basis of the decisions in Film Producers, Inc., v. Jordan, supra, and Del Monte L. & P. Co. v. Jordan, supra. The court, in granting the writ requiring the respondent as secretary of state to accept and file petitioner's certified articles of incorporation, determined that the consideration which justified the refusal to permit the filing of the articles of incorporation in the Film Producers, Inc., and Del Monte L. & P. Co. Cases, did not apply where a foreign organized corporation desired to file a certified copy of its articles of incorporation for the purpose of doing business in this state. And this because of the doctrine of comity between states as provided by the Constitution of the United States and the decisions of the United States Supreme Court in the interpretation thereof.

Referring to the considerations which were persuasive in determining the conclusions arrived at in the Film Producers, Inc., and Del Monte L. & P. Co. Cases, the court in Commonwealth Acceptance Corp. v. Jordan, supra, made the following observation: "The respondent herein contends that a foreign corporation organized for the foregoing purposes may not, under the foregoing inhibition of the Constitution, be permitted to enter the state of California and transact business herein, for two reasons: First, that because of its dual stock structure its stockholders have not an equality of voting power; and, second, that for the same cause its stockholders are not subjected to an equality of liability. As to the first of these reasons, it would seem that the matter of the equality or inequality of voting power in its stockholders is one which concerns merely the internal organism of the corporation and has nothing whatever to do with the transaction of the business of the corporation as between itself and the outside world; and that this being so, the language of this court in the case of Miles v. Woodward [115 Cal. 308, 46 P. 1076], supra, with this section of the Constitution immediately in mind, may be aptly applied: 'The Constitution was not designed to limit the powers of the Legislature when dealing with the organization and government of corporations which are created by its own will and act. Over such corporations it has and may exercise full powers of control. Over the organization and internal government of foreign corporations it has no such powers. The laws of the state do not have extraterritorial force. It would be meaningless for this state to try to legislate upon the internal affairs of such foreign corporations, and it has not attempted to do so.' Applying these principles, we are of the opinion that the question as to whether the stockholders of this foreign corporation have or have not an equality of voting power in the management of its internal affairs is not involved in the present inquiry."

As to the second contention of respondent, that, if petitioner were allowed to do business in California with its dual stock structure, its stockholders would have an advantage over the stockholders of domestic corporations in the matter of stock liability, the court disposes of this point with the declaration that stockholders of foreign corporations are subject to the same liabilities as stockholders of domestic corporations, citing cases which have established this rule in California. While the court did not see fit to go a step further and point out the rule or method of fixing or computing this liability in the case of foreign corporations with a dual stock structure, the opinion clearly is authority for the proposition that stockholders in such corporations have a stock liability in California.

The difference in the par value of each class of stock raises the question as to whether the liability shall be computed on a share basis, so that both the common and prefer-

red stock will be liable for the same amount per share, or upon a monetary basis whereby the liability is divided against the stock in proportion to the nominal par value of its shares.

The trial court adopted the latter method of computation. To this basis of fixing their liability, appellants make no criticism other than their general objection to any liability whatsoever.

Section 3, art. 12, of our state Constitution, in effect prior to November, 1930, provided for liability in the following language: "Each stockholder of a corporation, or joint-stock association, shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation or association. * * *"

In the case of Land Development Co. v. Jordan, supra, the court, in interpreting the above-quoted language of the Constitution, said: "In our view, the terms of the section do not require that the individual liability of stockholders to creditors of the corporation be ascertained and computed solely on a monetary basis. It may be computed on either a monetary or share basis. * * * It would seem * * * that both a monetary and a numerical or 'share basis' method of computation of stockholder's liability are authorized."

Accepting the premise that stockholders of foreign corporations doing business in California have a liability for the debts of the corporation, and that as to such stockholders the equality of liability should determine the rule or measure to be used in apportioning the liability as between the several classes of stock of different par values, it would seem that the method of fixing the liability on what has been described by authority as a monetary basis instead of a share basis would meet the requirements of our laws. The theory that from the outset underlay our stock liability laws was that the burden assumed by the stockholder was in proportion to his money investment as computed on a par basis. So long as there was but one par value stock, it so happened that the relative financial interest of the stockholders when based on the par value maintained the same constant ratio with their share interest. With a dual stock structure of different par values, this ratio between shares and monetary interest no longer remains constant. This fact does not, however, prevent maintaining a constant ratio between corporation liabilities and the stock when figured on the basis of par money value.

Moreover, adoption of the monetary basis of computation would do no violence to a reasonable interpretation of the phrase "amount of stock" as used in the Constitution, for the word "amount" is quite as commonly used to denote a sum in dollars as it is a numerical total of things.

We therefore conclude that the trial court did not commit error in the method adopted in fixing the amount for which each defendant was liable.

[5-7] Appellants' second point, that the stock held by them was illegally issued, and therefore void, because the Metals Refining Company had never secured a permit from the corporation commissioner of California authorizing it to issue any stock, is without merit.

The stock was transferred to appellants by third parties to whom it was issued in Maine. The act of the corporation in California was simply that of reissuing new certificates for those previously issued by the corporation. As this appeal is on the judgment roll alone, we must assume that the stock was lawfully in the hands of those who transferred to appellants. Under such circumstances, no permit was required for the reissue of the stock in California. Section 2, subd. (c), par. 3, Corporate Securities Act, Deering's Gen. Laws 1931, pp. 1925, 1928, Act 3814. People v. Pace, 78 Cal. App. 548, 238 P. 1089; Pollak v. Staunton, 210 Cal. 656, 293 P. 26.

Appellants next urge that the judgment cannot be sustained on a complaint which "contains no allegation of the number of shares issued to the defendants." While it is true that the amended complaint does not contain any allegation setting forth the specific number of shares issued to, or subscribed for by the defendants, it does allege "that during all of the times mentioned in this complaint each of said defendants was the owner and holder on the books of said Metals Refining Company of certain of the common and preferred stock of said corporation, the exact amount of which is unknown to this plaintiff and said plaintiff will ask leave to amend his complaint setting forth the exact amount of stock owned by each of said defendants when the same becomes known."

The findings of fact find the number of shares of preferred and common stock owned by each of the defendants. We must con-

clude that the evidence supports this finding.

While it may be conceded that plaintiff erred in failing to move before the trial court for permission to amend his complaint to conform to the proof, such oversight under the circumstances would not justify a reversal of the judgment. Section 4½, art. 6, of the California Constitution.

[8] In his reply brief appellant for the first time raises the point that "the alleged stockholders' liability of appellants was inchoate until reduced to judgment and was destroyed by the repeal of section 3, article 12, of the Constitution of California on November 4, 1930." The case of Coombes v. Getz, 285 U. S. 434, 52 S. Ct. 435, 76 L. Ed. 866, disposes of this question adversely to appellants' contention.

For the reasons indicated, the judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

139 Cal.App. 42

PEOPLE v. ROSENTHAL.

Cr. 2454.

District Court of Appeal, Second District, Division 2, California.

May 31, 1934.

Hearing Denied by Supreme Court June 29, 1934.

1. Criminal law ⇐706.

Where district attorney has reason to believe that some form of oath connected with or in addition to one customarily administered would be more solemn and obligatory, it is proper for him to bring that to attention of court, and it was not misconduct to ask permission to question defense witness on voir dire with respect to oath, or on cross-examination to ask whether witness believed in God (Code Civ. Proc. §§ 2095, 2096).

2. Criminal law ⇐720(1).

Showing that defense witnesses were threatened by deputy district attorneys, brought to attention of jury by defendant in obvious attempt to create prejudice in his favor, could not be construed as misconduct of district attorney in trial of case.

3. Criminal law ⇐706.

In robbery prosecution, cross-examination of defendant's wife whether certain persons, when they came to request rent payment and sought defendant, were told by witness that defendant was in San Francisco, *held* not misconduct as intimating defendant was in arrears in rent and that marital relations were strained.

4. Criminal law ⇐729.

District attorney's reference to defense witness, who was physician, as "Main street quack," *held* not misconduct resulting in miscarriage of justice, where apology was made after objection.

5. Criminal law ⇐713.

It is only when from course of conduct of prosecuting officer it is apparent that right of defendant to fair trial has been prejudicially invaded that defendant can successfully complain.

6. Witnesses ⇐277(2).

Defendant, accused of robbery, having taken stand and testified concerning movements on day in question, was subject to cross-examination as to such movements and as to companions at time just prior to commission of offense (Pen. Code, § 1323).

7. Criminal law ⇐1169(1).

In robbery prosecution, testimony of special agents for telephone company that record showed no calls were placed over pay telephones of certain store near defendant's home to residence of certain witness on day of robbery *held* not prejudicial, where it did not substantially contradict defendant's story.

8. Witnesses ⇐380(5).

Where prisoner in county jail, after making statements which supported people's case in prosecution for robbery, gave testimony which was at variance with previous statements, district attorney properly examined him as adverse witness and offered testimony to impeach him, having first made proper avowal of surprise (Code Civ. Proc. § 2049).

9. Criminal law ⇐942(1).

Where only tendency of newly discovered evidence was to contradict and impeach testimony of witness who testified in prosecution for robbery, denial of new trial was proper.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Joseph Rosenthal was convicted of robbery in the first degree, and he appeals.

Affirmed.

Joseph L. Fainer and R. E. Parsons, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

SCOTT, Justice pro tem.

Defendant was convicted of robbery in the first degree and has appealed from the judgment of conviction and from the order denying his motion for a new trial.

The testimony discloses that on the evening of March 25, 1933, at about 10:30 p. m., one Du Boise, proprietor of a garage in Los Angeles, and his companion, Wesselman, were held up at the point of a gun by two unmasked men, one of whom both identified as Rosenthal. The latter denied the commission of the offense, and offered evidence by way of an alibi to the effect that at the time of the holdup he was at or near his home.

[1] Appellant contends that the district attorney was guilty of prejudicial misconduct during the trial and argument of the case. A defense witness, Joe Blake, was called to the stand, and, upon his being sworn, the district attorney asked permission to question him on voir dire with respect to the oath, and on cross-examination asked him, "Do you believe in God?" This request was denied, and defendant's objection to the question was sustained. They are cited as misconduct. If the district attorney had reason to believe that some form of oath connected with or in addition to the one customarily administered would be more solemn and obligatory, it was a proper discharge of his duty to bring that to the attention of the court in order that the latter's discretion might be properly exercised. Code Civ. Proc. §§ 2095, 2096. The witness admitted that he had been convicted of robbery, a felony, and, if the jury disbelieved his story, it is reasonable to assume that it was because he was thus impeached.

[2] Counsel for defendant questioned his witness Soforenko with reference to a visit made to the witness late the preceding night by two deputy district attorneys. The witness, when asked, "Were you threatened by the gentlemen last night?" stated as follows: "Well, I was certainly given to understand that things might go wrong if I testified" and "they said that they believed that I was not telling the truth, and that the lid would be blown off and they would go—they intended to go to the grand jury." There is no contention by defendant that the witness testified falsely or that the alleged threats had any effect upon him.

A similar incident with reference to the witness Schlyen was presented by defendant, and is now complained of in like manner. These matters were brought to the attention of the jury by defendant in an obvious attempt to create prejudice in his favor, and could not be construed as misconduct of the district attorney in the trial of the case.

[3] Defendant's wife was asked on cross-examination, with reference to certain parties, whether "when they came down to request payment of rent, and seeking Mr. Rosenthal, that you told them that Mr. Rosenthal was in San Francisco?" The asking of this question is assigned as misconduct, as intimating that defendant was in arrears in rent and that his marital relations were strained. There is nothing in the question or its context to support that contention.

[4, 5] During his argument to the jury the district attorney referred to defense witness Soforenko, a physician, as "this Main street quack." Defense counsel interrupted as follows: "Just a moment. There is no evidence that he is a quack. I think that is pretty extreme language to be used against a professional gentleman, just because he comes here and testifies." The deputy district attorney responded: "Ladies and gentlemen of the jury, I apologize. * * *" There was no request by defendant that the jury be instructed to disregard the remark.

Other portions of the argument are now complained of as prejudicial misconduct, notwithstanding defendant's failure at the time to request an admonition by the court to the jury to disregard them. A careful reading of the entire transcript, with particular attention to the points so urged, does not disclose misconduct by the district attorney which resulted in a miscarriage of justice. It is only when from the course of conduct of a prosecuting officer it is apparent that the right of the defendant to a fair trial has been prejudicially invaded that the latter can successfully complain of it, and nothing of the kind appears here. People v. Willard, 150 Cal. 543, 89 P. 124; People v. Wolcott (Cal. App.) 30 P.(2d) 601.

[6] Rosenthal, who is an attorney admitted to practice in this state, took the stand and testified in his own behalf. On cross-examination he was questioned concerning his acts during the afternoon preceding the holdup, and stated that he knew his child was sick and that he had hurried home. He was then asked if he had not in fact been in an apartment with three other men and two women playing cards and having refresh-

ments, and at 9 o'clock, with one of the men, took two guns and went out to commit the robbery. The questions asked concerning defendant's movements during the afternoon are complained of as not being properly within the scope of cross-examination. The record does not support this view. Defendant having taken the stand and having testified concerning his movements on the day in question, was clearly subject to cross-examination as to such movements and as to his companions at a time just prior to the commission of the offense. Pen. Code, § 1323; People v. Teshara, 141 Cal. 633, 75 P. 338.

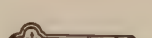
[7] Appellant next contends that a special agent for the telephone company should not have been permitted to testify concerning certain long-distance calls. He testified that the records showed that no calls were placed over the pay telephones of a certain drug store near defendant's home to the residence of the witness Soforenko in Santa Monica on the day of the robbery. Rosenthal testified that he thought he had gone to the drug store to telephone, but that he may have gone to the oil station or garage, and that he was not positive where he went to call. Such testimony by the agent did not substantially contradict defendant's story at this point, and it does not appear that any prejudice could have resulted to him even if it be conceded that the foundation therefor was meager.

[8] The next point urged is that the district attorney should not have been permitted to impeach the people's witness McIntyre, who was a prisoner in the county jail. At an earlier date this witness had made statements which, if true, supported the people's case, but also stated that he did not want to testify against the defendant. His reluctance to testify did not preclude the district attorney from calling him as a witness, but, when he took the stand, his testimony was at variance with his previous statements and was highly prejudicial to the people's case. The district attorney thereupon examined him as an adverse witness and offered testimony to impeach him, having first made a proper avowal of surprise. This procedure was proper under the provisions of Code Civ. Proc. § 2049. The purpose of that section "is to permit a party who has, in good faith, placed a witness upon the stand, with the distinct understanding that he will give testimony in support of his side of the issue, but, instead of so doing, and to the surprise of the party presenting him as such witness, has given damaging testimony against said party, to show that, prior to giving his testimony, he made a statement which, if testified to, would be favorable to the party so making him his witness." People v. Spencer, 58 Cal. App. 197, 225, 208 P. 380, 392.

[9] The order of the trial court denying the motion for a new trial based on newly discovered evidence is assigned as error. In support of his motion defendant produced an affidavit setting out, among other matters, that the people's witness Du Boise, in a report to the police shortly after the robbery, had given a description of the perpetrators of the crime which varied from his testimony at the trial, and that neither description corresponded with the appearance of defendant. The only tendency of the newly discovered evidence was to contradict and impeach the testimony of the witness Du Boise, and "it is well settled that such evidence neither warrants nor requires the granting of a new trial." People v. Ong Git, 23 Cal. App. 148, 151, 137 P. 283, 284.

Judgment and order affirmed.

We concur: STEPHENS, P. J.; CRAIG, J.



139 Cal.App. 202

LAIST v. NICHOLS et ux.

Civ. 1104.

District Court of Appeal, Fourth District, California.

June 11, 1934.

1. Evidence ⇐5(2).

Court would take judicial notice that Linda Vista irrigation district was organized on August 24, 1891, under provisions of Wright Act of 1887 (Code Civ. Proc. § 1875, subd. 3; St. 1887, p. 29).

2. Waters and water courses ⇐231

Certificates of sale of land for nonpayment of irrigation district assessment *held* not void as executed after repeal of act creating district, where provisions in subsequent act in respect of application of its fiscal provisions to districts organized under repealed act were amendatory of and supplemental to repealed act, and certificates were not issued under repealed provisions (St. 1887, p. 29; St. 1897, p. 287, §§ 109, 110).

3. Taxation ⇐529.

Tax receipts properly describing property taxed are competent evidence of payment of taxes.

4. Taxation ⇐710.

Where landowner has paid sum demanded by official intrusted with informing public of amount necessary to redeem property from tax sales, redemption is complete, and remedy of holder of tax sale certificate, if amount exacted was insufficient, is against official.

5. Waters and water courses ⇐231.

In action to quiet title to land sold for nonpayment of irrigation district assessment, production of redemption receipt, under presumption that regular course of business had been followed, was prima facie showing that application had been made to collector to redeem property and that collector had furnished figure on basis of which payment was made (Code Civ. Proc. § 1963, subd. 20).

6. Waters and water courses ⇐231.

In action to quiet title to land sold for nonpayment of irrigation district assessment, where plaintiff produced two receipts from district collector, payment evidenced by later receipt stating that payment was in redemption should be presumed to be in amount that collector required, in absence of showing to contrary (Code Civ. Proc. § 1963, subd. 20).

7. Waters and water courses ⇐231.

In action to quiet title to land sold for nonpayment of irrigation district assessment, where defendant produced treasurer's deed executed after time when land was allegedly redeemed, and plaintiff produced collector's receipts for more than amount necessary to redeem, trial court could not infer, in absence of further explanation, that collector had retained less than aggregate shown by receipts, so as not to effect redemption (St. 1911, p. 516, § 47½; St. 1931, p. 439).

8. Taxation ⇐743.

Rights of purchaser of tax title were no greater than rights of person to whom treasurer issued tax deed, where, at time of purchase, purchaser knew that original owner claimed to own property covered by tax deed.

Appeal from Superior Court, San Diego County; H. G. Ames, Judge.

Action by Theodore F. Laist, also known as T. F. Laist, against W. H. Nichols and his wife. Judgment for defendants, and plaintiff appeals.

Reversed and remanded for a new trial.

Virgil S. Kipp, of San Diego, for appellant.

Herbert C. Kelly, of San Diego, for respondents.

HAINES, Justice pro tem.

This action was brought by the appellant, Theodore F. Laist, to quiet, against the respondents W. H. Nichols and Geneva Nichols, husband and wife, title to the property known as lots 2 and 15 of the Highlands in San Diego county, as delineated on a map filed with the recorder thereof. The lots are located within what were the boundaries of the Linda Vista irrigation district, which was dissolved by court decree in 1914. Appellant's claim to the property is derived from a conveyance under date November 9, 1901, from Otto Laist, who is shown by the record to have then owned it. The conveyance was not recorded until April 30, 1929, but its effect is to constitute appellant the owner, unless his title has been divested by sale and conveyance of the two lots to respondents' predecessor in interest, one Gould, for nonpayment of the irrigation district assessment for 1911. The trial court found that appellant, Laist, was not the owner of the lots, but that respondents Nichols were, and gave judgment quieting their title against Laist, and from that judgment the present appeal is taken.

[1] It was stipulated at the trial that the district was organized in 1901 and the transcript purports to so show. Respondents in their brief claim, and appellant denies, that the statement of this date is an inadvertence and intended to be 1891. We feel justified in taking judicial notice that the district was actually organized on August 24, 1891 (Code Civ. Proc. § 1875, subd. 3; Wood v. Kennedy, 117 Cal. App. 53, 60, 61, 3 P.(2d) 366; Broyles v. Mahon, 72 Cal. App. 484, 237 P. 763), and that it was organized under the provisions of the act of March 7, 1887 (St. 1887, p. 29), known as the Wright Act. That act having been superseded, however, in 1897 by the act of that year commonly known as the Bridgeford Act (St. 1897, p. 254), the proceedings for the assessment and sale of the property must, if valid, have been had under the latter act in pursuance of the provisions of section 109 thereof making it applicable to districts theretofore organized. There can be no question that this might properly have been done.

The amount of this 1911 assessment against lot 2 was $116.32 and that against lot 15 $113.49, and the lots were sold by the collec-

tor of the district to Gould on February 28, 1912, for $124.63 and $121.66, respectively, and two certificates of sale, one applicable to each lot, issued to him. These certificates described the district as organized under the 1887 act and existing under and by virtue of said act and the acts of the Legislature of said state "amendatory thereof and supplemental thereto," and referred to the maker of the certificate, that is, to the collector, as "having this day sold the land last hereinafter described under and as commanded by said acts." The district having meanwhile been dissolved, the county treasurer, acting under the 1911 amendment to section 47½ of the Bridgeford Act (St. 1911, p. 516), in pursuance of the sale, issued a tax deed covering the two lots and containing the usual recitals, on May 21, 1923, to Gould, from whom whatever right to the property was so acquired by him passed by mesne conveyances to respondent W. H. Nichols. The deed to Nichols bore date December 27, 1926, and he paid therefor, through an escrow at the office of the Union Title Insurance Company of San Diego, $694.24, an amount fixed by adding to the purchase price paid by Gould the statutory penalties and interest thereafter accrued.

Manifestly, the result of the sales by the collector and the county treasurer's deed with the conveyances that followed it was to divest the Laist title and vest title to the property in respondent W. H. Nichols if the proceedings recited were regularly and properly taken. Appellant claims that they were not, for the reasons, first, that the collector's sale was had under the provisions of the repealed 1887 (Wright) Act, which had no application to a district that, according to his claim, was organized under the 1897 (Bridgeford) Act, and in any event authorized no sales under it after its repeal and, second, that after February 28, 1912, when the lots were sold to Gould by the collector, but before May 21, 1923, when the county treasurer issued his deed, the lots had been redeemed.

[2] In taking judicial notice that the district was organized under the Wright Act, we have disposed of the contention that the recitals in the certificates of sale were wrong in so reciting. We think that the criticism of the further recitals in the certificates of sale is over-technical. While it is true that the Wright Act was superseded by the Bridgeford Act, yet the saving provisions of section 109 of the latter act expressly provide for the continued life of districts organized under earlier statutes and their subjection to the provisions of the new act "so far as applicable." The provision in section 110 of the Bridgeford Act for the repeal of the Wright Act and the subsequent acts supplemental thereto and amendatory thereof only undertakes to repeal them "so far as they may be inconsistent herewith." We think that the Bridgeford Act may in respect of the application of its fiscal provisions to districts organized under the Wright Act be properly described as amendatory of and supplemental to that act, and therefore that the recitals in the certificates need not be construed as meaning that the sales were had under repealed provisions.

The serious question in this case is whether the lots had not been redeemed in the same year that they were sold and long before the deed issued, in which case, of course, there would have been no authority for issuing the deed. After the respondents had put in their evidence, including the county treasurer's deed, appellant in rebuttal offered two receipts shown by stipulation to have been signed by the collector of the district. Of these the first bore date March 14, 1912, and was in the words and figures following:

"Linda Vista Irrigation District Assessment Receipt, 1911.

"Linda Vista, County of San Diego, Cal., Mar. 14, 1912. Assessment Rate: $31.355 on each $100 valuation.

"Received of Otto Laist, Two Hundred Twenty-nine and 81 Dollars, in payment of the Assessment of said District levied in the year 1911 to pay the Judgments against said District upon the following described property:

Description.	Lot	Acres	Real Estate
The Highlands	2	16.86	371
The Highlands	15	16.44	362

Total value of all property after deductions$733
Assessment$229.81
Five per cent. added on the last Monday in December, 1911.....———
Total

"Lloyd G. Peters, Tax Collector."

The second receipt bore date July 7, 1912, and read as follows:

"Linda Vista Irrigation District Redemption Receipt.

"Linda Vista, County of San Diego, Cal., July 7, 1912.

"Received of T. F. Laist One Hundred Seventeen and 95 Dollars in redemption of the following described property, sold on the

——— day of February, 1912, for taxes of 1911 levied to pay outstanding indebtedness of said district.

Description of the Property

Lots 2 and 15 of the Highlands Sale Certificate No. 929–930.

Amount sold for.....$
Interest$———
Total$117.95

"Lloyd G. Peters, Collector."

[3] We are required at this stage to notice a contention by respondents that the collector's receipts are no evidence of the payments therein recited, in support of which it is claimed that the testimony of the person making, receiving, or seeing any payment is the best evidence of such payment, and that receipts are merely unsworn declarations or admissions against interest by the person executing the same; that, while as such admissions they are always admissible as against the makers of the receipts, they are incompetent evidence as against other parties. It is claimed that this principle, of the general correctness of which as to private receipts there is no doubt, is applicable to tax receipts, and to this effect respondents' counsel cite Spotswood v. Spotswood, 4 Cal. App. 711, 716, 89 P. 362, 364; Powell's Heirs v. Hendricks, 3 Cal. 427, 430; Christy v. Spring Valley, etc., 97 Cal. 21, 26, 31 P. 1110, 1111; Clark v. Blair (C. C.) 14 F. 812, 816; Miller v. Murphy, 186 Cal. 344, 349, 350, 199 P. 525. None of these citations sustain any such proposition. Tax receipts, since they are issued in pursuance of official duty, stand on a wholly different footing. In Spotswood v. Spotswood, without deciding whether the admission of tax receipts to prove a payment was proper or not, the court merely said "the admission of the tax receipts, if error, was without prejudice, as defendant testified to the payment and plaintiff afterwards admitted it. * * *" In Powell v. Hendricks, the Supreme Court held that a certificate of the tax collector, apparently to the effect that certain taxes had at some time previously been paid, was improperly admitted. This must obviously have been so, as the certificate would be mere hearsay and not a document officially issued as a part of the transaction itself. The court, however, went on to say: "If the payment of taxes was sought to be proved, in order to show that there was no abandonment of the premises, the evidence of the collector himself would be the best, and in his absence his receipt for the taxes, with proof of its execution, would be admissible." In Christy v. Spring Valley, etc., where the converse situation to that which arose in Spotswood v. Spotswood was presented, the Supreme Court said: "The error, if any, in excluding the tax receipts, was cured by the testimony of Eliott, who testified that the defendant had paid the taxes continuously. * * *" The proposition laid down in Clark v. Blair is merely that tax receipts are not evidence of the legality of the proceedings under which the taxes so shown to be paid were levied. The proposition involved in Miller v. Murphy was merely that the tax receipts there involved, evidencing payments on the property purporting to be described therein, were not shown to be applicable in their descriptions to the property involved in that action. It will be seen, therefore, that, though the testimony of the official receiving the payment or of some one else who saw it made would be proper and probably the best evidence that it occurred, yet it was directly holden in Powell v. Hendricks and intimated in Christy v. Spring Valley, etc., and in Miller v. Murphy that tax receipts properly describing the property taxed are competent evidence of the payment of the taxes. There is, moreover, as noticed by appellant, abundant other authority in this state to the same effect. Placer County v. Dickerson, 45 Cal. 12; In re Moore Estate, 72 Cal. 335, 344, 13 P. 880; Doolittle v. McConnell, 178 Cal. 697, 710, 174 P. 305; Lloyd v. Davis, 123 Cal. 348, 55 P. 1003.

The $229.81, payment of which was acknowledged by the receipt of March 14, 1912, was precisely the aggregate of the original assessments on the two lots, but, although at its date the lots had already been sold, it included nothing for accrued penalties or costs of sale. To have paid the amount for which the collector was then authorized to allow a redemption of the lots would have required approximately $21.08 more. The $117.95, payment of which was acknowledged by the receipt of July 7, 1912, would, if added to the $229.81, have made an aggregate of $347.76, or something like $100 over what would have been required to redeem the two lots on this latter date. If taken by itself, the $117.95 would be something short of half of the amount necessary to then make the redemption. No record of either of these redemption receipts appears to have been made in the county recorder's office, though it appears that both certificates of sale were filed there on July 3, 1912, at the request of the collector for the district. The evidence discloses no further explanation of these transactions.

[4] Numerous authorities are cited by ap-

pellant to the effect that, where the landowner has paid the sum demanded by the official intrusted with informing the public of the amount necessary to redeem property from tax sales, the redemption is complete and effective and the remedy of the holder of the tax sale certificate, if the amount exacted was insufficient, is against the official. There is no question that such is the law, and it was so declared in this state in Jones v. Sturzenberg, 59 Cal. App. 350, 210 P. 835, to which we refer for a full discussion of the subject. It is claimed, however, that no evidence of any such application to the collector for information appears. On the other hand, appellant asserts that the existence of the two receipts from the collector is itself evidence that an application to redeem had been made to him and his statement with respect to the amount required sought, and complied with, citing, inter alia, Corning Town Co. v. Davis, 44 Iowa, 622, 627, where it is said: "It is a fact which cannot be disputed, that all persons who pay taxes or redeem from tax sales resort to the proper county officers, and not to the county records for information as to the amount of their taxes, the existence of sales from which redemptions have not been made, and the like. The records, while they may be accessible and intelligible to the taxpayer, are not usually understood readily by persons doing business in the county offices. The officers uniformly impart to the taxpayer all information in regard to the condition of his taxes found in these books. And it is also true that information received from these officers is always relied upon by the taxpayer. Indeed, it is imparted in the discharge of official duties, and the law will justify such reliance thereon."

Appellant cites also People v. Faxon, 111 Misc. 699, 182 N. Y. S. 242, 244, where the writer of the opinion says: "The receipts offered in evidence show that the then owner paid taxes on this property for 1869 and 1870. In the absence of other proof, the receipts would in themselves raise a presumption of payment in full. The plaintiff contends, however, that by the introduction of the comptroller's book the presumption is overcome, and that the book shows that the payments shown by the receipts did not extinguish the amount of the tax levied against the premises. If it be true that the books of the comptroller show a greater amount of taxes than appear to have been paid, then I think, under the facts here shown, the presumption follows that the owner paid the amount demanded by the collector."

[5, 6] In the present case we incline to follow People v. Faxon, and agree with appellant that the production from his possession of the redemption receipt was, if taken by itself, under the presumption (Code Civ. Proc. § 1963, subd. 20) that the regular course of business had been followed, a prima facie showing that application had been made to the collector to redeem the property, and that he had furnished the figure on the basis of which the payment was made. It may be that this would not follow from the first receipt alone, which merely recites that it is "in payment of the assessment," saying nothing about any redemption, and as to that the trial court might, if it so believed, have been sustained in finding that the collector received it merely as a payment on account, requiring a further payment of the penalties and costs before he should issue a redemption receipt. The second receipt, however, is specifically stated to be "in redemption" of the two lots here involved, and must therefore be given some definitive effect. Respondents claim that the trial court may properly have inferred that the former payment had been returned, rather than that the collector retained it and that this latter receipt evidences an additional payment. Had it been returned, the rule contended for by appellant would apply to the payment of $117.95 evidenced by the later receipt, that is, that this payment, were there no showing to the contrary, should be presumed to be in the amount that the collector required, and should therefore be held in itself to have effected a complete redemption as of July 7, 1912; while, if the first payment was not returned, appellant would have no occasion to rely on that presumption, since at least as early as July 7, 1912, the collector would have been paid more than enough to meet all demands on both lots, and the redemption would by that time certainly have been complete.

In the case at bar, the collector's receipts were offered, as we saw, after respondents had placed in evidence the county treasurer's deed to Gould, and we have therefore to consider what effect to give to the circumstance that the treasurer executed the deed at a time long subsequent to the issuance of the receipt and in this connection to consider the effect of sections 47½ and 48 of the Bridgeford Act. Section 47½, as amended in 1911, after providing, as we saw, for the execution of deeds by the county treasurer where an irrigation district has been dissolved, goes on to provide that "a deed so executed shall have the same force and effect as if executed by the collector of an irrigation district." Sec-

tion 48 (as amended by St. 1931, p. 439) is as follows: "A deed issued by the collector of an irrigation district as provided in section 47 hereof, when duly acknowledged or proved, is prima facie evidence that: (a) The property was assessed as required by law; (b) the property was equalized as required by law; (c) the assessments were levied in accordance with law; (d) the assessments were not paid; (e) at a proper time and place the property was sold as prescribed by law, and by the proper officer; (f) the property was not redeemed; (g) the person who executed the deed was the proper officer. Such deed duly acknowledged or proved is (except as against actual fraud) conclusive evidence of the regularity of all the proceedings from the assessment by the assessor, inclusive, up to the execution of the deed. The deed conveys to the grantee the absolute title to the lands described therein free of all encumbrances, except when the land is owned by the United States, or this state, in which case it is prima facie evidence of the right of possession."

[7] The problem then is briefly this: The treasurer's deed raised the prima facie presumption that at the time it was issued the lots had not been redeemed from the sale, and this presumption stood uncontradicted until the introduction of the collector's receipts. These amounted to a showing to the contrary. Had the trial court believed that there had been paid in such redemption the aggregate amount shown by the two receipts, that is, $347.76, it must necessarily have held that the presumption of nonredemption raised by the production of the treasurer's deed was overcome and that the deed had been improperly issued. Had the court been justified in finding that the earlier payment of $229.81 had not been retained by the collector, but returned, and the later payment of $117.95 alone retained, then the prima facie presumption would still arise that the redemptioner had applied to the collector to find what it would cost to redeem and in paying the $117.95 had complied with the collector's demands. In that event, this presumption would be met by the other presumption arising under section 48 of the Bridgeford Act from the presence of the deed that the property had not been redeemed and the principle relied on by respondent would apply, that this presumption of nonredemption would necessarily have not only to be contradicted, but overcome before the trial court could have found that a redemption had been made. Miller & Lux v. Secara, 193 Cal. 755, 770, 771, 227 P. 171. But we do not think that this situation was before the court, nor do we think that, when presented with the collector's receipts for sums aggregating $347.76, the court was at liberty, in the absence of further explanation, to infer that the collector had retained less than that aggregate, and we think that the situation demanded some further explanation before the evidence could justify the finding implicit in the decision that no redemption had been made.

[8] We may add that the record shows that, when respondent W. H. Nichols purchased the tax title, he knew that appellant claimed to own the property. Nichols' rights are no greater than Gould's. Shackelford v. McGlashan, 27 N. M. 454, 202 P. 690, 692, 23 A. L. R. 75; Warden v. Glos, 236 Ill. 511, 86 N. E. 116, 117.

The judgment is reversed, and the case remanded for a new trial.

We concur: BARNARD, P. J.; MARKS, J.



139 Cal.App. 213

TUCKER v. CAVE SPRINGS MIN. CORPORATION.

Civ. 8275.

District Court of Appeal, Second District, Division 2, California.

June 12, 1934.

Hearing Denied by Supreme Court Aug. 9, 1934.

1. Corporations ⇐657(3).

President of unqualified foreign corporation *held* not barred from recovering on contract with corporation (Civ. Code, §§ 405, 406, 408, 409, as added by St. 1927, p. 396; Civ. Code, §§ 408, 409, as amended by St. 1929, pp. 1289, 1290, §§ 4, 5).

2. Statutes ⇐205.

Statutes relating to foreign corporations doing business in state must be construed as a whole (Civ. Code, §§ 405, 406, 408, 409, as added by St. 1927, p. 396; Civ. Code, §§ 408, 409, as amended by St. 1929, pp. 1289, 1290, §§ 4, 5).

3. Appeal and error ⇐1011(1).

Trial court's finding on conflicting evidence will not be disturbed.

4. Corporations ⇐662.

Foreign corporation doing business within state without license may be sued on contract made by it and action against stockholders and officers as partners is unnecessary (Civ. Code, §§ 405, 406, 408, 409, as added by St. 1927, p. 396; Civ. Code, §§ 408, 409, as amended by St. 1929, pp. 1289, 1290, §§ 4, 5).

5. Appeal and error ⇐882(17).

Appellant cannot complain of any defects in findings of fact and conclusions of law drawn by him, particularly where material issues are sufficiently covered.

Appeal from Superior Court, Los Angeles County; Dailey S. Stafford, Judge.

Action by W. W. Tucker against Cave Springs Mining Corporation. From a judgment for plaintiff, defendant appeals.

Affirmed.

Porter C. Blackburn, of Los Angeles, for appellant.

Gerard Remington, of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Defendant, a Nevada corporation, was sued by plaintiff, its president, on a complaint which set out his claim, differently stated in various counts as being based on a promissory note, quantum meruit, an open book account, and an account stated. Plaintiff recovered judgment for the principal sum as claimed in these counts plus interest, and failed to recover on certain other demands.

Defendant's contention on appeal is substantially as follows: As a foreign corporation which had its principal place of business in Los Angeles and was doing intrastate business in California, it should have complied with the law of this state relative to such foreign corporations; that it had not done so because its president, the plaintiff, had been negligent in that regard; that because of such noncompliance with the California law defendant suffered certain legal disabilities which would preclude it from enforcing its contracts or defending against adverse litigation; that since the plaintiff caused this legal disability of defendant corporation he could not and should not be permitted to recover and enforce a judgment against it even though he took no advantage of the corporation's legal infirmity. In the trial court defendant urged that plaintiff by reason of these same matters was estopped to assert his claim against it, but the trial court found to the contrary.

Before considering other legal aspects of this contention, it must be observed that notwithstanding any legal infirmity it may have been suffering, defendant had its day in court, presented its defense to plaintiff's claims, and was successful in defeating two of them; that it had placed before the trial court a cross-complaint seeking affirmative relief, which cross-complaint was at issue and ready for trial when cross-complainant voluntarily abandoned it after the issues of the complaint had been fully tried; that neither plaintiff nor the trial court treated defendant as other than a fully competent corporation, and its rights were adjudicated upon that basis; and that there was no claim that plaintiff by fraud or coercion kept the other directors of the corporation from doing the acts necessary to qualify it to do business in this state.

[1] Many of the transactions between plaintiff and defendant occurred during the year 1927 and continued thereafter until they culminated in February of 1930 in the execution of the promissory note sued on herein. Prior to the 1927 session of the Legislature certain provisions of Act 1743, Deering's General Laws of 1923, purported to impose taxes and otherwise regulate foreign corporations doing business in California. After the declaration by the Supreme Court of this state that these provisions violated the Constitution of the United States (Perkins Manufacturing Co. v. Jordan, 200 Cal. 667, 254 P. 551), the Legislature repealed them and re-enacted parts of them as sections 405, 406, 408, and 409 of the Civil Code (Stats. 1927, c. 222, p. 396). The law as thus amended required such a foreign corporation doing an intrastate business here to file with the secretary of state a certified copy of its articles of incorporation and do certain other acts, and provided that if such a corporation failed to do the acts required, "every contract made by or on behalf of any such foreign corporation * * * shall be held *void on its behalf* and on behalf of its assigns, but shall be *enforceable against* it or them." Civ. Code, § 409. (Italics ours.) Appellant cites Perkins Manufacturing Company v. Clinton Construction Co., 211 Cal. 228, 295 P. 1, 75 A. L. R. 439, as authority for its contention that transactions between plaintiff and defendant prior to the effective date of the next amendment to that portion of the law in 1929 were void as to both parties and therefore unenforceable. The court in that case quotes with approval

from the case of Ashland Lumber Co. v. Detroit Salt Co., 114 Wis. 66, 89 N. W. 904, 908, the following language: "We must hold that the words, 'shall be wholly void on its behalf, and on behalf of its assigns, but shall be enforceable against it and them,' mean just what they say; and, if they (the statutes) are valid, they render the contract in question absolutely void and a nullity, in so far as it is sought to be enforced on behalf of the defendants." A careful reading of the court's language makes it clear that the legal disability did not extend to the other party to a contract with such a nonqualified foreign corporation, but was only intended to apply to the corporation. There is nothing in the statute or the opinion of the court in construing it that supports appellant's contention that plaintiff could not enforce his claim against it.

[2] While business transactions between plaintiff and defendant continued, the Legislature met again in 1929 and amended Civil Code sections 408 and 409 (St. 1929, pp. 1289, 1290, §§ 4, 5). The amendments eliminated the provisions making the contracts of a noncomplying corporation void on its behalf and provided that if the corporation was not qualified at the time a transaction took place it could not sue or defend against a suit on it until it had so complied and paid a penalty. It also made it a misdemeanor for such nonqualified corporation or a person on its behalf to transact intrastate business in this state. Appellant contends that respondent was guilty of a misdemeanor when he transacted business for the corporation and therefore should be denied judgment. Although this question is raised in this case for the first time on appeal, a consideration of the penal provisions of this section of the law makes it obvious that no such intention was in the mind of the Legislature. A nonqualified corporation subject to a misdemeanor prosecution and on conviction to a heavy fine for doing business without complying with the law, is permitted to qualify, be restored to full legal competency, and have its prior transactions given full effect. It would be an unreasonable construction of the law to hold that an individual such as plaintiff herein should suffer greater disability than the corporation itself merely because of the penal aspects of that law. It must be borne in mind that the entire statute thus regulating corporations and individuals is but an expression and exercise of the police power of the state (Perkins Mfg. Co. v. Clinton Construction Co., supra), and must therefore be construed as a whole.

[3] Appellant next contends that respondent entered into an agreement with certain other officers of the corporation in September of 1927, which would preclude him from recovering in this action. This issue, however, was presented to the trial court, and its finding in favor of plaintiff on conflicting evidence will not be disturbed on appeal.

[4] A further proposition is urged by appellant for the first time on appeal, to the effect that respondent should have sued the officers and stockholders of the corporation as partners and should have asked for an accounting. Being without merit it requires no discussion.

[5] As a final point appellant urges that the findings "constitute a negative pregnant and are self destructive." The findings of the trial court as signed and filed bear the caption, "*Proposed Substituted* Findings of Fact and Conclusions of Law." Noting this in the clerk's transcript as transmitted to this court, the original file of the trial court was ordered produced for our inspection. It is apparent that the trial judge adopted as correct and signed the findings as *prepared and proposed by defendant,* which, as appellant, is now urging a reversal of the judgment because they are defective. The material issues raised by the pleadings are sufficiently covered by the court's findings, and appellant cannot complain at this time of defects for which it was responsible.

Appellant has filed a supplemental opening brief declaring that it is not merely legally *disabled* but since March, 1927, has been and now is a legally *dissolved* corporation. The cases cited and a reasonable interpretation of the law gives no support to this argument, which appellant also now advances for the first time.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; DESMOND, J.

139 Cal.App. 197

STURGEON v. SECURITY FIRST NAT. BANK et al.

Civ. 8985.

District Court of Appeal, First District, Division 1, California.

June 11, 1934.

1. Courts ⇐122.

Where court's jurisdiction depends on amount in controversy, ad damnum clause of complaint is sole test of amount in controversy (Gen. Laws 1931, Act 5238, § 29, subd. 1(a); Code Civ. Proc. § 76, subd. 1).

2. Courts ⇐472(6).

Client's action against bank for alleged breach of agreement to protect client against loss on bonds which client was obliged to sell at loss of $2,000 *held* action for damages, of which municipal court of Los Angeles county had exclusive jurisdiction, and not within jurisdiction of court of equity (Gen. Laws 1931, Act 5238, § 29, subd. 1(a), subd. 4; Code Civ. Proc. § 76, subd. 1).

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Rollin S. Sturgeon against the Security First National Bank and the Security First National Company. From a judgment for defendants, plaintiff appeals.

Affirmed.

Rollin S. Sturgeon, in pro. per.

Farrand & Slosson, of Los Angeles, for respondents.

JAMISON, Justice pro tem.

The only question involved on this appeal is whether or not the superior court of Los Angeles county had jurisdiction of the case. Defendants demurred to the complaint, one of the grounds being that the superior court of Los Angeles county had no jurisdiction of the subject of the action. The trial court sustained the demurrer without leave to amend and rendered judgment for defendants. From this judgment plaintiff prosecutes this appeal.

The complaint in this action is voluminous, covering some sixteen pages of the transcript. In substance it alleges: That during the past fifteen years appellant had been a client of respondents which were during that period engaged in a general banking business; that during such time he had business transactions with respondents in deposits, loans, repayments, and other dealings amounting to from $300,000 to $600,000; that his checking and savings accounts for considerable periods of time ran from $5,000 to $15,000; that he placed unlimited reliance and confidence in respondents and in their officers; that in April, 1931, he went to respondents' bond department and informed it that he was going away for some time and desired to invest in Liberty bonds; that respondents at that time induced him to buy $12,000 worth of Los Angeles municipal bonds, and as an inducement to appellant to purchase the said bonds represented to him that in case such bonds depreciated in value they would repay him for any loss thereby sustained; that, relying upon the representations of respondents as to the marketable value of these bonds and that they were a safe investment, and upon the promise of respondents to reimburse him for any loss sustained by him on account of depreciation, he purchased said bonds and $3,000 additional bonds; that said bonds were sold appellant at a price of $100¾ on the face value of $100; that respondents promised if said bonds depreciated more than 2 per cent. they would immediately give notice to appellant of such fact, but the respondents wholly failed to do this; that by reason of long-continued business relations that existed between respondents and appellant, and the trust and confidence he reposed in them, a fiduciary relationship existed between them; that he was finally compelled to sell said bonds at a loss of $2,000, for which sum he asks judgment.

If this case is an action at law, then the municipal court of Los Angeles county had sole jurisdiction. Act 5238, section 29, created municipal courts and fixed their jurisdiction (Gen. Laws of California, vol. 2, p. 2925). This act provides that: "Municipal courts shall have jurisdiction of civil cases and actions as follows: 1. * * * (a) *All cases at law in which the demand, exclusive of interest*, or where the value of the property in controversy, amounts to two thousand dollars or less. * * * 4. *Each municipal court shall have jurisdiction of all cases in equity*, when pleaded as defensive matter or by way of cross-complaint in any case properly pending in such municipal court." Section 76 of the Code of Civil Procedure provides that: "Superior courts shall have original jurisdiction: 1. *In all civil cases and proceedings* except cases and proceedings in which jurisdiction is or shall be given by law to municipal or to justices' or other inferior courts."

[1] It is the well-settled law in this state that where jurisdiction depends on the amount in controversy the ad damnum clause of the complaint is the sole test. Erving v. Napa Valley Brewing Co., 17 Cal. App. 367, 119 P. 940; Henigan v. Ervin, 110 Cal. 37, 42 P. 457; Rodley v. Curry, 120 Cal. 541, 52 P. 999. In Flood v. Templeton, 148 Cal. 374, 378, 83 P. 148, 150, the court said: "The jurisdiction of a court of equity * * * [depends upon] whether the breach complained of cannot be adequately compensated in damages. If it can, the action has no place in a court of equity, and the plaintiff's remedy is strictly in law. Equity is designed only to supplement the deficiencies of the law."

[2] In the instant case the only relief sought is a compensatory one of damages for the injury alleged to have been suffered by appellant. In Traffic Truck Sales Co. v. Justice's Court, 192 Cal. 377, 383, 220 P. 306, 309, the court said: "If the relief sought is analogous in form to the relief granted in courts of equity, then it is a case in equity within the meaning of the Constitution." In the case now under consideration, the sole relief sought is damages and therefore it is not one coming within the jurisdiction of a court of equity.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.



139 Cal.App. 130

CITY OF LONG BEACH v. ANDERSON et al.

Civ. 5092.

District Court of Appeal, Third District, California.

June 6, 1934.

Eminent domain ⇐265(3).

$100 fee of expert witness employed by landowner to appraise property in condemnation suit *held* not taxable as "costs" against municipality, where court had not appointed expert witness (Code Civ. Proc. §§ 1255a, 1871).

[Ed. Note.—For other definitions of "Costs," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Suit by the City of Long Beach against May E. Anderson and others. From an order refusing to retax costs, the plaintiff appeals.

Reversed and rendered.

Nowland M. Reid, City Atty., and Edmund J. Callaway, Deputy City Atty., both of Long Beach, for appellant.

Roy V. Reppy, E. W. Cunningham, and George H. Koch, all of Los Angeles, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The plaintiff has appealed from an order refusing to retax costs in this condemnation suit in which the respondent was allowed "necessary expenses incurred" in preparation for the trial, including the cost of securing the services of an expert witness.

In this suit in eminent domain, judgment was rendered in favor of the plaintiff for the condemnation of real property. After the rendition of judgment, the proceedings were abandoned by the plaintiff pursuant to the provisions of section 1255a of the Code of Civil Procedure. A judgment of dismissal was accordingly entered in which the defendants were allowed expenses incurred in preparation for the trial in the sum of $258.40 as evidenced by a memorandum of costs therefor, which was duly filed as provided by section 1255a, supra. This memorandum of costs contained an item of $100 for the services of an expert witness employed to appraise the property. The reasonableness of the amount of this item is not questioned. The plaintiff subsequently moved to retax costs by eliminating this item for expert witness fees on the ground that it was illegally allowed, since no order of court was procured under section 1871 of the Code of Civil Procedure for the appointment of the expert witness. The motion to retax costs was denied.

The appellant contends that an order of court appointing an expert witness under the provisions of section 1871 of the Code of Civil Procedure is an essential prerequisite to the allowance of such necessary expenses in preparation for the trial of a condemnation suit which had been abandoned pursuant to the provisions of section 1255a of the same Code.

Section 1255a of the Code of Civil Procedure as it then existed provided in part:

"Plaintiff may abandon the proceedings [in eminent domain] at any time after filing the complaint and before the expiration of thirty days after final judgment, by serving on

defendant and filing in court a written notice of such abandonment; and failure to comply with section 1251 of this code shall constitute an implied abandonment of the proceeding. Upon such abandonment, express or implied, on motion of defendant, a judgment shall be entered dismissing the proceeding and awarding the defendant his costs and disbursements, which shall include all necessary expenses incurred in preparing for trial and reasonable attorney fees. * * *"

With respect to the appointment and compensation for the services of expert witnesses, section 1871, supra, provides in part:

"Whenever it shall be made to appear to any court or judge thereof, either before or during the trial of any action or proceeding, civil or criminal, pending before such court, that expert evidence is, or will be required by the court or any party to such action or proceeding, such court or judge may, on motion of any party, or on motion of such court or judge, appoint one or more experts to investigate and testify at the trial of such action or proceeding relative to the matter or matters as to which such expert evidence is, or will be required, and such court or judge may fix the compensation of such expert or experts for such services. * * *

"Nothing contained in this section shall be deemed or construed so as to prevent any party to any action or proceeding from producing other expert evidence as to such matter or matters, but where other expert witnesses are called by a party to an action of (or) proceeding they shall be entitled to the ordinary witness fees only and such witness fees shall be taxed and allowed in like manner as other witness fees."

It has been held that expert witness fees may not be allowed in a condemnation case in the absence of an order of court appointing the witness as required by section 1871 of the Code of Civil Procedure. Costs of suit may be allowed only to the extent and in the manner authorized by statute. The exact question which is involved on this appeal was determined adversely to respondents in the condemnation case of City of Los Angeles v. Clay, 126 Cal. App. 465, 14 P.(2d) 926, in which a hearing was denied by the Supreme Court.

Since no order of court was procured for the appointment of the expert witness whose compensation is involved in the present case, under the authority of the case above cited, the court was in error refusing to retax costs by eliminating therefrom the expert witness fees. All that the witness is entitled to recover as compensation for his services are the fees which are allowed to an ordinary witness.

The order is reversed, with direction to the court to retax costs in accordance with the foregoing rule of law.

We concur: PULLEN, P. J.; PLUMMER, J.



139 Cal.App. 789

CITY OF LONG BEACH v. ANDERSON et al.

Civ. 5101.

District Court of Appeal, Third District, California.

June 6, 1934.

Hearing Denied by Supreme Court Aug. 2, 1934.

Eminent domain ⇐265(3).

$95.80 fee of expert witness employed by landowner to appraise property in condemnation suit *held* not taxable as "costs" against municipality, where court had not appointed expert witness (Code Civ. Proc. §§ 1255a, 1871).

[Ed. Note.—For other definitions of "Costs," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Suit by the City of Long Beach against May E. Anderson and others. From an order refusing to retax costs, the plaintiff appeals.

Reversed and rendered.

Nowland M. Reid, City Attorney, and Edmund J. Callaway, Deputy City Attorney, both of Long Beach, for appellant.

Louis N. Whealton and Raymond J. Kirkpatrick, both of Long Beach, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from an order refusing to retax costs. The facts are exactly the same as those which were involved in the case of City of Long Beach, a Municipal Corporation, Plaintiff and Appellant, v. May E. Anderson et al., Defendants, Edison Securities Company, a Corporation, Respondent, 33 P.(2d) 875, in which an opinion of this

court was this day filed, except that the expert witness fees which were allowed in this case amounted to the sum of $95.80.

Upon the authority of that case, the order in this case is reversed, with direction to the court to retax costs in accordance therewith.

We concur: PULLEN, P. J.; PLUMMER, J.



139 Cal.App. 175

SPECHT v. O'REILLY et al.

Civ. 7939.

District Court of Appeal, Second District, Division 1, California.

June 8, 1934.

1. Evidence ⇐588.

Court in trial without jury could properly believe defendants' witness rather than plaintiff's witness.

2. Boundaries ⇐3(4).

In action between adjoining owners involving boundary, number of feet from starting point to street line as specified in deed must yield to actual distance as fixed by street line (Code Civ. Proc. § 2077).

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Frederick August Otto Specht against Philip T. O'Reilly and another, who filed their cross-complaint. Judgment for defendants and cross-complainants, and plaintiff appeals.

Affirmed.

Robert H. Stelzner, of Los Angeles, for appellant.

Jas. W. Bell, of Los Angeles, for respondents.

HAHN, Justice pro tem.

The action out of which this appeal arises involves a controversy as to the dividing line between adjoining lots owned by plaintiff and defendants. Defendants' lot is situate at the northwesterly corner of Ninth and Kohler streets, while plaintiff's lot adjoins defendants' property on the west.

Defendants in 1920 built a one-story brick store building, as they believed entirely on their lot, with the westerly wall on their westerly boundary line. Plaintiff alleges in his complaint that this westerly wall is a few inches over on his property. This defendants deny in their answer, and also in their cross-complaint ask that their title to the property on which their building rests be quieted in them. At the close of the trial, defendants asked and were granted permission to amend their cross-complaint so as to make their pleading conform to the proof with regard to the location of this dividing line.

[1] Findings and judgment went for defendants on both their answer and cross-complaint, from which plaintiff prosecutes this appeal. Two grounds are urged for a reversal of the judgment: First, that the findings are not sustained by the evidence; second, that the court erred in the construction of the deeds. There is merit in neither point. Plaintiff and defendants each called a licensed surveyor to testify as to the proper location of the dividing line. Plaintiff's surveyor placed this line so that defendants' building projects from 4½ to 8½ inches over on plaintiff's lot. Defendants' surveyor with equal certainty located the line 3½ inches west of the westerly wall of the store; thus placing the entire building on defendants' property.

Defendants' deed described the land conveyed to them by metes and bounds, beginning at a point described as the "southeasterly corner of lot one of John H. Jacobs Subdivision," etc. The call then is for 3.7 feet easterly along the northerly line of Ninth street to the point of intersection of the northerly line of Ninth street with the westerly line of Kohler street.

Defendants' surveyor testified that the distance to the westerly line of Kohler street along the northerly line of Ninth street is 7.2 feet from the "southeasterly corner" of lot 1, while plaintiff's surveyor gave this distance as 3.7 feet. Accepting the testimony of defendants' surveyor, as the trial court had a right to do, the westerly line of defendants' property was found to be westerly from the west wall of defendants' building.

[2] With regard to the second point, the trial court was justified in construing the defendants' deed as conveying to them all the ground between the easterly boundary of lot 1 of John H. Jacobs subdivision, and the westerly boundary line of Kohler street for a distance of 132.26 feet north of the northerly boundary line of Ninth street. Section 2077 of the Code of Civil Procedure provides:

"When permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles, or surfaces, the boundaries or monuments are paramount."

The westerly line of Kohler street is designated in the deed to defendants as the easterly boundary of their lot. That line is established. Hence the distance in feet from the starting point to Kohler street as given in the deed being in conflict with the fact as testified to by defendants' witness, the number of feet as specified in the deed must give way to actual distance as fixed by the street line.

With this conclusion, other matters such as fences discussed in plaintiff's brief become immaterial, and hence will not require consideration.

Judgment affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.



139 Cal.App. 366

ELLISON v. DALLUGGE et al.

Civ. 8249.

District Court of Appeal, Second District, Division 2, California.

June 20, 1934.

Joint adventures ⇐5(3).
Partnership ⇐122.
Principal and agent ⇐24.

Evidence in action against landowners and their sales agent for amount due for surveying and laying out tract under contract with agent *held* insufficient to take case to jury as against owners on ground of joint adventure, partnership, or agency.

Evidence showed that corporation employed by landowners as agent to sell tract agreed to spend stated amount of its own money to map out and improve land for such purpose was not authorized to incur obligations against owners or employ any person at his expense; that plaintiff relied on corporation only and had no agreement with owners, was informed by agent that arrangement between it and owners had been worked out and was in trust department of bank for signature and talked to owners on property ten days or two weeks after commencement of work, but did not attempt to see contract until after its cancellation, nor ask owner whether he authorized corporation to employ plaintiff nor tell him that plaintiff was going to look to him for payment, and that plaintiff did not send a bill to owner until after the contract was canceled.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by C. H. Ellison against R. A. Dallugge, his wife, and another. From a judgment of nonsuit as to defendants Dallugge, plaintiff appeals.

Affirmed.

W. C. Shelton and George W. Burch, Jr., both of Los Angeles, for appellant.

Wm. Jennings Bryan, Jr., and Harry C. Cogen, both of Los Angeles, for respondents.

SCOTT, Justice pro tem.

Defendant R. A. Dallugge and his wife owned a tract of land which they wished to subdivide. They contracted with defendant Carlin G. Smith, Inc., to act as sales agent, and the latter engaged plaintiff, an engineer, to survey and lay out the tract. When the services were completed, plaintiff rendered his bill, and, not being paid, brought this action. Default of defendant corporation was entered, and at the conclusion of plaintiff's case a motion for nonsuit was granted as to defendants Dallugge and wife. Appellant contends that the trial court erred in granting the motion for nonsuit, and claims that the evidence was sufficient to establish a joint adventure or a partnership, or an agency.

The corporation was employed as sales agent to sell the Dallugge tract, and agreed to expend $5,000 of its own money to map out and improve the land for such purpose. It was not authorized to incur obligations against Dallugge nor to employ any person at his expense. It is apparent from the evidence that plaintiff relied on the corporation and not on defendant Dallugge, and that there was no agreement of any kind between plaintiff and Dallugge. Plaintiff had done work for the corporation on previous occasions, including preliminary reports on the value and availability for sale of other tracts. He was informed by Smith that Dallugge owned the land and that the arrangement between the corporation and Dallugge "had all been discussed and worked out and was now in the trust department of the Pacific National Bank for signature." Ten days or two weeks after the work commenced, plaintiff

saw Dallugge on the property and talked with him. Plaintiff did not attempt to see the contract setting out the relationship between Dallugge and the corporation until after it was canceled. He did not ask Dallugge at any time whether the latter had authorized Smith to employ him, nor did he tell Dallugge that he was going to look to him for payment. When the work was done, plaintiff billed Smith for it and did not send a bill to Dallugge or speak to him about payment of the bill until after the contract was canceled. The evidence being insufficient to support plaintiff's case on any theory advanced by him, the motion for nonsuit was properly granted. Title Insurance & Trust Co. v. Grider, 152 Cal. 746, 94 P. 601; Hicks v. Post, 154 Cal. 22, 96 P. 878.

Appellant's contention that the grounds of the motion for nonsuit were not stated with sufficient certainty is not supported by the record.

Judgment affirmed.

We concur: STEPHENS, P. J.; DESMOND, J.



139 Cal.App. 258

PEOPLE v. REED et al.

Civ. 9165.

District Court of Appeal, First District, Division 2, California.

June 14, 1934.

1. Eminent domain ⇐197.

In condemnation proceeding, whether landowner was entitled to attach intersecting causeway to causeway which state was about to construct could not be determined on motion to dismiss condemnation proceeding.

2. Eminent domain ⇐241.

Landowner could not attack order made by trial court permitting state to amend interlocutory decree and final order by causing them to conform to decision as shown by findings of fact and conclusions of law.

3. Eminent domain ⇐106.

Right of ingress to and egress from land condemned for highway purposes was property right which could be taken only in same manner as land itself, and it was a statutory condition precedent that highway commission should have passed resolution to that effect (Code Civ. Proc. § 1237 et seq.).

4. Eminent domain ⇐106.

Denial to landowner of right to attach causeway to causeway about to be constructed by state, because of impracticability, *held* not erroneous where landowner, if damaged, was entitled to compensation in money, and was not entitled to have state build connecting causeway, and where laying out of road for ingress and egress and location of such road was not in issue (Pol. Code, § 363h; Const. art. 1, § 14).

5. Eminent domain ⇐172.

In condemnation proceeding, court had no jurisdiction to pass on question as to where, in future, landowner's right of way to causeway connecting with causeway to be constructed by state should be located, where such issue was not for court but for board of supervisors, whose determination would be conclusive (Pol. Code, § 2690).

6. Eminent domain ⇐198(1).

Findings by court in condemnation proceeding as to when, where, and how landowner's right of way should be laid out, which questions rested with board of supervisors, were immaterial and not controlling on trial court or on court of review (Code Civ. Proc. § 1237 et seq.; Pol. Code, §§ 363h, 2690).

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by the People, acting by and through the Department of Public Works, against Clotilde J. Reed and others. From a decree, George H. Harlan appeals.

Modified, and, as modified, affirmed.

H. C. Symonds, of Mill Valley, for appellant.

Hugh K. McKevitt, Holloway Jones, and George C. Hadley, all of San Francisco, for respondent.

STURTEVANT, Justice.

The defendant George H. Harlan has appealed from the amended judgment, from the order permitting the amendment to the judgment, and from an order refusing to dismiss the action.

For some time prior to the commencement of the action, the defendant and his wife were the owners of a parcel of land containing 20 acres, which was located on the border of Richardson bay in Marin county. Through the division of highways of the department of public works the plaintiff planned the construction of a cut-off as a part of the Redwood highway. The cut-off was laid

out on a line extending north and south and passing over the western end of the lands so owned by the defendant. When the action was commenced, the defendant's land was surrounded by other tracts owned by certain private individuals. It was marshland, and was in part covered by water 2½ feet deep at low tide. The plan for constructing the highway over the land of the defendant and for a distance north of his lands and for a distance to the south of his lands consisted of a causeway resting on wooden piles at an elevation of 28 feet above high tide. The plaintiff's complaint is in the ordinary form, and recites the adoption by the California highway commission of a resolution to the effect that two-hundredths of an acre, describing it by metes and bounds, be taken from the defendant. After the defendant was served, he appeared and filed a demurrer. At the same time he prepared a deed containing a reservation as follows: "Reserving unto the parties of the first part the right of ingress to and egress from any highway, bridge or embankment constructed over or across the same at grade, for the purpose of obtaining ingress to and egress from Tide Land Block 311 for all purposes, and to erect such ramps or fills as the parties of the first part, their successors or assigns, may be advised, in order to make proper connections at grade with the aforesaid state highway for the purpose of obtaining such ingress to and egress from the said Tide Land Block 311 from said state highway." He also prepared a notice of motion to dismiss. Thereafter the motion was heard and denied.

The action was tried by the trial court sitting with a jury. In its findings the court adopted the verdicts of the jury and made additional findings. Among others, it made a finding as follows:

"The court finds that the allegations contained and the issues raised in the answer and supplemental answer of defendant George H. Harlan with respect to said defendant's proposed methods of ingress to and egress from his said land to and/or under the causeway upon which the plaintiff has constructed a state highway and/or to any of the property heretofore acquired by the plaintiff for highway purposes are physically possible, but that said methods of ingress and egress as proposed therein by said defendant would hinder the public in its use of the said causeway and/or land heretofore acquired by plaintiff for state highway purposes, as aforesaid, and injure the said causeway upon which said state highway is situated; that any connection made by said defendant to provide means for ingress to and egress from his said land to and/or under said causeway and/or to said property of plaintiff heretofore acquired for highway purposes will be incompatible with the greatest public good and benefit.

"That upon the first separate special defense set up in defendant's answer the court finds that the lands of the defendant George H. Harlan were before the commencement of this action, and now are, surrounded upon all sides by lands belonging to others, that on the north the lands of said defendant are bounded by the lands of F. G. Bartnett, on the northeast by the lands of Randolph Petterson, on the southeast by the lands of Union Trust Company and R. L. Coleman, on the southwest by the lands of the State of California, and that said defendant then had and now has no rights for a roadway over the lands of any of said adjoining owners, and that the only means of connecting the lands of said defendant with a public road in the County of Marin is over, across and through the said strip of land proposed to be condemned by plaintiff."

Among the conclusions of law was one as follows: "That said defendant shall not be allowed ingress to and egress from his said land or to make any physical connection whatsoever to or under the causeway upon which plaintiff has erected a state highway and/or to any property heretofore acquired by the plaintiff for state highway purposes."

Thereafter an interlocutory decree was signed and entered January 12, 1932. A final order of condemnation was signed and entered January 22, 1932. No appeal was taken from the interlocutory decree nor the final decree. Thereafter the plaintiff gave notice, and later it made a motion to amend the interlocutory decree and to amend the final order. The motion was granted, and to each decree a paragraph was added as follows: "It is further ordered, adjudged and decreed that said defendant shall not be allowed ingress to and egress from his said land or to make any physical connection whatsoever to or under the causeway upon which plaintiff has erected a State Highway and/or to any property heretofore acquired by the plaintiff for state highway purposes."

As recited above, the defendant has appealed from the order allowing the amendments, and has appealed from the decree as so amended.

[1] The defendant complains because the trial court did not grant his motion to dis-

miss the action, but we find no error in the ruling. The reservation contained in the deed would have given to the defendant the right to attach to the causeway which the plaintiff was about to construct an intersecting causeway. To do that the defendant had no absolute right. Whether under all of the facts he should be granted that privilege, or a different one, was a question of fact to be determined in another proceeding by the proper tribunal. To present the legal questions involved, a motion to dismiss was not the proper procedure. Forrester v. Lawler, 14 Cal. App. 170, 111 P. 284.

[2] He also attacks the order made by the trial court permitting the plaintiff to amend the interlocutory decree and the final order by causing them to conform to the decision as shown by the findings of fact and conclusions of law. The point has no merit. Takekawa v. Hole, 170 Cal. 323, 327, 328, 149 P. 593.

[3] The defendant contends that in legal effect the last paragraph of the judgment is an injunction precluding him from ever constructing and putting in place a way of ingress to and egress from the west, and that that portion of the judgment was in excess of the power of the trial court. We think that point must be sustained for several different reasons. The parcel of land over which the plaintiff sought to condemn a right of way included two-hundredths of an acre. As to that parcel the record is free from error. That parcel was a part of a larger tract containing 20 acres. The lands so owned by the defendant, but over which the right of way would not run, were not damaged, as we understand the findings, if the new highway did not operate to preclude ingress and egress. The right of ingress to and egress from such land was a property right. Strehlow v. Mothorn, 100 Cal. App. 692, 280 P. 1201. Such right could be taken but only in the same manner as the land itself could be taken; that is, in the manner provided in title 7, part. 3 (section 1237 et seq.) Code of Civil Procedure. Los Angeles v. Los Angeles Pacific Co., 31 Cal. App. 100, 118, 159 P. 992. But to do that it was a statutory condition precedent that the California highway commission should have passed a resolution to that effect. Pol. Code, § 363h (added by St. 1921, p. 1039, amended by St. 1927, p. 463). But there is no allegation in the pleadings and there is no finding that it did so.

[4, 5] The defendant by his pleadings sought to reserve, and cause to be reserved, the right to have a causeway of his own attached to and joined into the causeway about to be constructed by the plaintiff. This right was by the findings and judgment denied to him because such course was impracticable. To that extent we find no error in the decree for several reasons. If damaged, the defendant was entitled to compensation in money. Article 1, § 14, state Constitution. He was not entitled as a matter of right to have the plaintiff build a connecting causeway for him. 2 Lewis, Eminent Domain, p. 1343. The question before the court was not one of connecting the new highway with an existing highway or other road, and the case did not come within the provisions of Code of Civil Procedure, § 1247. The laying out of a road for defendant to have ingress to and egress from his tract of land, and the location of such road, was not an issue before the court in the action on trial. If and when that step is to be taken, the defendant must apply to the board of supervisors, and in that body is vested the power to hear and determine whether such road should or should not be laid out as running under, over, or upon the said causeway, or whether it should run to the north, south, or east (Pol. Code, § 2690), and the determination of that question by that board will be conclusive on the plaintiff in the instant case and on the courts. County of Siskiyou v. Gamlich, 110 Cal. 94, 42 P. 468. It follows that the court had no jurisdiction to pass on the question as to where, at some time in the future, the defendant's right of way should be located.

[6] As shown above, on an appeal based on the judgment roll only, we think it may not be said that the trial court did not have power to make a finding that the defendant should not be granted the privilege of attaching his own causeway to the causeway about to be constructed by the plaintiff. But we have also shown that the power to hear and determine the question as to when, where, and in what manner a right of way should be laid out for the defendant rests with the board of supervisors and not with the courts. It follows that the findings in the instant case on that specific subject were immaterial. 2 Cal. Jur. 1028. Such findings were not controlling on the trial court nor on a court of review. It follows that the last paragraph of the amended interlocutory decree in eminent domain and in the amended final order of condemnation should be modified to read as follows:

"It is further ordered, adjudged, and decreed that said defendant shall not be allowed to make any physical connection whatso-

ever with the causeway upon which plaintiff has erected a state highway." As so modified, the decree and order appealed from are affirmed. The defendant will recover his costs on this appeal.

We concur: NOURSE, P. J.; SPENCE, J.



139 Cal.App. 237

McCLOY et al. v. HUNTINGTON PARK UNION HIGH SCHOOL DIST. OF LOS ANGELES COUNTY et al.

Civ. 9316.

District Court of Appeal, First District, Division 2, California.

June 13, 1934.

Schools and school districts ⇐89.

School district is not liable to student injured through negligence of fellow student, even though latter acted under teacher's order or direction.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Sproul McCloy, by J. Wallace McCloy, his guardian ad litem, against the Huntington Park Union High School District of Los Angeles County and others. From a judgment for plaintiff against defendant named, such defendant appeals.

Reversed.

Everett W. Mattoon, Co. Counsel, and Ernest Purdum, Deputy Co. Counsel, both of Los Angeles, for appellant.

Ezra Neff, of Los Angeles, for respondent.

SCHMIDT, Justice pro tem.

This appeal is from a judgment in favor of plaintiff and against the Huntington Park union high school district arising from injuries to plaintiff claimed to have been caused through the negligence of a fellow student; the additional claim being made that said fellow student acted under the order or direction of one of the teachers of the school.

Several questions are raised. Only one need be considered, as it is determinative of this appeal. In an action for damages for personal injuries to a student arising from the negligent act of a fellow student, even though such fellow student act upon the order, direction, or instruction of an instructor of the school, can such injured student maintain an action for damages against the school district?

Since the trial of this action in the court below and the taking of this appeal, this department of the Appellate Court held to the contrary in Hack v. Sacramento City Junior Col. Dist., 131 Cal. App. 444, 21 P.(2d) 477. Commencing bottom page 447 of 131 Cal. App., 21 P.(2d) 477, 479:

"By the amendment of section 1623 of the Political Code (Stats. 1923, p. 298—which is now School Code, §§ 2.800 to 2.804), the state consented that a school district could be sued for the negligent acts of the officers or employees of the district (Ahern v. Livermore Union High School Dist., 208 Cal. 770, 284 P. 1105), but counsel have cited no authority, and we know of none, that holds that a school district may be sued for the negligent acts of the students.

"The fact that the students were attempting to carry out certain requests made by their instructor, Mr. Halstead, does not change the rule. In conducting classwork a teacher must frequently give directions. While carrying out such directions, the students may, in many ways, act without due care. But for their negligence in such matters the statutes have not gone to the extent of imposing a liability on the school district.

"From what has been said we think it clearly appears that no act of negligence was alléged, proved, or found against an officer or employee of the defendant. The utmost that can be claimed is that negligence was committed by the students Hunt and Thorne, who are not parties to the action."

A petition for hearing in the Supreme Court was denied.

Analogous decisions are found in Ellis v. Burns Valley School District, 128 Cal. App. 550, 18 P.(2d) 79, and Underhill v. Alameda Elementary School District, 133 Cal. App. 733, 24 P.(2d) 849.

At the close of plaintiff's case at bar, defendant and appellant moved the trial court for a nonsuit as well as for a directed verdict. In view of the foregoing, the motion for a directed verdict should have been granted.

Judgment reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

139 Cal.App. 265

HAVERTY v. HARTWELL et al.

Civ. 9247.

District Court of Appeal, First District, Division 2, California.

June 14, 1934.

1. Appeal and error ⇐1060(4).

In action for injuries to brain, statement of plaintiff's counsel that jurors had been reading in paper about what some people have been getting where they have had brain injuries without objective symptoms *held* not prejudicial on ground that statement must have influenced verdict, where negligence was admitted and defendant did not complain of verdict as excessive.

2. Appeal and error ⇐1060(4).

Where verdict is not excessive and question of defendant's liability is not close, misconduct of counsel will not be deemed prejudicial.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Edwin V. Haverty against C. A. Hartwell and another. From a judgment against named defendant, named defendant appeals.

Affirmed.

Bronson, Bronson & Slaven, of San Francisco, for appellant.

Irving Phillip Barnett, of San Francisco (Samuel P. Vartanian, of San Francisco, of counsel), for respondent.

NOURSE, Presiding Justice.

In a trial before a jury, the plaintiff obtained a verdict against the defendant Hartwell in which the jury specified $1,100 as special damages and $3,900 as general damages. The injuries to plaintiff arose out of a motor vehicle collision, and on the trial the defendant Hartwell admitted liability arising out of his negligence which caused the injuries.

[1, 2] In his appeal from the judgment, the point raised is the misconduct of counsel for the plaintiff in his address to the jury when he stated: "You have been reading in the paper in the last few days about what some people have been getting where they have had brain injuries without objective symptoms." Appellant argues that counsel must have had in mind a particular case in which a jury had a short time before returned a verdict for $50,000 in a case where the plaintiff had suffered injuries to her brain. It is then said that, inasmuch as this case involved injuries to plaintiff's brain, the statement must have influenced the verdict.

Respondent makes sufficient answer that, the negligence being admitted, the only real issue was the amount of the verdict, and, since appellant does not claim that the verdict is excessive, he has failed to show prejudicial error. Respondent then points to the evidence showing the extent of his injuries and affirmatively asserts that the verdict is not excessive. Similar questions have arisen in cases involving misconduct of counsel in referring to the fact that the liability of the defendant is covered by insurance. In reviewing those cases the courts have held that, where the verdict is not excessive and the question of defendant's liability is not close, the misconduct will not be deemed prejudicial. Eldridge v. Clark & Henery Const. Co., 75 Cal. App. 516, 532, 243 P. 43; Coursault v. Schwebel, 118 Cal. App. 259, 265, 5 P.(2d) 77; Crabbe v. Rhoades, 101 Cal. App. 503, 513, 282 P. 10; Lahti v. McMenamin, 204 Cal. 415, 422, 268 P. 644.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

138 Cal.App. 528

RUFFINO et al. v. QUEEN INS. CO. OF AMERICA.

Civ. 5046.

District Court of Appeal, Third District, California.

June 13, 1934.

Insurance ⇐612(1).

Insurer's liability under fire policy is not waived by insured's breach of provision of standard form constituting prerequisite to maintenance of suit, where breach was caused by fault of insurer or its agents.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Original opinion modified as stated.

For original opinion, see 33 P.(2d) 26.

Miller, Van Ness & Leo J. McEnerney, of San Francisco, for appellant.

Griffin & Boone, of Modesto, for respondents.

PER CURIAM.

The opinion in the above-entitled action as it appears in 33 P.(2d) 26, is modified as follows:

Strike out the following language appearing on line 28, column 1, page 30: "By a denial of its liability by the company."

Also strike out the following language commencing on line 54, column 1, page 30: "The foregoing denial of liability by the insurer for a breach of contract due to its own fault constitutes a waiver of the same requirements of the policy as a prerequisite to the commencement of this action." And insert in lieu thereof: "The liability of the insurer is not waived by a breach of a provision of the standard form of policy on the part of the insured which is declared to be a prerequisite to the maintenance of a suit upon the contract, when that breach is caused by the fault of the insurance company or its agents."

Also strike out the following language commencing on line 44, column 2, of page 31: "By the rules of law applicable to insurance contracts in exactly the same manner that it was construed prior to the adoption of the standard form." And insert in lieu thereof: "As such."

Also strike out the following language appearing on lines 5–8, column 1, of page 31, to wit: "By the rules usually applied to insurance companies exactly as they were applied prior to its adoption by the Legislature," and insert in lieu thereof: "As such."

139 Cal.App. 373

CAMERON et al. v. FEATHER RIVER FOREST HOMES et al.

Civ. 5024.

District Court of Appeal, Third District, California.

June 20, 1934.

1. Judgment ⇐256(1).

Finding that defendant in action to establish riparian rights to waters of creek was entitled to maintain dam, provided it should not deplete flow of creek, *held* not to warrant judgment enjoining plaintiffs and other defendants from interfering with maintenance of dam.

2. Judgment ⇐256(1).

Purpose of every judgment should be to limit litigation and clearly establish rights of parties as found by courts.

3. Judgment ⇐248.

Nothing should be entered in judgment either limiting rights of parties which are not involved in action, which may arise in future, or be interfered with thereafter, especially when such language can only be productive of uncertainty or confusion.

Appeal from Superior Court, Butte County; R. M. Rankin, Judge.

Action by John Cameron and others against the Feather River Forest Homes and others. From the judgment, plaintiffs appeal.

Modified and, as modified, affirmed.

Seth Millington, of Gridley, for appellants.

Carleton Gray and George F. Jones, both of Oroville, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

The defendant Feather River Forest Homes, sued as a corporation, was found by the court to be a copartnership consisting of the defendants George C. Mansfield and Duncan C. McCallum.

The plaintiffs began this action against the defendants to establish their riparian rights to the waters of Berry creek, a stream arising in the Sierra Nevada mountains and flowing westerly through the county of Butte; also, to restrain the defendants from maintaining a certain dam erected by the defendants impounding the waters of the said creek.

The record is before us upon the judgment roll alone, and presents only one question for our consideration, to wit: That the words, "and the plaintiffs and defendants, other than Feather River Forest Homes, are perpetually enjoined and restrained from interfering in any manner with the maintenance of the dam across Berry creek, hereinbefore referred to," should be stricken from the judgment.

The findings are to the effect that the plaintiffs in the action are all riparian owners to the waters of Berry creek, and are entitled to the waters thereof in the respective

amounts found by the court, which rights are prior to the impounding of any of the waters of Berry creek by the copartnership doing business under the fictitious name of Feather River Forest Homes.

The answer of the defendant Feather River Forest Homes, a copartnership, sets forth that in 1928 said defendant erected a dam across Berry creek on real property belonging to the partnership, at a cost of about $25,000; that in the year 1929 this dam was washed out, and thereafter a district was organized, designated as "Road Improvement District No. 1," in Butte county, upon the petition of the copartnership, and a dam and causeway erected across said Berry creek, on property belonging to the said copartnership, at a cost of something over $63,000; that by the erection of this dam, in addition to furnishing a highway across the same, a lake covering about thirty acres in area was created by holding back the waters of said creek, and since said date has been used for boating, fishing, bathing, and other uses incidental to the erection of homes on the real property owned by the copartnership; that this dam does not appreciably decrease the flow of the waters of Berry creek to any material extent, and is made use of for the purposes above mentioned without any pollution of the same.

It is further set forth in the answer that Road Improvement District No. 1 of Butte county is a public agency, and that no protest or complaint was made by any of the plaintiffs against the erection of said dam. The prayer of the answer was to the effect that the plaintiffs take nothing by reason of their action, and that the defendants have such other and further relief as to the court might seem just and equitable.

After finding the erection of the dam by the Feather River Forest Homes, a corporation, and the uses made thereof, the court drew the following conclusions relating to the rights of the Feather River Forest Homes, a corporation, to wit: "That the defendants, George C. Mansfield and Duncan C. McCallum, doing business as a copartnership under the fictitious name of Feather River Forest Homes, their successors and assigns, are entitled to the judgment of this court permitting them to maintain the dam erected across Berry creek, by 'Road Improvement District No. One of Butte County,' in 1931, and thereby to impound the water of Berry Creek so as to create a lake about thirty acres in area to be used by said defendants and the owners of parcels of real property sold to them, being a portion of the real property described in finding XXIV hereof, for boating, fishing, bathing and other proper uses incidental to the occupation of the homes erected on the parcels of real property by the owners thereof, provided, however, that said defendants shall not deplete the flow of Berry Creek to any appreciable or material extent, and shall not pollute same."

The judgment entered in pursuance of the findings fixes the quantity of water to which the respective plaintiffs were found to be entitled, and concludes as follows: "That the defendants, George C. Mansfield and Duncan C. McCallum, doing business as a copartnership under the fictitious name of Feather River Forest Homes, their heirs or assigns, are permitted to maintain the dam erected across Berry Creek, by 'Road Improvement District No. One, of Butte County,' in 1931, and thereby to impound the water of Berry Creek so as to create a lake about thirty acres in area, to be used by said defendants and the owners of parcels of real property sold to them, being a portion of that certain real property situate, lying and being in the County of Butte, State of California, which is more particularly described as follows, to wit" (here was given a description of the premises), "for boating, fishing, bathing and other proper uses incidental to the occupation of the homes erected on the parcels of real property by the owners thereof, provided, however, that said defendants shall not deplete the flow of Berry Creek to any appreciable or material extent, and shall not pollute same. It is further ordered, adjudged and decreed that the plaintiffs and the defendants, their heirs, successors or assigns, are, and each of them is perpetually enjoined and restrained from interfering with the property or property rights of every other plaintiff or defendant in this action as hereinbefore set forth, and the plaintiffs and defendants, other than Feather River Forest Homes, are perpetually enjoined and restrained from interfering in any manner with the maintenance of the dam across Berry Creek, hereinbefore referred to."

On the part of the appellant, as herein stated, it is contended that the words "and the plaintiffs and defendants, other than Feather River Forest Homes, are perpetually enjoined and restrained from interfering in any manner with the maintenance of the dam across Berry Creek, hereinbefore referred to," should be stricken therefrom. The findings of the court do not disclose that any of the plaintiffs have ever attempted to interfere with the maintenance of the dam in question other than by bringing this action. Nor does

it appear that any of the plaintiffs threatened to interfere with the maintenance of said dam as found by the court as having been erected by the copartnership across Berry creek; nor is there anything in the pleadings indicative of such action.

On the part of the copartnership it is contended that the injunction, as worded, has a proper place in the judgment, and cites two cases in support of the contention, to wit: Roger v. Struven, 44 Cal. App. 528, 186 P. 817, and Fisher v. Feige, 137 Cal. 39, 69 P. 618, 59 L. R. A. 333, 92 Am. St. Rep. 77. Neither of these cases, however, appears to sustain the contention of the copartnership. In the case of Roger v. Struven, supra, the record shows interference with the rights of the respondent, and in the case of Fisher v. Feige, supra, the injunction complained of went beyond proper limits, and attempted to bar undoubted rights belonging to the defendant. It does establish the fact that one owning riparian lands along a stream has a right to build a dam across the stream on his own land, provided that thereby he does not appreciably diminish the amount of water which would naturally flow onto the lands of his neighbor below. This statement is made in connection with the uses of the waters of the stream other than as the law permits for strictly riparian purposes.

[1] In support of the contention that the objectionable words in the judgment should be stricken therefrom, plaintiffs cite the cases of Fairbanks v. Macready, 92 Cal. App. 156, 267 P. 716, 268 P. 947, and Reak v. Borsi, 55 Cal. App. 169, 202 P. 951. The first case holds that where there is nothing in the findings to support an injunction, it has no proper place in the judgment. The second case relates to the question of conflicting findings. A reading of the findings and the judgment establishes conclusively that the Feather River Forest Homes copartnership has been accorded all the rights to which it is entitled, in the wording of the judgment preceding the words complained of by the appellants. The copartnership is permitted to maintain the dam erected across Berry creek so as to create a lake of about thirty acres in area, to be used "for boating, fishing, bathing and other proper uses incidental to the occupancy of the homes erected on the parcels of real property by the owners thereof, provided, however, that said defendants shall not deplete the flow of Berry Creek to any appreciable or material extent, and shall not pollute the same." Then the judgment specifically enjoins all of the parties not to interfere with the rights of any other parties to the action, as follows: "It is further ordered, adjudged and decreed that the plaintiffs and the defendants, their heirs, successors or assigns, are, and each of them is perpetually enjoined and restrained from interfering with the property or property rights of every other plaintiff or defendant in this action, as hereinbefore set forth." The rights of all of the parties as established by the court are those prohibited from being interfered with by any of the other parties to the action. The remainder of the judgment, if it goes beyond what has just been established, has no place in the record by reason of the fact that there is nothing in the record upon which it can be based. If it does not go beyond the rights fixed by the judgment preceding the objectionable words, it is surplusage. If it goes beyond the rights established by the preceding portion of the judgment then it would include the right of the copartnership to proceed to change the purposes for which the dam is constructed to make different uses thereof, and prohibit the plaintiffs, or any of them, from bringing any action to restrain such different use.

[2, 3] As the purpose of every judgment should be to limit litigation and clearly establish the rights of the parties as found by the courts to exist, and having done that, nothing should be entered therein either limiting the rights of the parties which are not involved in the action, which may arise in the future, or be interfered with hereafter, especially when such language can only be productive of uncertainty or confusion.

It follows that the judgment should be modified by striking therefrom the words, "and the plaintiffs and defendants, other than Feather River Forest Homes, are perpetually enjoined and restrained from interfering in any manner with the maintenance of the dam across Berry Creek, hereinbefore referred to," and it is so ordered.

As so modified, the judgment is affirmed.

None of the parties herein are awarded costs.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

139 Cal.App. 164

RIO GRANDE OIL CO. v. SEABOARD SURETY CORPORATION OF AMERICA.

Civ. 7847.

District Court of Appeal, Second District, Division 1, California.

June 8, 1934.

1. Attachment ⇐333.

Surety on bond to release attachment is bound by judgment rendered in original action unless amendment of complaint therein after release of attachment states new and independent cause of action not included in original complaint (Civ. Code, §§ 2819, 2840).

2. Appeal and error ⇐916(1).

On appeal from judgment for plaintiff on pleadings, facts alleged in defendant's answer must be accepted as true.

3. Pleading ⇐8(9).

Allegation of surety on bond to release attachment that judgment in original action was based on amended complaint and that surety had no knowledge of filing of amended complaint at the time *held* allegation of fact, but allegation that judgment recovered in original action was not the judgment surety agreed to pay was conclusion of law.

4. Attachment ⇐333.

Surety on bond to release attachment *held* bound by judgment in original cause, though judgment was based on amended complaint of which surety had no knowledge after release of attachment, where first count of original complaint was contained in amended complaint as well as indebtedness alleged in second count of original complaint, though different contracts and dates of delivery of goods were alleged (Civ. Code, §§ 2819, 2840).

5. Evidence ⇐43(1).

Appellate court judicially knows that short periods of stay of execution by consent of parties are customary incidents of litigation.

6. Attachment ⇐337.

Surety on bond to release attachment *held* not released by stay of execution for some sixty days pursuant to stipulation of parties in original cause without surety's knowledge (Civ. Code, §§ 2819, 2840).

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by the Rio Grande Oil Company against the Seaboard Surety Corporation of America. From a judgment for plaintiff, defendant appeals.

Affirmed.

Edgar H. Craddock, of Los Angeles, for appellant.

H. L. Dunnigan, of Los Angeles, and T. P. Hogan, of Pomona, for respondent.

CONREY, Presiding Justice.

In an action against Eureka Petroleum Corporation, plaintiff filed a complaint in two counts for the several sums of $9,671.10 and $6,158.65, making a total demand of $15,829.75, besides interest. Both demands arose out of a contract of date October 18, 1927, and were for unpaid balances due for gasoline sold and delivered to the defendant under said contract. After filing of the original complaint, an attachment was levied against property of the defendant. Thereupon, for the purpose of obtaining release of said attachment, the defendant herein executed an undertaking in the sum of $19,000, whereby it promised "that in case the plaintiff recover judgment in the action, we will on demand pay to plaintiff the amount of whatever judgment may be recovered in said action, together with the percentage, interest and costs." The plaintiff having recovered judgment in the action in the sum of $18,032.20, which judgment was not paid, plaintiff brought this action to recover on the bond. The judgment herein, from which the defendant Seaboard Surety Corporation of America appeals, is a judgment entered pursuant to an order granting a motion for judgment on the pleadings, after answer filed by the defendant.

[1] The principal contention of appellant is that it was exonerated from the penalty of its undertaking by reason of amendments to the complaint in the original action, made after the bond was executed, whereby the liability of the surety was changed. Turner v. Fidelity & Deposit Co. of Maryland, 187 Cal. 76, 200 P. 959, 961, was an action similar to the case at bar, where the same kind of defense was presented. After making a statement of the principal rules governing cases of this kind, including a reference to leading cases on the subject, the court said:

"The weight of authority, however, seems to sustain the rule that unless the amendments are such as to substitute new or different parties, or to state a new and independent cause of action, the sureties or guarantors are bound by the judgment.

"It is generally held that, where a surety's

obligation discharges from attachment the assets of the debtor upon which the attaching creditor had a right to rely for security of his claim, such surety ought not to be exempted from liability unless the obligation with reference to which he had contracted has been essentially changed without his consent. Having made himself responsible for 'any judgment recovered in the action,' it would be unduly limiting his agreement to permit him to plead successfully an amendment that did not alter the 'nature and character' of the original claim." Further on in the opinion the court said: "The obligation which it was sought to enforce against the principal through the suit and judgment demanded was the payment of the liability arising under the contracts set out in the original complaint. There was no alteration or modification of that contractual liability of the defendant. The plaintiff was not estopped by his original complaint from making any corrections or supplying any omissions by amendment which were proper or necessary to fully set forth the liability of the defendant under the contract sued on. The surety entered upon its contract to guarantee payment of the judgment, any judgment on the cause of action, with presumptive understanding that the original complaint might be amended to cover any damages which had occurred prior to commencement of suit from a breach of the contracts which constituted the cause of action though omitted from the original complaint. Bierce v. Waterhouse, 219 U. S. 320, 31 S. Ct. 241, 55 L. Ed. 237 [see, also, Rose's U. S. Notes].

"If the liability of the release bond had been predicated upon a judgment on the precise facts pleaded in the original cause of action, then such complaint would be the measure of the liability; but the surety contracted upon the basis of whatever judgment was obtained in the action, and it will be presumed to have taken into consideration the possibility of changes by amendment in the extent and nature of the liability incident to the cause of action."

And, finally, with reference to the right of a surety to rely upon the strict terms of its contract, the court said: "In this case the surety company stands upon a purely technical defense, and, while it is true that the rule is in its favor that it may rely upon the strict terms of its contract, there is no reason in law or equity why the same liberality of construction and interpretation of those terms should not be applied as in construing any other contract. In the matter of the obligations of corporations organized to execute surety bonds and securities as a business there is a growing disposition in the courts to hold such sureties to their obligations unless there has been some material departure from the conditions of the agreement. 21 R. C. L. p. 1160; Ann. Cas. 1912B, p. 1087."

[2, 3] The law being thus clearly stated, we have only to determine upon its proper application to the facts of the case at bar. Since the judgment rendered herein is a judgment on the pleadings in a case where the complaint states a good cause of action, necessarily the judgment is based upon a decision that the answer filed by the defendant does not state a defense to the action. The theory of the defense relied upon by the defendant is that the cause of action upon which the plaintiff recovered judgment in the prior action "is not the same cause of action alleged by plaintiff in its original complaint pursuant to which this defendant filed its undertaking under release of attachment as surety for said Eureka Petroleum Corporation." In support of this defense the answer herein sets forth the original complaint and also the amended complaint in the former action, and alleges that the judgment in that action was rendered on said amended complaint. For the purposes of the present decision we must assume that the facts of the case are truly alleged in the answer herein; that is to say, that the judgment in the former action was based on said amended complaint, and that the defendant did not consent to nor did it have any knowledge of the filing of said amended complaint at the time of the filing thereof. The allegation in the answer, "that the judgment recovered by the plaintiff herein against the Eureka Petroleum Corporation is not the judgment which this defendant in its undertaking undertook and agreed to pay," is a statement of a conclusion of law which may or may not be correct. It presents the very question which we are called upon to decide, and is controlled by the contents of the original complaint and the amended complaint in said former action. Thus we are called upon to examine the causes of action stated in the first complaint and compare them with the amended complaint. So far as this defense is concerned, before we can hold that the judgment against the surety on the bond should be reversed, we must first be convinced that said former judgment was founded upon a cause or causes of action essentially or substantially different from the causes of action in the first complaint or, in other words, that the amended complaint stated "a new and independent

cause of action" not included in the first complaint.

On October 18, 1927, plaintiff and the Eureka Petroleum Corporation entered into a written contract for the sale by the plaintiff to said corporation of gasoline to be delivered from time to time at the agreed price of 10 cents per gallon. The agreement was made for the term of thirty days from date and was to continue thereafter until notice of termination given by either party. The complaint in the former action was in two counts, each of which stated a cause of action arising out of said contract. In the first count the complaint alleged delivery to the defendant, between December 13, 1927, and December 20, 1927, of gasoline of the aggregate price and value of $9,671.10. Also in this count there were set forth six checks which had been drawn by the defendant and delivered to the plaintiff in the aggregate sum above stated, all of which on presentation to the bank against which they were drawn were returned unpaid for the reason that the defendant had not sufficient funds for the payment thereof. It was alleged that thereafter the plaintiff made demand upon the defendant for the payment of said total sum represented by said checks, and that the defendant had failed, neglected, and refused to pay said sum of $9,671.10, or any part thereof. In the second count of the first complaint it was alleged that between April 1, 1928, and May 5, 1928, plaintiff sold and delivered gasoline to the defendant under the terms and conditions of said contract, upon which sales and deliveries there remained due, owing, and unpaid the sum of $6,158.65. Plaintiff prayed judgment for the said two unpaid amounts of money.

The amended complaint was in two counts, of which the first was substantially the same as the first count contained in the first complaint. The second count of the amended complaint contains the changes in pleading which appellant here contends amounted to a new and different cause of action from that in relation to which it gave its undertaking for release of the attachment. In substance, the allegations of this count are as follows: After alleging the execution of the agreement of October 18, 1927, the complaint sets forth the following transactions:

That between October 27, 1927, and January 1, 1928, plaintiff, pursuant to the terms and conditions of said contract, sold and delivered to the defendant gasoline in a large stated amount. That defendant prior to January 1, 1928, made payments on account, leaving a balance on said last date in the sum of $23,226.70. "That on or about the 1st day of January, 1928, the said contract hereinabove referred to was cancelled by plaintiff by reason of the defendant's default in the performance of said contract, and a new contract entered into by and between the plaintiff and defendant for the sale to defendant by plaintiff of such amount of gasoline as plaintiff was able and willing to deliver from time to time to defendant at a price of ten and one-quarter cents (10¼c) per gallon, payable cash on delivery.

"That defendant agreed to pay plaintiff cash in advance for all gasoline delivered under the terms and conditions of said new contract.

"That defendant further promised and agreed to pay to plaintiff the sum of approximately twelve hundred ($1,200.00) dollars per week in addition to cash payments for gasoline delivered from plaintiff to defendant until said balance of twenty-three thousand two hundred twenty-six and 70/100 ($23,226.70) dollars was fully paid.

"That thereafter and between the 1st day of January, 1928, and the 12th day of April, 1928, the plaintiff sold and delivered to the defendant gasoline of the aggregate price and value of seventy-six thousand nine hundred eighty-three and 86/100 ($76,983.86) dollars, at the rate of ten and one-quarter (10¼c) cents per gallon.

"That thereafter, on or about the 12th day of April, 1928, the said defendant having failed to pay to the plaintiff the sum of $1,200.00 per week on account of the balance due and owing on the 1st day of January, 1928, as hereinbefore alleged, and having failed to pay to the plaintiff the agreed purchase price of gasoline furnished by plaintiff to the defendant subsequent to said 1st day of January, 1928, in accordance with the contract hereinbefore alleged, plaintiff cancelled the contract hereinbefore set forth and alleged between plaintiff and defendant, and terminated the same, and the plaintiff and defendant entered into a new and separate agreement wherein and whereby plaintiff agreed to sell to defendant such amount of gasoline as it was able and willing to deliver to defendant from time to time as defendant might request at a price of eleven and one-half (11½c) cents per gallon, and that the said defendant agreed to pay plaintiff the said price of 11½c per gallon for all gasoline delivered to the defendant under the terms of such contract and said purchase price to be paid in advance of and prior to the delivery of said

gasoline by plaintiff to the defendant, and defendant as a part of said contract agreed to pay to the plaintiff, in addition to the price of said gasoline thereafter to be delivered to the defendant, the sum of twelve hundred ($1,200.00) dollars per week to be applied on account of gasoline previously delivered by plaintiff to the defendant and then unpaid for as herein alleged.

"That pursuant to the contract last above referred to and entered into on the 12th day of April, 1928, plaintiff delivered to the defendant between the 12th day of April, 1928, and the 1st day of May, 1928, gasoline of the aggregate price and value of eleven thousand five hundred and ninety 01/100 ($11,590.01) dollars at the rate of 11½c per gallon in accordance with the terms of said contract.

"That on the 1st day of May, 1928, the defendant having failed and refused to comply with the terms of said contract last hereinabove referred to and entered into between the plaintiff and defendant on the 12th day of April, 1928, the plaintiff did cancel said contract and the plaintiff and defendant entered into a new contract on the said 1st day of May, 1928, wherein and whereby plaintiff agreed to sell to the defendant, and defendant agreed to purchase from the plaintiff, such amount of gasoline as plaintiff was able and willing to sell to the defendant from time to time, not exceeding the amount which plaintiff should request and desire at and for a price of 12½c per gallon, and defendant agreed to pay said price to the plaintiff for gasoline so furnished.

"That pursuant to the contract last hereinabove referred to, and entered into between plaintiff and defendant on the 1st day of May, 1928, plaintiff delivered to the said defendant gasoline in the aggregate price of three thousand seven hundred twenty-nine and 76/100 ($3,729.76) dollars, at the agreed price of 12½c per gallon."

"Plaintiff further alleges that the defendant has failed, neglected and refused to pay any part of the balance due from defendant to plaintiff in the sum of $23,226.70 for gasoline sold and delivered up to the 1st day of January, 1928, or any part of the purchase price of gasoline sold and delivered to defendant as hereinbefore alleged subsequent to the 1st day of January, 1928, up to and including the 5th day of May, 1928, except the following amounts paid by the defendant to the plaintiff on the dates as follows." Here follows a list of said amounts. "The balance, to-wit: $15,577.89, remains wholly due, owing and unpaid.

"That notwithstanding the several agreements of the defendant made on or about January 1, 1928, and subsequent thereto, to pay for all gasoline sold and delivered under the said several contracts at the time of delivery thereof and in addition thereto to pay the sum of at least $1,200.00 per week upon the unpaid balance for gasoline previously sold and delivered as hereinbefore alleged, the defendant has at all times failed and refused to comply with said contracts as to payment, and that from time to time the said defendant in drawing checks, has for some one or other of the aforesaid payments, endorsed memorandum thereon as plaintiff is informed and believes designating that such checks or the proceeds thereof shall be credited upon prior deliveries or amounts of gasoline sold or delivered prior to the issuance of such checks, and that for that reason the plaintiff is not now able and cannot designate the exact amount paid by the defendant for gasoline sold and delivered under the said several contracts hereinbefore alleged, but this plaintiff alleges that defendant has paid no more nor has any more money been paid on account of any of the amounts of gasoline sold and delivered as hereinbefore alleged except those as herein expressly stated."

The amended complaint closes with a prayer for judgment in the sum of $15,737.23. This amount it may be noted is $192.52 less than the amount demanded by the prayer of the first complaint. It further appears that the cause of action stated in the second count of the amended complaint, and the amount for which judgment was demanded, includes the cause of action for $9,671.10 set forth in the first count of each complaint. The principal differences are found by comparing the second counts of the two complaints. In the second count of the first complaint plaintiff sought to recover $6,158.65 for gasoline sold and delivered between April 21, 1928, and May 5, 1928, and in the second count of the amended complaint the statement of facts shows that on January 1, 1928, there remained due for gasoline sold under the contract, the sum of $23,226.70. Then follows the statement of the further history of the transactions, which we have shown by quotation from said second count of the amended complaint.

The original complaint in said action was filed June 1, 1928; the undertaking for release of attachment was executed June 4, 1928; the amended complaint was filed April 9, 1930. The judgment in that action was entered July 3, 1930, in the sum of $18,032.20

damages and interest. The present action was commenced October 22, 1930, and, after answer filed, the court rendered judgment on the pleadings as first herein stated.

[4] A careful comparison of the first complaint in said action with the amended complaint upon which it is alleged that the judgment in that action was rendered, has brought us to the conclusion that the amended complaint did not state a new and independent cause of action not included in the first complaint. Heretofore we have pointed out that the demand for $9,671.10 is included in the amount of the demand stated in the second count of the amended complaint. We are satisfied that the remaining $6,066.13 of the principal sum demanded in the amended complaint was included within the second count of the first complaint which called for the principal sum of $6,158.65, for gasoline delivered between April 1, 1928, and May 5, 1928. This presumably was the unpaid balance due for the gasoline delivered during the period ending May 1, 1928, as stated in the second count of the first complaint. Although the second count of the amended complaint says that on January 1, 1928, the prior contract was canceled by reason of plaintiff's default in performance thereof, the terms of the new contract, entered into concurrently with the cancellation of the old one, included a renewal of the agreement to pay the amounts due on the original contract. The indebtedness upon which the action was brought, as stated in the first complaint, was in reality the same indebtedness which constituted the cause of action in the amended complaint and upon which the judgment was rendered. We therefore conclude and decide that the liability of the surety was not changed and that the defendant was not exonerated from the penalty of its undertaking by reason of the amendments to the complaint or the filing of the amended complaint in the original action, made after the bond was executed.

[5, 6] On the 3d day of July, 1930, when the judgment against Eureka Petroleum Corporation was entered, a stipulation in writing was made between said corporation defendant and the plaintiff by their attorneys, that execution upon the judgment "may be stayed by order of court to and including the 31st day of August, 1930." The defendant surety corporation by its answer in this present action alleged the fact of said stipulation, and that execution was stayed accordingly. The court in its findings herein declared that the filing of said stipulation did not exonerate the bond of the defendant. Appellant now contends that it was released by virtue of said stipulation, and that this was a defense to the action because the execution of such stipulation amounted to an extension of time on the liability without its consent. We may assume without reviewing the decisions on the subject that a surety is exonerated in like manner with a guarantor (Civ. Code, § 2840), and that a guarantor is exonerated under the conditions set forth in section 2819 of the Civil Code. One of these conditions is that by some act of the creditor, "the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended." The stipulation, made on the day of entry of the judgment (July 3, 1930), that execution upon the judgment "may be stayed by order of court to and including the 31st day of August, 1930," does not lend support to the contention here made by appellant, unless we can say that by such stipulation and order the remedy of the creditor, in respect to the original obligation of the principal, was in some way "impaired or suspended." Sometimes a rule of law may be defeated by a too strictly literal, as well as by a too liberal, application of its provisions. Reasonable interpretation is the breath of life in the rule. To solve the immediate question here, we should consider the group of procedural facts which attend the entry of a judgment. In relation to the right of appeal, a judgment of the superior court is not final until the expiration of sixty days from the date of entry. In the event of an appeal taken, and stay bond given, enforcement of the judgment might be postponed, without consent of the judgment creditor, for much longer than sixty days. It is within the limits of judicial notice that short periods of stay of execution arranged by consent are customary incidents of litigation. They are very much on a parity with continuances, for the convenience of parties, during a trial. The fact that these incidents are so common, accounts for the scarcity of decisions on the direct question now presented for our consideration. Yet we are not entirely without a guiding light in the darkness. In Preston v. Hood, 64 Cal. 405, 1 P. 487, 488, the action was brought to recover judgment on a bond like the one which is the subject of the present action. In the attachment suit, when the case came on for trial, judgment by consent of counsel in open court was directed to be entered in favor of the plaintiffs, and a minute order was made that "By consent of respective counsel, it is ordered that proceedings on execution be stayed for sixty days."

At the trial of the suit on the bond given for release of attachment, the sureties claimed that this extension, being without their consent, released them from liability on the undertaking. The Supreme Court said: "There is no doubt as to the general proposition that if the obligee make a valid contract with the obligor, for a consideration, to extend the time for payment, such contract will discharge the sureties, if made without their consent. The question is, does this case come within the general proposition?" The court observed that the judgment had been by consent, and that, by consenting to the judgment, the defendant practically waived any ground he might otherwise have had for motion for new trial and of appeal. But we cannot see that this was the particular ground of the decision. The real foundation of that decision evidently was the fact that, in the ordinary course of business of this kind, a creditor may find more advantage to himself and more speed in the collection of the debt by consenting to an order for temporary stay of execution. In effect, the court by its decision held that the mere consent of counsel to the entry of an order staying execution for sixty days is not an impairment or suspension of the remedies or rights of the creditor against the principal in respect to the original obligation. Upon this authority and for these reasons, we think that appellant was not released by virtue of said stipulation.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

139 Cal.App. 40

PEOPLE v. LENORE.

Cr. 2531.

District Court of Appeal, Second District, Division 2, California.

May 31, 1934.

1. Constitutional law ⇐266.
Criminal law ⇐662(2).

Statute providing that where commercial paper is protested for insufficiency of funds or credit notice of protest shall be admissible as proof of presentation, nonpayment, and protest, and shall be presumptive evidence of knowledge of insufficiency of funds or credit, *held* not invalid as depriving defendant of right to be confronted by witnesses or denial of due process (Pen. Code, § 476a).

2. Criminal law ⇐1043(3).

Form of notice of protest of checks could not be objected to on appeal from conviction for issuing checks without sufficient funds, where no such objection was made at trial (Pen. Code, § 476a).

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Florence Lenore was convicted of issuing checks without sufficient funds, and of having been convicted of a felony, and she appeals.

Affirmed.

Larsen & Shaw, of Pasadena, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

SCOTT, Justice pro tem.

The information charged defendant with issuing checks without sufficient funds in two counts. A prior conviction of a felony was also charged, and admitted. Upon trial by the court without a jury defendant was convicted on both counts. From the judgment and order denying motion for a new trial, she appeals.

Defendant presented two checks to the proprietor of the hotel in Los Angeles where she was stopping and received cash therefor. The checks, drawn on a bank in Des Moines, Iowa, were returned unpaid, with a "certificate of protest" and copy of "notice of protest" attached to each, attested by a notarial signature and seal. Upon being arrested defendant stated that she had never been in Des Moines and had no account at the bank in question, but had obtained the blank checks from a friend, and that she wrote them. At the trial no evidence was presented in her behalf.

[1] Appellant contends that section 476a of the Penal Code, which provides, in part, that "where such check, draft or order is protested, on the ground of insufficiency of funds or credit, the notice of protest thereof shall be admissible as proof of presentation, nonpayment and protest and shall be presumptive evidence of knowledge of insufficiency of funds or credit with such bank or depositary, or person, or firm, or corporation," is contrary to the provisions of the Constitution of the United States and of the state of California, in that it denies her the "right to be confronted

by the witnesses against" her, and is in violation of due process of law. This question was determined by this court adversely to such contention in People v. Bullock, 123 Cal. App. 299, 11 P.(2d) 441, and an application to have such cause heard in the Supreme Court was denied. Defense counsel cites Morrison v. People of the State of California, 291 U. S. 82, 54 S. Ct. 281, 78 L. Ed. ——, in support of the contention that this court should reconsider its view of the law as expressed in the Bullock Case. A careful consideration of the principles announced in that case, with especial reference to the language used in distinguishing it from Morrison v. California, 288 U. S. 591, 53 S. Ct. 401, 77 L. Ed. 970, confirms the correctness of this court's reasoning concerning the validity of section 476a, as expressed in People v. Bullock.

[2] The remaining contention is that the affidavits of protest were inadmissible, in that they were not in the proper form as required by law. Appellant made no objection at the trial to the form of notices of protest or the lack of authentication of the notary's signature and seal. The objection was made to their introduction for the reason that their introduction would be in violation of the defendant's constitutional rights. The same question was raised and decided adversely to appellant in People v. Bullock, supra, under a state of the record similar to that in the instant case.

Judgment and order affirmed.

We concur: STEPHENS, P. J.; DESMOND, J.



139 Cal.App. 244

NAYLOR v. PETERS.

Civ. 8366.

District Court of Appeal, Second District, Division 2, California.

June 13, 1934.

1. Malicious prosecution ⇐71(2).

In action for malicious prosecution for embezzlement, whether probable cause existed for issuance of warrant *held* for jury.

2. Malicious prosecution ⇐16.

To make case of malicious prosecution, evidence must not only establish lack of probable cause, but it must show existence of malice, which may be inferred by jury from want of probable cause or from declarations of defendant indicating prejudice, ill will, or malicious motive.

3. Malicious prosecution ⇐71(3, 4).

In action for malicious prosecution for embezzlement, whether defendant acted maliciously and upon legal advice after full and fair disclosure of all facts *held* for jury.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by Margaret Naylor against D. L. Peters. From a judgment for defendant, plaintiff appeals.

Reversed.

Henry G. Bodkin, of Los Angeles, for appellant.

Edgar C. Levey and Leon Samuels, both of San Francisco, and Tanner, Odell & Taft, of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

From a judgment in favor of defendant entered on the verdict of a jury in his favor upon direction of the court, plaintiff has appealed.

Prior to February, 1929, plaintiff was the owner of an apartment house in Oakland, incumbered by a first trust deed and upon which she herself had placed a second trust deed. The El Merrie Del Corporation (apparently owned or controlled by defendant) owned some lots in Los Angeles county. A deal was made by which plaintiff exchanged her apartment house for certain notes secured by trust deed on an agreed number of said lots. The lots were deeded by defendant to one Noble, who executed the notes and trust deeds. Plaintiff executed a deed to her apartment house in blank and delivered same to one McDonnell, who caused to be inserted therein the name of one Janssen, who in turn with his wife executed a deed to defendant. The taxes, interest, insurance, and rents on and from said apartment house were to be prorated as of February 1, 1929, "out of escrow." Plaintiff paid the amounts required of her to settle her share thereof to Mr. McDonnell, through whom the deal was made; plaintiff's son, Nathan A. Naylor, representing her by power of attorney. McDonnell testified that he in turn paid said sums to defendant. Defendant employed plaintiff to manage the apartment house at an agreed salary. The owner of the second trust deed thereon, not receiving his interest, asked plaintiff for it. Finding that defendant was the new owner of the apart-

ment house and that plaintiff had paid her pro rata portion of the interest in making the deal, he wrote defendant requesting payment. Plaintiff sent defendant a check for the rents collected up to March 17, 1929, less expenses and salary, amounting to $684.03. Plaintiff's son met defendant accidentally in Los Angeles about that time and says he asked defendant why he didn't "pay our interest and taxes that are due on our first and second trust deeds * * * due to the fact that you have received the money which, according to Mr. McDonnell, has been given you, amounting to something like $3,400.00," and that defendant replied, "It is none of your * * * business when I pay that interest or when I pay the taxes." This conversation was communicated to plaintiff by her son, and on his advice she stopped payment of the rent check "until this thing was threshed out by our attorney, Mr. Soren Christensen." The son had another conversation with defendant the latter part of March, in which defendant asked why payment of the check had been stopped by the mother, and at that time defendant was told that it was on the son's instruction. Mr. Naylor testified that defendant then said that "if my mother did not send that * * * money on to him immediately he would go up and have her arrested," and that he then told defendant "that we would continue to hold that money and we would continue to hold other money, collect all the rents, until such time as the thing was settled, and if it was settled we would be only too glad to turn that money over to him upon demand, but upon the advice of our counsel, Mr. Christensen."

Thereafter plaintiff brought suit in Oakland against defendant, McDonnell and other parties connected with the exchange, for damages claimed to have resulted from the alleged fraudulent acts of said defendants in obtaining the deed to the apartment house. Such action went to the jury on October 29, 1929, which returned a large verdict in favor of the plaintiff and against McDonnell and another defendant but in favor of defendant Peters. While plaintiff was shaking hands with the jurors who returned the verdict, she was arrested on a warrant issued on a complaint sworn to by defendant here charging her with embezzling $111.10, being rent collected in March by her and being a part of the rent covered by the check on which payment was stopped. Plaintiff was found not guilty by the jury before whom she was tried on such charge, and in this action sought damages against defendant for alleged malicious prosecution. At the close of the evidence, defendant's motion for a directed verdict on the ground that the evidence showed there was probable cause and that the action was taken on advice of counsel was granted, resulting in the judgment from which this appeal is taken.

[1] It is the contention of appellant that the court erred in taking the case from the jury.

"When the evidence bearing upon the question of probable cause is in conflict in any essential particular, it is the province of the jury to determine whether or not facts exist which will warrant or reject an inference of probable cause. * * * Good faith is undoubtedly an element of probable cause in malicious prosecution cases, and an actual and honest belief in the guilt of the plaintiff is obviously an integral part of good faith." Franzen v. Shenk, 192 Cal. 572, 578, 221 P. 932, 934.

In addition to the evidence heretofore mentioned, there is evidence from which the jury might have concluded that defendant, from the beginning of the deal which finally resulted in the exchange, was the party in whom title to plaintiff's property was to be vested and who was to furnish the consideration she was to get on the exchange; that he was to pay the interest and taxes on the notes securing the trust deeds on the apartment house, on one of which plaintiff was personally obligated; that plaintiff paid the pro rata of such interest and taxes as well as insurance on the property up to February 1, 1929, to McDonnell, and that the latter turned the money over to defendant; that plaintiff accounted for and paid to defendant the rents collected in February and did not withhold any rent until she stopped payment on the check in March, in an attempt in good faith to compel defendant to pay such interest and taxes, and that plaintiff had no intention of ultimately depriving defendant of any part of such rental collections. To be sure, there is evidence which tends to prove the contrary, but it simply created a conflict the determination of which bears directly upon the good faith of defendant in causing the issuance of the warrant above mentioned. In our opinion, if the jury believed plaintiff's evidence, it could have concluded therefrom that defendant did not in good faith cause the issuance of such warrant; and, such good faith being a fact necessary to the existence of probable cause, the conflicting evidence should have been left for the jury to weigh and conclude therefrom, under appropriate instructions by the court, whether or not such element was shown, and in consequence whether or not probable cause existed.

[2, 3] To make a case of malicious prosecution, the evidence must not only establish lack of probable cause, but it must show the existence of malice, which may be inferred by the jury from want of probable cause or from declarations of the defendant indicating prejudice, ill will, or malicious motive. Runo v. Williams, 162 Cal. 444, 450, 122 P. 1082. In addition to the inference of malice which the jurors could have drawn if they believed the evidence tending to show lack of good faith and consequently want of probable cause, there is other evidence which, if believed, tended to show malice. The testimony of Mr. Naylor was to the effect that Peters threatened that, if his mother did not pay the money immediately, he would have her arrested. Another witness, who was present at the trial of plaintiff's damage suit in Oakland, testified that defendant said, "Well, you people are having your fun now, but I will have my fun later," that this was a few minutes before Mrs. Naylor was arrested, and that she (the witness) was in the courtroom when Mr. Peters "came back with the arresting officer." Plaintiff testified that in July she was requested to come to the office of the district attorney; that she did so with her attorney, Mr. Christensen, and there met a deputy named Westphal; that defendant and his attorneys were also present; that her attorney explained the exchange of property, and that the deputy district attorney refused to file a complaint, saying to defendant that "he could not see any suit there in a charge against me for embezzlement" and that "this is a case for the civil court to decide." Defendant, however, tells an entirely different story of what occurred at the time, but in view of such conflict and the further fact that defendant admits he did not tell his attorney about the conversation with the son of plaintiff, the fact that the jury, if it believed plaintiff's evidence, could conclude that the deputy district attorney who issued the complaint in October was not the same one who plaintiff says refused to do so in July, and that in October, when defendant's attorney "did all the talking" and plaintiff none, a full and fair disclosure of all the facts was not made to the official issuing the complaint, the question of malice should have been left to the jury, as well as the determination of whether or not defendant acted upon legal advice after a full and fair disclosure of all the facts.

Judgment reversed.

We concur: STEPHENS, P. J.; DESMOND, J.

139 Cal.App. 384

PEOPLE v. ROACH.

Cr. 164.

District Court of Appeal, Fourth District, California.

June 21, 1934.

1. Witnesses ⇐277(1).

Where defendant testified in detail upon direct examination as to what had occurred on an occasion some time prior to time offense was alleged to have been committed, cross-examination directed to what had actually happened on that occasion was proper.

2. Criminal law ⇐706.

Cross-examination whether defendant remembered that district attorney had asked him a number of questions while he was in jail, and whether certain things had not been asked of him on that occasion, and whether his reply had not been in each instance that he had nothing to say, *held* not misconduct where no bad faith was shown.

3. Criminal law ⇐865(2).

Where jury was brought into court at 8:37 p. m., and again at 11:33 p. m., and at latter time upon interrogatories five jurors stated they believed a verdict possible, five stated the contrary, and two were doubtful, holding jury overnight, after which a verdict was reached at 9:02 a. m., *held* not abuse of discretion.

4. Criminal law ⇐982.

Refusing probation *held* not abuse of discretion where court considered written report of probation officer and also heard oral testimony in defendant's behalf.

5. Criminal law ⇐982.

Defendant in matter of probation has only right to have his application considered by court, and probation may not be demanded as matter of right.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Fain Roach was convicted of assault with intent to commit rape, and he appeals.

Affirmed.

J. M. Lopes, of Visalia, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Clarence H. Wilson, Dist. Atty., of Hanford, for the People.

BARNARD, Presiding Justice.

After a trial before a jury, the defendant was found guilty of the crime of assault with

intent to commit rape and has appealed from the judgment and from an order denying a motion for a new trial. It would serve no useful purpose to set forth here the facts which were developed on the trial of the case. No claim is made that the evidence is insufficient to support the verdict, and it may be observed that the story told by the prosecuting witness on the stand is not only convincing, but the same is corroborated by other evidence to an extent which is unusual in cases of this nature.

[1] The first point raised is that the court erred in permitting certain questions to be asked of the appellant upon cross-examination. On his direct examination the appellant had testified in considerable detail as to what had occurred on a certain occasion some time prior to the time when the offense in question is alleged to have been committed. The cross-examination, which is here objected to, not only related to the incident about which he had testified, but was particularly directed to what had actually occurred on that occasion. It had an immediate and material connection with the appellant's testimony on direct examination. Not only was it proper to bring out the entire transaction, concerning a part of which the appellant had testified, but the questions asked directly concerned an implication which the appellant plainly desired to have drawn from the partial statements made in his testimony in chief. The cross-examination complained of was entirely proper. People v. Teshara, 141 Cal. 633, 75 P. 338.

[2] A second contention is that the district attorney was guilty of prejudicial misconduct in asking certain other questions of the appellant upon cross-examination. After being asked if he remembered that the district attorney had asked him a number of questions while he was in jail the appellant was asked several questions relating to whether certain things had not been asked of him on that occasion and whether his reply had not been, in each instance, that he had nothing to say. The court sustained an objection to each of these questions and refused a request made by the district attorney to give him a few minutes in which to produce authorities to the effect that the evidence was admissible. It is now contended that the district attorney did not ask these questions in good faith and that, in asking the same, he was guilty of prejudicial misconduct. It clearly appears that the district attorney asked these questions in good faith and in the belief that they were proper. If it be assumed that the questions called for evidence which was inadmissible, the court sustained objections thereto, and there is neither a showing of misconduct nor of prejudice sufficient to justify a reversal.

[3] It is next urged that the court abused its discretion in not discharging the jury for failure to agree upon a verdict. It does not appear at what hour the case was submitted to the jury, but it does appear that on the day this was done the jury was taken out to dinner and thereafter was brought into court at 8:37 p. m. and again at 11:33 p. m. At the time last mentioned the court questioned each member of the jury with respect to his belief as to whether or not it was possible for the jury to agree upon a verdict. Five of the jurors stated that they did not believe it was possible to arrive at a verdict, five others stated that they believed a verdict was possible, while the other two expressed doubt as to a final agreement. Thereupon, the court ordered the jury to retire for the night and a verdict was returned the next morning at 9:02 a. m. Nothing here appears in any way indicating any abuse of discretion on the part of the trial court in connection with this matter. People v. Cage, 48 Cal. 323, 17 Am. Rep. 436; People v. Lee, 34 Cal. App. 702, 168 P. 694; People v. Selby, 76 Cal. App. 715, 245 P. 792; People v. Phillips, 120 Cal. App. 644, 8 P.(2d) 228.

[4, 5] The only other point raised is that the court abused its discretion in not granting probation to the appellant. On application of the appellant the court referred the matter to the probation officer and fixed a time for hearing. When the matter came on for hearing it appears that the court considered the written report of the probation officer and also heard oral testimony in appellant's behalf. It not only appears that the application for probation was fully considered, but nothing in the record indicates any abuse of the discretion vested in the trial court. The only right of a defendant is to have his application for probation considered by the court and we have not yet come to the point where a defendant may demand such clemency as a matter of right. People v. Payne, 106 Cal. App. 609, 289 P. 909.

The judgment and order appealed from are affirmed.

I concur: MARKS, J.

JENNINGS, J., being absent, does not participate in this opinion.

1 Cal.(2d) 147

SANDELIN v. COLLINS et al.

Sac. 4873.

Supreme Court of California.

June 26, 1934.

1. Intoxicating liquors ⇐6.

State, having power to prohibit entirely manufacture and traffic in intoxicating liquor, subject to interstate commerce laws, may impose such conditions and regulations for sale of liquor as it deems proper (St. 1933, pp. 1697, 1698, §§ 1–4; Const. art. 20, § 22, as added in 1932).

2. Intoxicating liquors ⇐143.

Permitting patrons to bring liquor in original packages, other than wine or beer, into hotel dining room, and to consume contents thereof while occupying tables, would constitute unlawful maintenance of public drinking place (St. 1933, pp. 1697, 1698, §§ 1–4; Const. art. 20, § 22, as added in 1932).

3. Intoxicating liquors ⇐143.

Where proprietor of hotel operated retail liquor store on premises, permitting employees of hotel dining room to go to retail liquor store, at request of patrons of dining room, to procure liquor other than wine or beer, and serve same to patrons in dining room, operations would constitute unlawful maintenance of public drinking place (St. 1933, pp. 1697, 1698, §§ 1–4; Const. art. 20, § 22, as added in 1932).

4. Intoxicating liquors ⇐143.

Where proprietor of hotel operated retail liquor store on premises, permitting proprietor to partition off space in dining room, with service window opening therefrom into dining room through which proprietor could furnish liquor, other than wine or beer, to patrons, and thereafter permit employees to mix liquor with other ingredients and serve same to patrons in dining room, would constitute unlawful maintenance of public drinking place (St. 1933, pp. 1697, 1698, §§ 1–4; Const. art. 20, § 22, as added in 1932).

5. Intoxicating liquors ⇐143.

Intoxicating liquors, other than wine and beer, may not under any circumstances lawfully be consumed in hotel dining rooms or other public drinking places, in whatsoever manner liquor may be supplied, and wine and beer may be consumed in public places only with meals (St. 1933, pp. 1697, 1698, §§ 1–4; Const. art. 20, § 22, as added in 1932).

6. Constitutional law ⇐14.

Where meaning of constitutional provision is plain, there is no opportunity for construction, and court can only apply to facts meaning which constitutional provision plainly imports.

7. Intoxicating liquors ⇐238(1).

Whether sandwich constitutes "meal" within liquor laws permitting serving of beer and wines with meals furnished in good faith, is question of fact, depending on circumstances, and to be determined as problem in enforcement of liquor laws (St. 1933, pp. 1697, 1698, §§ 1–4; Const. art. 20, § 22, as added in 1932).

[Ed. Note.—For other definitions of "Meal," see Words & Phrases.]

8. Intoxicating liquors ⇐238(1).

Where sandwich is served in good faith as "meal" within liquor laws permitting serving of beer and wines with meals furnished in good faith, fact that sandwich is not consumed would not as matter of law classify it as lacking essential characteristics of "meal" (St. 1933, pp. 1697, 1698, §§ 1–4; Const. art. 20, § 22, as added in 1932).

9. Intoxicating liquors ⇐61(1)

State board of equalization, as regulatory body under liquor control laws, *held* authorized to investigate alleged or threatened violations of liquor laws, necessary element of which is policing of premises where such violations may be committed (St. 1933, pp. 1700, 1705, §§ 5, 29).

In Bank.

Appeal from Superior Court, Medocino County; W. D. L. Held, Judge.

Proceedings for a declaratory judgment brought by F. W. Sandelin against R. E. Collins and others, comprising the State Board of Equalization. From the judgment rendered, the plaintiff appeals.

Affirmed.

Taft & Spurr, of Ukiah, for appellant.

H. L. Preston, of Ukiah, for appellees.

SHENK, Justice.

Both parties appeal from a judgment in a proceeding for declaratory relief under section 1060 et seq. of the Code of Civil Procedure. The facts are undisputed.

The plaintiff is operating the Palace Hotel in the city of Ukiah, county of Mendocino. The hotel is a three-story brick and concrete structure, 100 feet by 200 feet in dimensions. Within the building is a dining room wherein the plaintiff conducts a public eating place, in which customers of the plaintiff are served with meals and with wines or beer under an "on sale" license from the defendant state

board of equalization. In the same building and on the same floor with the dining room is a retail liquor store operated by the plaintiff, wherein liquor is sold in original packages under an "off sale" license from the defendant. This liquor store has an entrance on West Smith street, which is not the hotel entrance, and is separated from the dining room by substantial partitions. The liquor store is patronized generally by the local and traveling public. Customers come to the dining room bringing with them original packages containing intoxicating liquor (other than wine or beer) and open and consume the same while seated at the plaintiff's tables. Customers also frequent the dining room and request the plaintiff or his employees to go to said liquor store, purchase liquor (other than wine or beer), and serve the same to them at the dining room tables of the plaintiff. Other customers of the plaintiff come to the dining room "and order a sandwich and a glass of beer or wine, or both, consume the beer or wine, or both, and leave the sandwich untouched." Customers also come to the dining room, order a sandwich and a glass of beer or wine, and consume both the sandwich and the beer or wine. The plaintiff desires to partition off a space in the dining room 12 by 14 feet in dimension, with a service window opening into said dining room, through which he may furnish liquor (other than wine or beer) to his customers in the dining room, after which the employees of the plaintiff would take said liquor to a mixing counter, separate and apart from said liquor store, mix the same with other ingredients, and serve it to said customers. A controversy has arisen between the plaintiff and the defendant board as to whether the use of said property as alleged and proposed is contrary to law, also as to whether the board has the right to designate persons to police the property of the plaintiff to prevent violations of law, and to prosecute offenders for such violations.

The board does not question the right of the plaintiff to serve wine and beer with regular meals in his dining room, nor to sell liquors in his liquor store in original packages and not to be consumed on the premises where sold, and regulation with reference to the wholesale trade is not involved herein. The privileges which the plaintiff claims the right to exercise and which the defendants deny him are:

(1) To permit patrons to bring into the dining room liquor in original packages (other than wine or beer), and consume the contents thereof while occupying seats at the dining room tables.

(2) To permit his employees in the dining room to go to the liquor store, at the request of patrons of the dining room, and procure liquor, other than wine or beer, and serve the same to said patrons.

(3) To partition off a space in the dining room 12 by 14 feet in dimensions, with a service window opening into the dining room, through which he may furnish liquor, other than wine or beer, to his customers in the dining room; after which the employee of the plaintiff would take said liquor to a mixing counter, apart from the space partitioned off, add other ingredients thereto, and serve the same to customers in the dining room.

(4) To serve wine and beer in the dining room to patrons who order and consume only a sandwich and such wine or beer.

(5) To serve wine or beer in the dining room to patrons who order only a sandwich and wine or beer, and consume only the latter.

(6) To be relieved of the policing of his premises by the defendant board and its inspectors.

The trial court found and declared that the plaintiff had not the rights asserted in items 1, 2, 3, and 6 above enumerated, but had the privileges claimed in items 4 and 5.

Prior to the enactment of the Eighteenth Amendment to the Constitution of the United States, the right of regulation of traffic in alcoholic liquors was exercised by the state or under the authority of the state by local legislative bodies and by local option. These rights of regulation were superseded by the federal law and the enactment of the State Prohibition Enforcement Act, commonly known as the Wright Act. Stats. 1921, p. 79. The Wright Act was repealed by an initiative measure approved at the general election held on November 8, 1932. At the same election, also as an initiative measure (designated on the ballot as proposition No. 2), section 22 was added to article 20 of the state Constitution. This section provides: "In the event of the repeal of the State Prohibition Enforcement Law, commonly known as the Wright Act, and if and when it shall become lawful under the Constitution and laws of the United States to manufacture, sell, purchase, possess or transport intoxicating liquor for beverage purposes within the United States, the State of California, subject to the internal revenue laws of the United States, shall have the exclusive right and power to

control, license and regulate the manufacture, sale, purchase, possession, transportation and disposition of intoxicating liquor within the State, and, subject to the laws of the United States regulating commerce between foreign nations and among the States, shall have the exclusive right and power to control and regulate the importation into and the exportation from the State of intoxicating liquor; provided, however, no public saloon, public bar or barroom or other public drinking place where intoxicating liquors to be used for any purpose shall be kept, bought, sold, consumed or otherwise disposed of, shall ever be established, maintained or operated within the State; provided, further, subject to the above provisions, that in hotels, boarding houses, restaurants, cafés, cafeterias and other public eating places, wines and beer may be served and consumed with meals furnished in good faith to the guests and patrons thereof, and the Legislature may authorize, subject to reasonable restrictions, the sale in retail stores of liquor contained in original packages, where such liquor is not to be consumed on the premises where sold." Stats. 1933, p. lxxx.

In 1933 the Legislature enacted the present state Liquor Control Act to become operative upon the repeal of the Eighteenth Amendment to the Constitution of the United States. Stats. 1933, p. 1697. The Eighteenth Amendment was repealed by the Twenty-First Amendment, effective December 5, 1933.

The State Liquor Control Act of 1933 appears to be a complete and comprehensive plan for the license, regulation, and control of the traffic in intoxicating liquors in conformity with the constitutional provision now in effect. Among other things, the statute provides:

"Section 1. In hotels, boarding houses, restaurants, cafeterias, and other public eating places, wines and beer may be served and consumed with meals furnished in good faith to the guests and patrons thereof, subject to the provisions of this act and other applicable provisions of law.

"Sec. 2. Liquor contained in original packages may be sold in retail stores where such liquor is not consumed and is not sold to be consumed on the premises where sold, subject to the provisions of this act and other applicable provisions of law.

"Sec. 3. No public saloon, public bar or barroom or other public drinking place where intoxicating liquors to be used for any purpose shall be kept, bought, sold, consumed or otherwise disposed of, shall ever be established, maintained or operated within this State."

The act (section 4) defines "liquor" or "intoxicating liquor" as "beer, wine, gin, whiskey, cordials, or rum, and every liquid or solid, patented or not, containing one-half of one per cent or more of alcohol by volume and which are fit for use for beverage purposes." An "on sale license" is defined as "a license to sell beer or wine for consumption with meals only on the premises in respect to which the license is issued." An "off sale license" is defined as a "license to sell liquor in original packages in retail stores for consumption only off the premises in respect to which the license is issued."

[1] The language of section 22 of article 20 of the Constitution (proposition No. 2) is plain. Subject to certain federal laws, the state thereunder has the exclusive right and power to control, license, and regulate the manufacture, sale, purchase, possession, transportation, and disposition of intoxicating liquors within the state. Under the broad and comprehensive language preceding the provisos, the state could prohibit entirely the manufacture and traffic in intoxicating liquor, subject, of course, to interstate commerce laws. Indeed, the state, independent of the constitutional provision, would have that right under the police power, and having the power to prohibit entirely could impose such conditions and regulations as it might deem proper. Ex parte Christensen, 85 Cal. 208, 24 P. 747; Matter of Application of Anixter, 166 Cal. 762, 138 P. 353.

The provisos are included in the constitutional amendment. The effect of each is to place limitations on the power theretofore in the section vested in the lawmaking department of the state. The first proviso is one of prohibition against saloons and other public drinking places and the second is one of assurance against prohibition in specified particulars. The plaintiff's hotel dining room, operating under an "on sale" license, is unquestionably a public drinking place, as contemplated by the constitutional provision; and this is not questioned. The first proviso would prohibit entirely the maintenance and operation of that dining room if intoxicating liquor to be used for any purpose be kept, bought, sold, consumed, or otherwise disposed of therein, if it were not for the second proviso which permits service and consumption of beer and wine only with regular meals. The first proviso strikes at the consumption, or disposition otherwise, of intoxicating liquor in said dining room, and would operate

as complete prohibition therein if it were not for the second proviso which permits and guarantees the right to the service and consumption therein of beer and wine with regular meals.

Applying the plain terms of the Constitution to the facts presented it must be declared:

[2] 1. That if the plaintiff should permit his patrons to bring into his dining room liquor in original packages (other than wine or beer), and consume the contents thereof while occupying seats at the dining room tables, he would be maintaining a public drinking place where such liquor is there consumed, in violation of the Constitution and the statute. See Butler Hotel Co. v. U. S. (C. C. A.) 35 F.(2d) 76; Id., 281 U. S. 733, 50 S. Ct. 248, 74 L. Ed. 1149; Briggs v. U. S. (C. C. A.) 45 F.(2d) 479; Rossi v. U. S. (C. C. A.) 16 F.(2d) 712.

[3] 2. That if the plaintiff should permit his employees in the dining room to go to the retail liquor store, at the request of the patrons of the dining room, and procure liquor, other than wine or beer, and serve the same to said patrons in the dining room, he would be maintaining a public drinking place where such liquors are "consumed or otherwise disposed of," in violation of the Constitution and the statute.

[4] 3. If the plaintiff should partition off a space in the dining room, with a service window opening therefrom into the dining room through which the plaintiff would furnish liquor, other than wine or beer, to his patrons, and thereafter permit his employees to mix said liquor with other ingredients and then serve the same to his patrons in the dining room, he would be maintaining a public drinking place where such liquor is kept, sold, or consumed, in violation of the Constitution and the statute.

[5, 6] In other words, under the plain terms of the Constitution, intoxicating liquors, other than wine and beer, may not under any circumstances lawfully be consumed in hotel dining rooms or other public drinking places, in whatsoever manner said liquor may be supplied, and wine and beer may be consumed in the public places specified by the act only with meals. This conclusion is not arrived at by any process of construction or the ascertainment of the intention of the people of the state in enacting section 22 of article 20 of the Constitution, but is compelled from the plain meaning of the words used. In such case there is no opportunity for construction; nor is there any function for the court to perform other than to apply to the facts the meaning which the constitutional provision plainly imports.

If construction of the language were required or justified, resort might well be had to the title of the initiative measure submitted to the electors of the state for their approval and prepared at the instance of the proponents thereof. The title states that the effect of the proposed constitutional amendment is as follows:

"Prohibits public saloons, bars or drinking places where intoxicating liquors are kept, sold or consumed.

"Permits serving wine and beer with meals furnished in good faith to patrons of hotels, boarding houses, restaurants, and public eating places.

"Permits legislation to authorize, under reasonable restrictions, sale of liquor in original packages in retail stores when same not consumed therein."

There is nothing in section 22 of article 20 of the Constitution which would indicate that intoxicating liquor, other than wines and beer, might be served and consumed with meals. The contrary definitely appears. To hold that so-called "hard liquors" might be served and consumed with meals in public drinking places would be contrary to the plain terms of the Constitution which permit only wines and beer to be served with meals, and would seriously interfere with the regulation of the traffic in liquors as provided for in the Liquor Control Act.

To determine what shall constitute a meal as contemplated by the Constitution, it is first noted that good faith is an element in the transaction. The State Liquor Control Act (section 4) defines a meal as "that quantity of food of such nature as is ordinarily consumed by an individual at regular intervals for the purpose of sustenance" in the dining rooms of hotels, boarding houses, restaurants, clubs, dining cars, cafés, cafeterias, and other public eating places where meals are regularly served at tables.

[7, 8] The question now considered is whether a sandwich, consumed or unconsumed, when served with wine or beer, is a meal as contemplated by the Constitution and statute.

The question is one of fact. No light is thrown upon it by expert or other testimony or evidence in the record. If common knowledge be resorted to, it may be said that to one who is accustomed to simple sustenance,

a sandwich with a beverage would constitute a meal. A sandwich may or may not be a meal within the meaning of the Constitution and the statute, depending on the circumstances. If it be served as a mere subterfuge for a meal, it is not such a meal. Under our modern system of living, a sandwich served in good faith as a meal would constitute a meal as contemplated by law. Matter of Cullinan, 93 App. Div. 427, 87 N. Y. S. 660. Obviously, the court cannot lay down a general rule of law applicable in all cases with reference to a question so intimately connected with and controlled by individual tastes, conditions of diet, and circumstances. If a sandwich is served in good faith as a meal, the fact that it is not consumed would not as a matter of law classify it as lacking the essential characteristics of a meal. It may therefore be said generally that the question whether the food served with wine or beer is a "meal furnished in good faith" is primarily a question of fact to be determined as a problem in enforcement, having in mind the limitations of the Constitution and the definition of a meal in the statute.

To recapitulate: The Constitution and the Liquor Control Act provide that intoxicating liquors of all kinds may be sold by duly licensed retail dealers to the public generally, but only in original packages and when such liquor is not to be consumed on the premises where sold. The Constitution and the statute prohibit the maintenance or operation within this state of any public drinking place where intoxicating liquors of any kind shall be kept, bought, sold, consumed, or otherwise disposed of, except that wine and beer may, under appropriate licenses, be served and consumed with meals furnished in good faith in the dining rooms of hotels, boarding houses, restaurants, cafés, cafeterias, and other public eating places to the guests and patrons thereof. Whether the food furnished with wine or beer or both, in such public eating places, constitutes a "meal" furnished in good faith is a question of fact to be determined in the enforcement of the act.

[9] Lastly, the plaintiff asserts the right to operate his dining room under the "on sale" license freed from policing on the part of the inspectors of the defendant board. Under section 5 of the state Liquor Control Act the board is "directed to administer and enforce the provisions of this act. For this purpose the board may employ * * * such additional inspectors and clerks as may be determined * * * to be necessary for the efficient administration and enforcement of the provisions of this act. The members of the board and the inspectors employed under the provisions of this act shall have all the powers of peace officers in enforcing the provisions of this act." A violation of any of the provisions of the act or of any order, rule, or regulation of the board, or of any of the terms and conditions of a license issued by the board is made a misdemeanor. The board, under section 29, is directed to cause the prosecution by the proper authorities of those who violate the provisions of the act. The foregoing is ample authority for the board and its inspectors to investigate alleged or threatened violations of the law, a necessary element of which is the policing of the premises where such violations may be committed.

We are in accord with the conclusions of the trial court as expressed in the findings and judgment herein.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; TYLER, Justice pro tem.



1 Cal.(2d) 206

ROSENFELD v. MILLER.

L. A. 13819.

Supreme Court of California.

July 2, 1934.

Rehearing Denied July 30, 1934.

1. Brokers ⊂⊃50.

Failure to secure a purchaser or lessee upon terms proposed and within time provided precludes recovery of commission by broker unless such failure was due to owner's negligence, fraud, or fault.

2. Brokers ⊂⊃75.

Where broker did not procure lease for owner within time fixed by original written agreement and later agreed that his commission for procuring less favorable lease should be payable solely out of building loan, but loan was never procured, owner was not liable for commission.

In Bank.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by A. M. Rosenfeld against Robert Miller. From a judgment for plaintiff, defendant appeals.

Reversed.

See, also, 216 Cal. 560, 15 P.(2d) 161.

Willcox & Judson, George A. Judson, F. W. Heatherly, Joe Orloff, and Oregon Smith, all of Los Angeles, for appellant.

Loucks & Phister, of San Pedro, and Harry J. Miller, of Los Angeles (John Perry Wood, of Los Angeles, of counsel), for respondent.

PRESTON, Justice.

Plaintiff, a real estate broker, brought this action against defendant, a manufacturer of curled hair, for a commission, founded upon a written authorization signed by defendant, dated December 20, 1929, and purporting to authorize plaintiff to "negotiate for a tenant" for a period of thirty days. The property involved was owned by defendant, and was a vacant lot situated in San Pedro, Cal. It was proposed to cause to be erected thereon, at a cost of not less than $220,000, a theater building, with stores and offices in connection therewith.

The authorization went into some detail as to the character of the contemplated building, its seating capacity, the amount of the anticipated rentals, etc., and it contained the following further paragraphs: "(4) That all increases in taxes over the present tax on the portion of the building used as a theater shall be paid by the tenant." "(7) In event a lease is closed in accordance with the terms of this authorization, I hereby agree to pay you a commission in accordance with the Schedule of Commissions now in use by the Los Angeles Realty Board. (8) Stores and other buildings to be constructed along Pacific Avenue and Third Street frontage shall be included in the original plans and specifications but this authorization is to include only that portion of the premises to be used as a theater."

It should be noted that the above authorization was the last of a series of three such documents; the second and third being renewals of the first one, with perhaps some minor changes. During the thirty-day period mentioned, as well as during the terms of the previous letters of authority, plaintiff was in touch with the Fox West Coast Theatres, a corporation, as a prospective tenant for said proposed building. Thinking he had brought the parties to an agreement, a lease was prepared in December, 1929, by the attorney for defendant, the exact date not appearing. It was executed by defendant and his wife, but, upon presentation to the prospective tenant, was by it rejected. Thereafter negotiations lapsed for a period of weeks—the exact time cannot be ascertained from the evidence. The testimony of plaintiff is in a confused state on this question, but it is clear that a distinct period elapsed before renewal of any negotiations between the parties. For instance, plaintiff testified: "* * * I talked to Mr. Miller in a few days after the first lease was rejected. I didn't come back afterwards and take it up with him in February." Again: "After this conversation the next time I talked to Mr. Sturzenacker or Mr. Miller was at least a month or more before the last lease was signed;" and "I don't recall going down there and telling them I wanted to make another try and see if I could get another lease on the place signed."

Defendant testified that following the rejection of the first proposed lease, plaintiff told him the deal was off. His wife testified that plaintiff did not renew the negotiations until some time in February. It is also undisputed that plaintiff did not seek a renewal of his letter of authority as had been his practice—a practice he himself said was to protect him, among other things, in his claim for commissions.

Later, in the first part of March, 1930, plaintiff secured from the prospective tenant a lease which had been prepared by its attorneys, and he again came in contact with defendant. On March 10, 1930, some four hours were spent in the office of defendant's attorney in the consideration of this proposed new lease, plaintiff being at all times present and also a Mr. Suggerman, who represented the prospective lessee. At the close of this conference of four hours, defendant executed the lease appearing in the record. However, it had at least two material provisions which differed from the written authorization above referred to. First, paragraph 4 respecting the assumption of the increase in taxes by the lessee was eliminated; and, second, the lease included the stores and offices as well as the theater. The term of the lease, too, was different.

The evidence also shows without substantial conflict that during said four-hour conference it was definitely understood that the expense of construction of the building, the commission of plaintiff for his services, and attorney and architect fees, as well as other expenses, would be paid solely and alone out

of a construction fund to be secured by a loan upon the property. Plaintiff himself produced defendant's attorney, who testified in this respect as follows: "The agreement was at the time this lease was drawn, that the plans and specifications and commission for Mr. Rosenfeld, if any, were all to be paid out of the financing. My fee was to be paid out of the financing when it was obtained. * * * The agreement was that the loan as eventually received should be sufficient to cover the cost of construction and all expense. * * * The commission was to be paid out of the loan, but whether to be repaid I don't know. * * * In the final analysis it was said at that time that Mr. Miller was not to be out any money for financing expenses, plans or commission, or your fee, and that the financing on the building was to be sufficient to take care of all expenses. All expenses were to come out of the loan. A loan sufficient to take care of all expenses was to be secured."

There is a conflict in the evidence as to whether plaintiff himself was to procure the loan, but plaintiff nowhere in any of his testimony undertakes to controvert the plain testimony of the attorney, above quoted. That all expenses, including plaintiff's commission, were to come from a loan, was also testified to by the architect and several other witnesses. The evidence is abundant that thereafter all parties, including the procuring agent, attorney, and architect, engaged in diligent and constant efforts to secure suitable financing for this building, but that they and each of them wholly failed. The building was never constructed. The attorney has not received his fee, nor has the architect received his. Plaintiff, however, was more aspiring, and brought this action, seeking thereby to bring into the proceedings his said written authorization, which, by its own terms, expired on January 19, 1930, some fifty days prior to the meeting of the minds of the parties or the execution of the lease evidencing same. Plaintiff had findings and judgment in his favor in the court below, and defendant appealed.

[1] Since the case of Wilson v. Sturgis, 71 Cal. 226, 16 P. 772, the general rule has been that, unless the failure to secure a purchaser or lessee upon terms proposed and within the time provided is due to the "negligence, fraud, or fault" of the owner, the agent may not recover upon his contract. This rule has been steadfastly adhered to as shown by the following cases: Zeimer v. Antisell, 75 Cal. 509, 17 P. 642; Ropes v. Rosenfeld's Sons, 145 Cal. 671, 79 P. 354; Hicks v. Post, 154 Cal. 22, 96 P. 878; Brown v. Mason, 155 Cal. 155, 99 P. 867, 21 L. R. A. (N. S.) 328; and Cline v. Carpenter, 83 Cal. App. 792, 257 P. 459.

An exact parallel to the case at bar is the case of Howard v. Burrow, 77 Cal. App. 4, 245 P. 808, a case where the plaintiff was denied a recovery even though, after expiration of the stipulated period of agency, he actually participated in proceedings which, it was assumed, resulted in a binding lease. In fact, the broker was named as the procuring cause in the written agreement between the parties. This court denied a petition for transfer in said cause.

Respondent, however, relies upon three cases to bring the present case within an exception to the above rule. Estes v. Hotchkiss, 63 Cal. App. 284, 218 P. 605; Umphray v. Hufschmidt, 73 Cal. App. 140, 238 P. 749, and Moore v. Borgfeldt, 96 Cal. App. 306, 273 P. 1114.

The case of Estes v. Hotchkiss, supra, is of no value in this inquiry, as there, after the expiration of the time limit in the agency agreement, and after the agent had performed later services in the matter, and secured a binding contract of sale and purchase, the defendant gave him a new letter of authority which confirmed and modified the previous agreement, and it was upon this latter agreement that a recovery was sustained.

The case of Moore v. Borgfeldt, supra, is likewise of little importance, for there, during the life of the agency agreement, the agent produced a purchaser ready, able, and willing to buy upon the terms imposed, but, because the owner was not ready to carry out his part of the bargain, negotiations, in which the agent actively participated, were continued after the expiration of the prescribed time and said agent finally secured a sale upon better terms for his principal.

Under the doctrine of such cases as Twogood v. Monnette, 191 Cal. 103, 215 P. 542, the commission was earned during the life of the contract, and whatever was said in the opinion about waiver was unnecessary to a decision.

The case of Umphray v. Hufschmidt, supra, is predicated upon the fact that negotiations of the broker continued without interruption, with the sanction of the owner, and within a few days an agreement was made on substantially the identical terms named in the agent's undertaking. It was there held, in view of these two elements, that a waiver was properly made.

[2] But here, as already pointed out, the negotiations lapsed for a considerable time. The custom of renewing the agency contract was not indulged; the lease as finally executed differed material from that contemplated by the letter of authority and at least elimination of the item of taxes made the lease more burdensome to defendant owner. But, more than this, as also pointed out above, the express understanding with plaintiff was that, unless a loan on the property sufficient for all purposes was secured, he was to receive no commission. Whether it had been previously so understood is immaterial, for it was then made plain that, unless and until the deal was properly financed, plaintiff was not to receive any commission. It follows that the finding of the court that plaintiff performed the written contract is unsupported by any competent evidence. This conclusion makes it unnecessary to discuss the other points made by appellant.

The judgment is reversed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SHENK, J.



1 Cal.(2d) 226

GRAY v. STATE BAR OF CALIFORNIA.

S. F. 15063.

Supreme Court of California.

July 2, 1934.

Attorney and client ⇐57.

Where only one attorney was subjected to investigation and disbarment proceeding, though he was not sole attorney to transaction, proceeding resulting in recommendation that attorney proceeded against be suspended will be remanded, with directions to board of governors to bring before it for investigation any attorneys who directly participated in the transaction and to take such steps as may seem proper.

WASTE, C. J., and SHENK and THOMPSON, JJ., dissenting.

In Bank.

Petition by Bingham Gray to review a recommendation of Board of Governors of the State Bar of California that petitioner be suspended from practice of law for one year.

Remanded, with directions.

Joseph Scott and Jerry Giesler, both of Los Angeles, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent State Bar.

PER CURIAM.

It appearing that the transaction which formed the basis of the charges preferred against petitioner, and which resulted in a recommendation by the board of governors of the State Bar that he be suspended from practice of the law for a period of one year, involved a party or parties who participated therein with petitioner, but who were not proceeded against, and whose conduct in the matter has not been inquired into, it is hereby ordered that this entire proceeding be remanded to the board of governors, with directions to reopen the same, and by proper orders to bring before it for investigation any members of the State Bar who directly participated in the said transaction, or take such further steps as may seem meet and proper.

We dissent: WASTE, C. J.; SHENK, J.; IRA F. THOMPSON, J.



1 Cal.(2d) 116

VITIMIN MILLING CORPORATION v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

L. A. 14559.

Supreme Court of California.

June 22, 1934.

1. Prohibition ⇐10(2).

Where judge granted one defendant's motion for directed verdict, jury disagreed, and mistrial was ordered, defendant was not entitled to prohibition preventing judge from proceeding with retrial as against him because of granting of motion, where defendant made no request for instruction directing jury to return verdict, no such instruction was submitted, no verdict was returned, and there was no showing that jury would have refused to return verdict for defendant if so instructed (Code Civ. Proc. §§ 616, 618, 628).

2. Trial ⇐326, 342.

Requirements that verdict be in writing and entry thereof be made in minutes of court apply equally to verdicts returned by jury

after deliberation and directed verdicts (Code Civ. Proc. §§ 618, 628).

3. Appeal and error ⇐78(1).

Order merely granting motion for directed verdict is not appealable, since there is no finality to proceedings, in absence of verdict entered as required by law (Code Civ. Proc. §§ 618, 628, 963).

4. Judgment ⇐197.

Purported judgment based on granting of motion for directed verdict *held* void, where no verdict was actually rendered (Code Civ. Proc. §§ 618, 628).

5. New trial ⇐9.
Trial ⇐316.

Where court granted one defendant's motion for directed verdict, jury disagreed and mistrial was ordered generally, nunc pro tunc order changing order directing mistrial generally to exclude defendant whose motion for directed verdict was granted *held* ineffective to complete trial, and new trial was properly ordered as to all defendants and all issues (Code Civ. Proc. §§ 616, 618, 628, 656).

6. Prohibition ⇐10(2).

Prohibition *held* not to lie to prevent judge who granted motion of one defendant for directed verdict from proceeding with retrial of case as against such defendant, where court had jurisdiction of all parties and subject-matter of action.

In Bank.

Application by the Vitimin Milling Corporation for a writ of prohibition to be directed to the Superior Court in and for Los Angeles County, Hon. William J. Palmer, as Judge thereof.

Peremptory writ denied.

Prior opinions, 25 P.(2d) 469, and 26 P.(2d) 497.

Fitzpatrick & Dickey, of Los Angeles, for petitioner.

Everett W. Mattoon, County Counsel, Fred M. Cross, Deputy County Counsel, and Mathes & Sheppard, all of Los Angeles, for respondents.

SHENK, Justice.

Prohibition. From January 12 to 18, 1933, an action entitled "J. J. Schumacher v. E. M. Allison, Vitimin Milling Corporation, et al., No. 331685," was on trial with a jury in department 11 of the superior court in and for Los Angeles county. On January 18th, when both sides had rested, a motion for a directed verdict was made on behalf of the defendant Vitimin Milling Corporation, petitioner herein. The motion was granted. A similar motion was made on behalf of other defendants and denied. As to the petitioner, the following minute order was entered: "Motion of defendant, Vitimin Corporation, a corporation, for an instructed verdict is granted. * * *" The jury was instructed and retired for deliberation at 4:17 p. m. on January 18th. At 9:45 p. m. of the same day the jury returned to the court and reported inability to agree upon a verdict, whereupon, by stipulation, an order was entered in the minutes that, "it appearing to all concerned the jury is unable to reach a verdict, the jurors are discharged from the case and a mistrial is ordered." Thereafter, on January 20th, the judge of department 11 signed and filed an order "that the motion for a directed verdict, made by counsel in behalf of the defendant Vitimin Milling Corporation, be granted." The cause was set down for retrial as to all defendants in department 16, and came on regularly for trial in that department on May 3, 1933, before the respondent judge. During the trial then in progress, and on May 4th, the judge of department 11 signed and filed a purported judgment reciting the fact that an order had been made in said action granting a motion for a directed verdict as to the petitioner, and wherein it was "ordered, adjudged and decreed that the defendant, Vitimin Milling Corporation, do have judgment from plaintiff." Thereafter on the same day in department 16 counsel for the petitioner objected to the introduction of any further evidence as to the petitioner on the ground that the principles of res adjudicata barred any further proceeding in the matter. Whereupon counsel for the plaintiff moved the court to set aside said judgment of May 4th, on the ground that the same was void on the face of the record, in that it appeared of record that no verdict had been returned or entered in favor of the petitioner at the former trial or at all; that the trial as to the petitioner had not been completed, and that the order of January 18th, directing a mistrial, was general and applied to all the defendants. The objection to the further introduction of evidence as to the petitioner was overruled, and the motion to set aside the judgment of May 4th was granted. The further trial of the action was then continued to May 22d. Pending such further trial, and on May 10, 1933, the judge of department 11 signed and filed an order purporting to change and correct nunc pro tunc the minute order directing a mistrial in general terms to read: "The jurors are discharged from this

case and a mistrial is ordered as to all defendants except Vitimin Milling Corporation, a corporation." In advance of the further trial to be had on May 22d, the present proceeding was commenced, to wit: On May 17, 1933, to prohibit the court in department 16 from proceeding with the further trial of the action as to the petitioner. An alternative writ was issued and a general demurrer to the petition was interposed.

[1-5] There are at least two reasons why the petition should be denied. In the first place, it appears without dispute that, although a motion for a directed verdict as to the petitioner was made and noted by the minute order as "granted," no instruction to return a verdict was submitted to the jury; no request was made by the petitioner for an instruction to the jury to return a verdict; and no verdict was returned either by the jury, by the court, or at all, and there is no showing or intimation that the jury in this case would have refused to return a verdict for the petitioner, if it had been instructed so to do. That the court has the power to direct the jury to return a verdict in a proper case cannot be questioned. Nor is it disputed that the return of a verdict in such a case is a ministerial act. A verdict in any case must be in writing. Section 618, Code Civ. Proc. When the verdict is rendered, an entry thereof must be made in the minutes of the court. Section 628, Code Civ. Proc. As to these requirements there is no distinction between a verdict returned by the jury after deliberation and one returned by direction of the court. In each case the verdict serves as a basis for the entry of a judgment thereon. In the absence of a verdict entered as required by law, there is no finality to the proceedings. The order merely granting the motion for a directed verdict is not an appealable order. Section 963, Code Civ. Proc. And we know of no authority in law for the entry of a judgment which would, in the absence of a verdict, in any way constitute a judgment on a verdict. The purported judgment of May 4th was therefore void on the face of the record, and was properly set aside by the respondent judge. The necessity for this conclusion is apparent when it is appreciated that the regularity of a proceeding may, as it does here, depend on the form which it takes under the rules of practice. Rights which depend on the form then become matter of substance. Without the entry of a verdict, the aggrieved party, if the verdict be against him, would be deprived of his right to move for a judgment notwithstanding the verdict, as provided in section 629 of the Code of Civil Procedure. Here, without the entry of a judgment, at least regular in form after the rendition of a verdict, the plaintiff would have nothing from which he could then appeal. Since the judgment signed by the judge in department 11 on May 4th was void, it was no judgment at all, and the respondent judge on that day was confronted with the question whether the trial of the action as to the petitioner had been terminated. It either had or it had not. The respondent judge was justified in concluding that it had not. The former trial was not complete, and would not be complete until the jury had rendered a verdict. San Joaquin, etc., Irr. Co. v. Stevinson, 30 Cal. App. 405, 158 P. 768; 24 Cal. Jur. p. 718. As stated, no verdict had been entered in the case on trial before the respondent court. When the jury was discharged without the rendition of a verdict, the jury, in effect, was prevented from giving a verdict under appropriate instructions, and a new trial was in order under section 616 of the Code of Civil Procedure. A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury, court, or referee. Section 656, Code Civ. Proc. Since no verdict was rendered and no valid judgment entered, the judge in department 11, by the belated nunc pro tunc order of May 10th could not complete the trial which had not theretofore been completed, and the new trial in progress was properly on trial as to all the defendants and as to all issues.

[6] The second reason why the petition herein must be denied is that the respondent court has jurisdiction of the parties, including the petitioner, and of the subject-matter of the action. Pleas of res judicata and estoppel are defensive matter, and the respondent court has jurisdiction to determine the merits thereof when interposed properly by pleading or proof. United Security, etc., Co. v. Superior Court, 205 Cal. 167, 270 P. 184; Baird v. Superior Court, 204 Cal. 408, 268 P. 640; 21 Cal. Jur. p. 583. Any alleged error in ruling upon the plea would be reversible on appeal. This alone would be sufficient ground upon which to deny this petition, but since the other questions are in the case, they have been determined for the guidance of the trial court.

The peremptory writ is denied.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

1 Cal.(2d) 172

BANKERS' TRUST CO. v. PATTON et al.

L. A. 14049.

Supreme Court of California.

June 28, 1934.

1. Appeal and error ⇐1008(1).

Whether defendant administratrix in action to impress trust on proceeds of realty acted in good faith in failing to disclose to probate court that estate was insolvent and being administered in another state was primarily for trial court, whose judgment cannot be disturbed, in absence of showing that his conclusion that defendant did not know facts was not supported by substantial evidence or that she should have known them as matter of law.

2. Trusts ⇐372(3).

Evidence in mortgagee's action against administratrix to impress trust on proceeds of realty *held* to support court's conclusion that she had no actual knowledge or sufficient information to give notice of plaintiff's intention to take deficiency judgment and that her failure to inform probate court of estate's insolvency and pending administration thereof in another state was neither willful nor in bad faith.

3. Executors and administrators ⇐518(1).

Administratrix of estate in another state owed no absolute duty to divulge facts of its insolvency and such administration to probate court of state on applying thereto for letters of administration on realty in state, unless failure to do so amounted to active suppression of facts in bad faith or fraud on creditors (Probate Code, § 1040).

4. Trusts ⇐365(2).

Corporate mortgagee, not filing creditor's claim in probate court proceeding, of which it had actual knowledge, nor suing to impress trust on proceeds of mortgaged realty until over year after final distribution, nearly two years after issuance of letters of administration and after satisfaction of mortgage, *held* not entitled to equitable relief (Probate Code, § 1040).

In Bank.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by the Bankers' Trust Company against Frances West Patton and another. From a judgment for defendants and an order directing L. E. Lampton, County Clerk, and others to show cause why moneys represented by warrants drawn to defendants should not be restored, plaintiff appeals.

Affirmed.

Overton, Lyman & Plumb, of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, S. V. O. Prichard, Deputy Co. Counsel, Libby & Sherwin, Warren E. Libby, Roane Thorpe, and Louis Thomsen, all of Los Angeles, and L. C. Lampton, H. A. Payne, and H. L. Byram, for respondents.

SHENK, Justice.

This is an appeal from a judgment in favor of the defendants in an action to impress a trust upon certain real property or the proceeds thereof.

Pending trial in the action and pursuant to stipulation, the real property was sold and the net proceeds of the sale impounded with the clerk of the court subject to the judgment of the court. After judgment for the defendants was rendered and before notice of appeal was filed, the defendant Frances West Patton, through her counsel the defendant Louis Thomsen, withdrew the proceeds represented by two warrants, one drawn to the defendant Thomsen in the sum of $506 as attorney fees allowed by the court, and the other in the sum of $2,609.71, in favor of the defendant Frances West Patton. An order to show cause why the moneys should not be restored, directed against the county clerk, the county auditor, and the county treasurer, was discharged. The plaintiff also has appealed from that order and has joined said county officers as respondents in that appeal.

Chase West and the defendant Frances West Patton were the surviving children and the only heirs at law of Mary Chase West, who died on March 2, 1930, a resident of Des Moines, Polk county, Iowa. Frances West Patton and Chase West were appointed by the district court in Iowa as the administrators of the estate. While the estate in Iowa was in course of administration and on March 24, 1930, there was filed on behalf of the defendant Frances West Patton, in the county of Los Angeles, her petition for letters of administration for the purpose of administering on certain real and personal property here belonging to said estate. The defendant Frances West Patton did not disclose to the probate court in Los Angeles county that the estate of Mary Chase West was also in process of administration in Iowa, nor any of the other facts the failure to disclose which is claimed by the plaintiff to constitute a fraud by said defendant as against the plaintiff, who was a creditor of the estate in Iowa.

On November 14, 1930, the defendant Fran-

ces West Patton filed her first and final account in the probate proceedings in Los Angeles county and her petition for distribution to her as the assignee and sole distributee of the property in this state belonging to the decedent. Her account and report were settled and allowed and a decree of distribution in accord therewith was granted on December 1, 1930. That decree became final. The present action was filed on January 28, 1932. The plaintiff herein sought to have the defendants Frances West Patton and Louis Thomsen, who acted as her attorney in the administration proceedings in Los Angeles county, declared trustees and to have the proceeds from the sale of the property in this state, without deduction for administratrix' or attorney's fees, transmitted to the probate court in Iowa for administration in the proceedings pending therein. The complaint alleged facts which admittedly disclose that the estate in Iowa is insolvent and that the assets there are insufficient to pay all of the allowed claims of creditors. As grounds for the relief sought, the plaintiff charged that the defendant Frances West Patton intentionally and willfully concealed from the probate court in Los Angeles county the fact of the administration of the estate in Iowa and the fact of its insolvency, which the plaintiff contends constituted a fraud against it and other creditors in Iowa.

The trial court found that the defendant Frances West Patton did not willfully or intentionally conceal any facts in connection with either of said estates which she was by law required to disclose or state, but that she at all times acted in good faith; that she believed in good faith at the time of filing said account and at the time of distribution of the California estate and at all times involved that the assets of said Iowa estate were and would be sufficient to pay all Iowa claims including the claim of the plaintiff herein.

It may not be seriously questioned that the case alleged by the plaintiff is one which, if proved, would afford it the relief sought. It is assumed that the willful suppression in bad faith of material facts in probate proceedings by which the plaintiff and other creditors would be deprived of property and assets to which they would otherwise become entitled in satisfaction of their claims would constitute an extrinsic fraud against which equity could grant relief by discharging the distributees as trustees, even though the decree of distribution itself be not disturbed. In re Estate of Hudson, 63 Cal. 454, 457; Wickersham v. Comerford, 96 Cal. 433, 31 P. 358; Curtis v. Schell, 129 Cal. 208, 61 P. 951, 79 Am. St. Rep. 107. We indulge this assumption without discussion of what might have been done under section 1040 of the Probate Code if the facts herein had been disclosed to the court in Los Angeles county at the time distribution was ordered. A discussion of that question is unnecessary in view of the determination of other questions presented.

[1] The principal question for determination is whether certain findings of the trial court are supported by the evidence. These findings are that Frances West Patton did not know, on December 1, 1930, when the decree of distribution was made, or at the other times herein involved, that the assets of the estate in Iowa were or would be insufficient to satisfy the claims of creditors in Iowa, but that she believed in good faith at all of such times that the assets of the estate in Iowa were and would be sufficient to pay all Iowa claims including the claim of the plaintiff, and that she did not learn of the plaintiff's deficiency judgment until subsequent to December 1, 1930. Under the particular facts of this case the question whether the defendant Frances West Patton was acting in good faith was primarily for the trial court to determine; and if there is support in the evidence for its conclusion, i. e., unless it be shown that there is no substantial evidence to support the conclusion that she did not know, or unless it be shown as a matter of law that she should have known the facts, the judgment may not be disturbed.

[2] The Iowa estate of Mary Chase West consisted of real and personal property. The personal property was sold on March 28 and October 7, 1930, for a total sum of approximately $5,100. It was stipulated that in the course of administration in Iowa, claims against the estate totaling $13,691.85 were filed and allowed. Of this sum $9,333.07 represented deficiency judgments under mortgage foreclosures. The balance of $4,358.78 represented general claims against the estate. The plaintiff held a mortgage in the sum of $10,000 on a piece of property belonging to the estate the value of which, at the time of taking the mortgage, it had appraised at the sum of $27,000. A mortgage for $35,000 held by Penn Life Insurance Company on a portion of the real property was foreclosed on September 10, 1930, and a sale under foreclosure held on November 1, 1930, and no deficiency judgment taken. The mortgage held by the plaintiff was foreclosed by decree on October 8, 1930, and at foreclosure sale held on November 15, 1930, one day after the final account in the California pro-

ceedings was filed, the plaintiff bid in the property covered by the mortgage at $5,000 and took a deficiency judgment in the sum of $5,833.07. The balance of $3,500 of the claims represented by deficiency judgments is the amount of a deficiency judgment taken against the estate resulting from a foreclosure sale, held on January 17, 1931, of property which the decedent prior to her death had conveyed to her son subject to a $15,000 mortgage, and which was sold under foreclosure for the sum of $12,500.

The defendant Frances West Patton arrived in Iowa in January, 1930, and remained there until October of the same year, when she came to California and has not since returned to Iowa. Notice to creditors in the California proceeding was duly published. Frances West Patton has not been charged with, and she is not chargeable with, any act to prevent the plaintiff's acquiring knowledge of the California proceedings, nor any act calculated to mislead the plaintiff or to prevent it or the other creditors acting in accordance with their best interests in respect thereto. On the contrary, it appears that the plaintiff had actual knowledge of the administration in California but filed no claim in the probate proceedings here. It further appears that at the time petition for letters of administration was filed in this state, there existed a $7,500 mortgage against the real property to be administered which was owned by six members of the Chase family, including Chase West and the defendant Frances West Patton, through administration of the estate of Charles Chase in Iowa. The defendant Frances West Patton was able to settle the claims of all owners of the mortgage and discharge the lien on the real property for the total sum of $1,064.

The record supports the trial court's conclusion that neither of the coadministrators of the Iowa estate had actual knowledge, or sufficient information which as a matter of law might be said to give them notice, of the plaintiff's intention to take a deficiency judgment under its mortgage. In some respects the evidence is conflicting, but it cannot be said that the findings of the trial court that the failure to inform the probate court here was neither willful nor in bad faith are without support in the evidence.

[3] The cases relied upon by the plaintiff do not compel a different conclusion. In those cases, such as Wickersham v. Comerford, supra; Curtis v. Schell, supra; Sohler v. Sohler, 135 Cal. 323, 67 P. 282, 87 Am. St. Rep. 98; Simonton v. Los Angeles T. & S. Bank, 192 Cal. 651, 221 P. 368, acts clearly amounting to a willful suppression of a material fact were involved. The plaintiff contends that the defendant Patton must have intended to do what she actually did, viz., fail to divulge the facts to the court in California, and that this state of her mind was sufficient to constitute a willful suppression under the cases relied upon. There was, however, no absolute duty on her part under the provisions of section 1040 of the Probate Code to present the facts involved unless the failure to do so amounted to active suppression in bad faith, or other circumstances were present which would constitute such act or omission a fraud upon the plaintiff. Bad faith, therefore, was a necessary additional element under the facts of the case which must be shown before the defendant may be found guilty of any fraudulent act or omission as to the plaintiff so as to charge her as a trustee. As stated, there is support in the evidence for the trial court's conclusion on this phase of the case.

[4] Furthermore, pursuant to said section 1040 of the Probate Code the plaintiff itself, had it so chosen, could have applied to have the court exercise the discretion vested in it. The plaintiff had actual knowledge of the condition of the probate proceedings in California from their inception and could have filed a creditor's claim in the proceedings here. It did nothing until more than a year after final distribution and nearly two years after letters issued in this state, and after the mortgage on the real property in this state had been satisfied. On any view of the case, therefore, no compelling reason is presented which would justify us in disturbing a judgment that the plaintiff is not entitled to any equitable relief as against the defendant Frances West Patton.

This conclusion renders it unnecessary to consider the findings respecting the good faith of the defendant Louis Thomsen, as attorney for his codefendant in the matter of the probate proceedings in this state. The record shows that his knowledge was no different from hers and no contention is made that he may be held to have acted in bad faith so as to be liable to the plaintiff, if the finding as to the good faith of his client be upheld. Inasmuch as the judgment must be affirmed, the same result would follow the order discharging the order to show cause.

Judgment and order affirmed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

1 Cal.(2d) 138

BOWDEN v. KERR, Registrar of Voters (BOWRING, Intervener).

L. A. 14813.

Supreme Court of California.

June 25, 1934.

Rehearing Denied July 19, 1934.

Time ⇐10(1).

Where first day on which nomination papers could be circulated and signed fell on holiday, so that declaration of candidacy necessary for appointment of verification deputies to obtain signatures could not then be filed, candidates for judges of superior court of Los Angeles county might file required declarations of intention to become candidates not later than five days before following day (St. 1927, p. 529, § 2; St. 1933, p. 358, § 5).

In Bank.

Petition for writ of mandate by Leslie S. Bowden against W. M. Kerr, as Registrar of Voters of the County of Los Angeles, in which Lynden Bowring intervenes.

Petition denied.

W. L. Pollard, S. L. Kurland, and Leslie S. Bowden, in pro. per., all of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and Fred M. Cross, Deputy Co. Counsel, both of Los Angeles, for respondent.

CURTIS, Justice.

Petition for writ of mandate against the registrar of voters of the county of Los Angeles, directing said officer to strike from the files of his office the names of twenty-seven persons, each of whom has filed in the office of said registrar his or her declaration of intention to become a candidate for the office of superior judge in and for said county, and to restrain said registrar from placing the names of said persons on the official primary ballot as candidates for the office of superior judge at the coming August primary election to be held in said county. Each of said declarations of intention was filed in the office of said registrar on the 26th day of May, 1934. It is the contention of the petitioner that the last day on which such declarations could by law be filed was the 25th day of May, 1934, and that as said declarations of intention were filed one day too late, it is the duty of said registrar to strike the same from the files of his office.

In the county of Los Angeles two or more judges of the superior court are to be elected for the same term during the year 1934. By section 2 of chapter 316, pp. 528, 529, Statutes of 1927, p. 529 (Deering's Gen. Laws, 1931, Act 2274), it is provided that: "Each candidate for judicial office for which two or more judges or justices are to be elected for the same term at the same election as herein provided, not more than ten days nor less than five days prior to the first day on which his nomination papers may be circulated and signed, shall file in the office in which his nomination papers are required to be filed, a written and signed declaration of his intention to become a candidate for such office and shall state in such declaration for which of the said number-designated offices of courts of record he intends to become a candidate."

By an examination of the primary law as now in force, we find that there is no express provision thereof fixing the first day on which the nomination papers of a candidate for a judicial office may be circulated and signed. However, section 5 of the General Primary Law (Stats. 1913, p. 1379), as amended in 1933 (Stats. 1933, p. 358; Deering's Gen. Laws 1931, Act 2256, Supp. 1933) provides for the filing by a candidate for public office of his declaration of candidacy and for the appointment by him of verification deputies to obtain signatures of sponsors to his nomination papers. The plain reading of this section of the primary law indicates that these verification deputies are to be appointed during the period within which the candidate may file his declaration of candidacy, but not before that period. If verification deputies are appointed on the first day the candidate can file his declaration of candidacy, it would be possible for a candidate to have his nomination papers circulated and signed on that day. Said section provides that said declaration of candidacy must be filed at least sixty days and not more than ninety days prior to the August primary election. It follows, therefore, from these provisions of this section of the primary law that the first day on which the nomination papers of a candidate for office to be voted for at the August primary election may be circulated and signed would be ninety days before the date of said primary election. The primary election this year falls on the 28th day of August, and ninety days prior thereto would be May 30, 1934, as the first day on which the nomination papers of a candidate may be circulated and signed.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

As we have seen by section 2 of the primary law (Stats. 1927, p. 529), a candidate for the office of superior judge of the county of Los Angeles must file his notice of intention to become a candidate for such office at least five days prior to the first day on which his nomination papers may be circulated and signed, and as the first day on which his nomination papers may be circulated is the 30th day of May, five days prior to that day would be May 25th as the last day on which said declaration of intention to become a candidate may be filed. As the candidates here involved did not file their declaration of intention until May 26, their filing thereof was one day too late unless the fact that May 30, 1934, the earliest date on which the nomination papers of such candidates might be circulated and signed, fell upon a holiday compels a different result. While it is true, we think that a nomination paper can be circulated and signed on a holiday, it cannot be circulated until after the appointment of a verification deputy, and a verification deputy cannot be appointed until the candidate can file his declaration of candidacy. This declaration of candidacy must be filed in the office of the registrar of the county of Los Angeles, which office is not open for the transaction of business on a holiday. These candidates, therefore, could not file on May 30th. If they filed on May 29th, their filing would be premature, as the 29th would be ninety-one days before election. The earliest day, therefore, on which they could legally file would be May 31st, which would be the eighty-ninth day before said primary election, and as the statute requires the declaration of candidacy to be filed at least sixty and not more than ninety days prior to said day of election, they would be within the strict letter of the statute. As May 31st was the earliest day on which these candidates could file their declaration of candidacy and appoint their verification deputies, that date was the first day on which their nomination papers could be circulated and signed, and five days prior thereto would be May 26th, as the last day on which they could file their declaration of intention to become candidates. As the declarations herein involved were filed within that time, it follows that they were timely filed and that the petition should be denied.

It is so ordered.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; LANGDON, J.; TYLER, Justice pro tem.

HINDMAN v. OWL DRUG CO. et al. (CORK et al., Interveners).*

L. A. 14375.

Supreme Court of California.

June 26, 1934.

Rehearing Granted July 26, 1934.

1. Bankruptcy ⇐270.

Proceeding involving attack on bankruptcy trustee's sale of bankrupt corporation's assets pursuant to order of bankruptcy court *held* collateral attack, and could not be considered unless asserted invalidity or want of jurisdiction was apparent on examination of record.

2. Bankruptcy ⇐270.

On collateral attack on bankruptcy trustee's sale, all presumptions will be indulged in favor of validity of proceedings.

3. Bankruptcy ⇐270.

Where adjudication in bankruptcy and subsequent proceedings, including trustee's sale of bankrupt's assets, appeared to be correct in form, and regularity of proceedings was not challenged, they could be impeached only by direct proceeding in competent court.

4. Bankruptcy ⇐100(1).

Reasons or motives actuating filing of bankruptcy petition are immaterial and do not affect adjudication, if competent evidence shows bankrupt was insolvent, and such reasons or motives cannot be considered on collateral attack.

5. Bankruptcy ⇐263.

Any intimate connection between purchaser of bankrupt corporation's assets at trustee's sale and bankrupt corporation would not affect validity of sale.

6. Bankruptcy ⇐268.

Bankruptcy trustee's sale of bankrupt's assets, including choses in action, transferred to purchaser further right to prosecute action brought by bankrupt's stockholder in representative capacity to recover damages allegedly sustained by bankrupt because of defendants' alleged wrongful acts.

7. Appeal and error ⇐790(3).

Where judgment of trial court has become final, appeal from order denying intervention in such cause will be dismissed, since reversal of order would be unavailing.

8. Appeal and error ⇐790(3).

Where judgment for corporation approving settlement in stockholder's representative action for alleged wrongful acts against corporation was fully satisfied and had become final, appeal from order denying right of

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 50 P.2d 438.

intervention by other stockholders to carry on litigation was dismissed.

In Bank.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by W. W. Hindman against the Owl Drug Company and others, in which J. C. Cork and others intervened. From an order striking from the files the complaint in intervention, the interveners appeal. On motion to dismiss the appeal.

Motion granted.

John C. Mead, of Los Angeles, and Keyes & Erskine, of San Francisco, for appellants.

Christopher M. Bradley, of San Francisco, and Will J. Thayer and E. Eugene Davis, both of Los Angeles, for plaintiff respondent.

Gibson, Dunn & Crutcher, of Los Angeles, Chickering & Gregory, of San Francisco, and Norman S. Sterry, of Los Angeles, for defendants respondents Owl Drug Co. and others.

Penaat & Penaat, Joseph E. Bien, Werner Olds, William M. Maxfield, Bertram Ross, and James P. Sweeney, all of San Francisco, amici curiæ for appellants (Owl Drug Co.'s preferred stockholders' protective committee and stockholders represented by it).

WASTE, Chief Justice.

Plaintiff, a stockholder in the Owl Drug Company, instituted this action in a representative capacity to recover damages alleged to have been sustained by the drug company because of alleged wrongful acts of the other defendants. An agreement was reached for the exchange of stock in another corporation for the outstanding preferred stock of the Owl Drug Company and the cancellation of an indebtedness of the drug company to the United Drug Company of $500,000, in full settlement of the alleged wrongful acts. The agreement of settlement was reported to and confirmed by the court, and judgment was entered according to its terms. The judgment was satisfied and has become final. During the progress of the litigation, other stockholders of the Owl Drug Company obtained an ex parte order from the court permitting them to file a complaint in intervention, in which it was alleged that the settlement agreement was unfair to the drug company. The court granted them the right to intervene and be heard in the proceeding then occupying its attention, that relating to the fairness of the settlement agreement, but refused them the right to intervene in the cause at large until it had passed upon the proposed settlement. The interveners refused the offer, and declined to join in the inquiry relating to the settlement agreement. The trial court thereupon struck the complaint from the files, and the would-be interveners appeal from the order "dismissing their complaint in intervention from the files * * * and denying the right to intervene in said action."

Certain of the respondents now move to dismiss the appeal of appellants J. C. Cork and Orrery, Anais Hale, and Ira Abraham, upon the ground that the interveners no longer have any right to prosecute the action for and on behalf of the Owl Drug Company. This contention, which presents the only question raised by the appeal, rests upon two grounds: (1) That since the appeal was taken, the Owl Drug Company was duly adjudged a bankrupt, and under and pursuant to an order of the bankruptcy court all its assets, including all choses in action belonging to it, were sold by the trustee in bankruptcy, and therefore the interveners no longer have any right to prosecute the action on behalf of the drug company. (2) That the judgment, made and entered in the lower court, from which no appeal was taken, was fully satisfied and has become final, and constitutes a bar to further prosecution of the action, even if the right to maintain the same had not been sold at the bankruptcy sale.

The exhibits supporting the motion conclusively establish the facts. In neither affidavits nor in their briefs do appellants challenge the basic facts upon which the grounds of the motion rest. While conceding the bankruptcy and sale of the assets of the Owl Drug Company, they seek to attack such proceedings in this action and on the appeal on the ground alleged that the bankruptcy was fraudulent because it was adjudicated upon the voluntary petition of the Owl Drug Company, and that the motive of the company in filing the petition was to destroy any right of the appellants to proceed with this appeal, that therefore the sale of the assets of the bankrupt, though confirmed by the court, is voidable and open to attack, and that the question of their right to intervene is not moot, and that, if it should be here determined that the superior court erred in striking out their complaint in intervention, they may yet attack the adjudication in bankruptcy and the sale of the assets as void.

[1-3] We cannot agree with appellants' argument. Concerning the nature of the attack

appellants seek to make on the bankruptcy proceedings through the continuance of the appeal, this court recently held an assault of that kind to be collateral in character and not to be considered unless the asserted invalidity or want of jurisdiction is apparent upon an examination of the record in the insolvency proceeding. "Moreover," says the opinion, "upon collateral attack, all presumptions will be indulged in favor of the validity of the bankruptcy proceeding, and any condition of facts consistent with its validity will be presumed to have existed rather than one which will defeat it." Miller v. McKenzie, 217 Cal. 389, 392, 19 P.(2d) 1, 2. The United States District Court in Nevada had jurisdiction of the voluntary petition in bankruptcy filed by the Owl Drug Company. The adjudication and the subsequent proceedings appear to be correct in form. We do not understand that appellants challenge the regularity of the proceedings. They can therefore be impeached only by a direct proceeding in a competent court. Chapman v. Brewer, 114 U. S. 158, 169, 5 S. Ct. 799, 29 L. Ed. 83; Miller v. McKenzie, supra; Larkin-Green Logging Co. v. Sabin (C. C. A. 9) 222 F. 814.

[4] It is equally well settled that the reasons or motives which may actuate the filing of a petition in bankruptcy are immaterial, do not affect the adjudication, if it be proved by competent evidence that the bankrupt is insolvent, and cannot be considered upon a collateral attack. In re Automatic Typewriter & Service Co. (C. C. A.) 271 F. 1, 4; State of Alabama v. Montevallo Mining Co. (D. C.) 278 F. 989, 990.

[5] It is urged by the appellants that the sale of the assets of the Owl Drug Company was made by the trustee in bankruptcy to the Union Holding Company, alleged to be a subsidiary corporation of the United Drug Company, one of the defendants below and one of the moving parties here. Assuming there was, or is, some intimate connection between the Owl Drug Company and the purchaser at the trustee's sale, we fail to appreciate what bearing such fact can have on appellants' situation. In re Witherbee (C. C. A.) 202 F. 896, 900. The sale, open to the whole world, was made by the trustee and confirmed by the bankruptcy court. Any one could have purchased who was willing to bid more for the assets of the drug company than was bid by the Union Holding Company. A trustee's sale is not invalid even though the bankrupt becomes the purchaser. In re National Mining Exploration Co. (D. C.) 193 F. 232, 237.

[6-8] We are of the view that the bankruptcy of the Owl Drug Company and the sale by the trustee of all the bankrupt's assets, including choses in action, transferred the right to further prosecute this action to the purchaser at the sale, the Union Holding Company, and divested the appellants, or any other person, from carrying on the litigation on behalf of the Owl Drug Company. Hindman, the plaintiff, in prosecuting the action, acted only in a representative capacity. Whitten v. Dabney, 171 Cal. 621, 630, 154 P. 312. The action was to recover for the corporation, of which he was a stockholder, damages for the alleged wrongful acts of others. Appellants contend that they should be permitted to intervene, to join with plaintiff, Hindman, in order to carry on this representative action on behalf of the drug company. But, if it were possible (which it is not) for this court to reverse the order denying appellants the right to intervene at large in the action and striking the complaint in intervention from the files, appellants could not carry on in a representative action brought solely for the benefit of the Owl Drug Company. Neither the drug company nor the appellants can carry the litigation any further. The judgment in the company's favor has been fully satisfied and has become final. Where the judgment in a cause, rendered in the trial court, has become final, an appeal from an order denying intervention in such cause will be dismissed, as a reversal of such order would be of no avail. The appeal presents only a moot case. Mitchell v. Madden, 130 Cal. xviii, 62 P. 483.

We deem further discussion of the arguments advanced unnecessary. Appellants' rights, if any they had, to prosecute the litigation for, or on behalf of, the Owl Drug Company, have ceased. The question presented by the appeal has become moot.

The motion to dismiss the appeal is therefore granted.

We concur: SHENK, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

1 Cal.(2d) 142

HINDMAN v. OWL DRUG CO. et al. (CORK et al., Interveners).

L. A. 14545.

Supreme Court of California.

June 26, 1934.

Appeal and error ⇐780(2).

Questions involved in appeal of intervener who no longer had interest in subject-matter of litigation became moot, and appeal was dismissed.

In Bank.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by W. W. Hindman against the Owl Drug Company and others, in which J. C. Cork, Florence Brown, and others intervened. From an adverse decision, intervener Florence Brown appeals. On motion to dismiss appeal.

Appeal dismissed.

Keyes & Erskine, of San Francisco, and John C. Mead, of Los Angeles, for appellant.

Christopher M. Bradley, of San Francisco, and E. Eugene Davis, of Los Angeles, for plaintiff respondent.

Chickering & Gregory, of San Francisco, Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles, for defendants respondents.

PER CURIAM.

Respondents move to dismiss the appeal of the intervener Florence Brown upon the grounds, first, that she no longer has any interest in the subject-matter of the litigation, and, as to her, the questions involved in the appeal have become moot, and on the further (second) ground that she has failed to perfect the appeal within the time required by law.

Both grounds of the motion are good. The first has been considered and held to be a sufficient reason for dismissing the appeal in the opinion and decision this day rendered in Hindman v. Owl Drug Company (Cal. Sup.) 33 P.(2d) 1023.

It appears from the certificate of the clerk of the court in which the action was prosecuted that notice of appeal to the Supreme Court of the intervener Florence Brown was filed November 7, 1932. As to her, no further proceedings appear of record in the action.

The appeal is dismissed.

1 Cal.(2d)245

DIETHELM v. RAINEY, Superintendent of Banks, etc.

S. F. 15098.

Supreme Court of California.

July 5, 1934.

1. Banks and banking ⇐80(5).

Statute providing that capital and assets of bank are security to depositors and stockholders, depositors having priority of security over stockholders, did not create preference in favor of nonstockholding depositors over stockholding depositors (Gen. Laws 1931, Act 652, § 21).

2. Banks and banking ⇐80(5).

Bank Superintendent liquidating insolvent bank could withhold from stockholder's deposits only so much as represented stockholder's liability on his share, and stockholder was entitled to participate ratably with nonstockholding depositors as to remainder (Gen. Laws 1931, Act 652, § 21).

In Bank.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by Ulrich Diethelm against Edward Rainey, as Superintendent of Banks of the State of California, and as trustee in charge of the liquidation of the Bank of Oakley. Judgment for plaintiff, and defendant appeals.

Affirmed.

For prior opinion, see 27 P.(2d) 917.

Sullivan, Roche, Johnson & Barry, Elbert W. Davis, and J. H. Hoffman, all of San Francisco, for appellant.

W. F. Williamson and Williamson & Wallace, all of San Francisco, for respondent.

Pillsbury, Madison & Sutro, Alfred Sutro, Eugene M. Prince, and A. B. Tanner, all of San Francisco, amici curiæ.

WASTE, Chief Justice.

The Bank of Oakley, with a capital stock of 250 shares of the par value of $100 per share, was organized on August 20, 1920. Plaintiff, at an undisclosed date, became the owner and holder of one share of its stock. In 1925 he opened a savings account with said bank and made deposits therein. On December 19, 1930, the bank became insolvent, whereupon the Superintendent of Banks in the manner provided by law assumed possession of the

bank and undertook to administer its affairs as an insolvent bank. In due time plaintiff filed a claim for his deposits which, at the time of the bank's insolvency, aggregated $3,718.77. The Superintendent of Banks rejected the claim and this suit followed. Trial was had on an agreed statement of facts. From a judgment entered in favor of the plaintiff the Superintendent of Banks has prosecuted this appeal.

The disposition of the cause turns on the construction to be placed on section 21 of the Bank Act as it read in 1930 (1 Deering's Gen. Laws [1931], p. 237), the pertinent portion of which is as follows: "The capital and assets of such bank are a security to depositors and stockholders, depositors having the priority of security over stockholders."

It is the appellant's contention, in substance, that respondent, being a stockholder as well as a depositor, is precluded from participating ratably with other depositors and loses all rights as a depositor until the deposits of those creditors, who are not stockholders, are paid in full. In other words, the appellant urges that the section creates a preference in favor of nonstockholding depositors as against stockholding depositors.

Literally construed, the section as above quoted fails, in our opinion, to create the preference contended for by the appellant. Standing alone, uninfluenced by other considerations, the section draws no distinction between depositors. It broadly creates a preference in favor of *all* depositors, stockholding or nonstockholding.

Appellant is inclined to agree with this literal interpretation of the section for in his opening brief he states that: "Upon first impression, and without considering the history of section 21, or authorities relating thereto, one would be inclined to doubt that the priority given to depositors by said section was intended to inure only to the benefit of those depositors who are not stockholders. Indeed, one would be disinclined to place that construction upon section 21, unless compelled to do so, because of its effect upon the depositor who has a substantial deposit in the bank, who holds only a nominal stock interest therein and who takes no active part in its management."

With this literal construction of the section in mind, we turn now to a consideration of its legislative history to ascertain whether a different conclusion is suggested. Appellant contends that the history of the section, and the authorities construing similar statutes superseded by it, definitely indicate the legislative intention to have been to defer the claims of stockholding depositors to those of nonstockholding depositors. He refers us first to section 10 of the act of 1862 (Stats. 1862, p. 201) and to the cases of Murphy v. Pacific Bank, 119 Cal. 334, 51 P. 217; Id., 130 Cal. 542, 62 P. 1059; and to Laidlaw v. Pacific Bank, 137 Cal. 392, 70 P. 277, applying the same. The act of 1862 provided in part that "the capital stock and the assets of the corporation shall be a security to *depositors who are not stockholders*, and the by-laws may provide that the same security shall extend to deposits made by stockholders." This differs materially from the section here involved. The italicized language expressly limited the preference granted in the act of 1862 to "depositors who are *not* stockholders," unless changed by the by-laws.

With the adoption of the codes in 1872, section 573 of the Civil Code came into being. This court had occasion to refer to the section in People v. California Safe Deposit & Trust Co., 160 Cal. 374, 117 P. 321. That section reads, in part, that "the capital stock and the assets of the corporation are a security to depositors and stockholders, depositors having the priority of security over the stockholders, but the by-laws may provide that the same security shall extend to deposits made by stockholders." Here, again, the Legislature, by the concluding proviso, definitely evidenced its intention to limit the preference, unless changed by the by-laws, to nonstockholding depositors.

We come now to section 21 of the Bank Act, adopted in 1909 (St. 1909, p. 92), which section is now before us for construction. This section superseded section 573, supra, as to banking corporations thereafter organized. As originally enacted, section 21 of the Bank Act was identical with the former section 573, providing, in part, that "the capital and the assets of the bank are a security to depositors and stockholders, depositors having the priority of security over the stockholders, but the by-laws may provide that the same security shall extend to deposits made by stockholders." Thus, again, the Legislature by the language employed definitely evidenced an intention to prefer nonstockholding depositors over stockholding depositors, unless changed by the by-laws. The section remained unchanged from 1909 to 1913, at which time (St. 1913, p. 147) the Legislature deleted the concluding proviso to the effect that "the by-laws may provide that the same security shall extend to deposits made by stockholders." As so amended, and until subsequent to the insolvency of the Bank of

Oakley, the section provided, as first set out above, that "the capital and assets of any such bank are a security to depositors and stockholders, depositors having the priority of security over stockholders."

[1, 2] We have already indicated that a literal construction of the section in this form fails to evidence a legislative intention to prefer nonstockholding depositors over stockholding depositors. Appellant, while so conceding, urges that the Legislature by deleting the language providing for an equality between depositors by by-law provision intended to preclude such equality and to create a preference in favor of nonstockholding depositors. The point is arguable and the contention cannot be said to be without a semblance of merit. However, we are not inclined to accept the appellant's reasoning. Inasmuch as a literal construction of the section as so amended fails to disclose the preference contended for by the appellant, and inasmuch as the deleted proviso theretofore was the only language in the section indicative of a distinction between stockholders, we are inclined to accept its elimination from the section as evidence of a legislative intention to place all depositors of an insolvent bank on an equal basis in the matter of participating ratably in dividends.

This conclusion not only avoids a harsh result, but is in accord with a recent amendment of the section (St. 1933, p. 1178) which now provides that stockholding depositors may enjoy the same priority as other depositors. The section as amended in 1933 reads: "The capital and assets of any such bank are a security to depositors and stockholders, depositors having the priority of security over stockholders; provided, however, that any stockholder who is also a depositor and who has paid all assessments, debts or other obligations due from him to the bank, shall enjoy the same priority as other depositors."

Appellant points to the 1933 amendment as the first and only *express* legislative declaration of equality between stockholding and nonstockholding depositors of an insolvent bank and argues that prior to this amendment of the section the Legislature could not therefore have intended such equality. This reasoning, too, must be conceded to have some merit, but, again, we are inclined to adopt that reasoning which tends to support the literal construction of the section as it read in 1930 when the Bank of Oakley went into liquidation. In other words, we are inclined to accept the 1933 amendment as some evidence that the Legislature by expressly providing for an equality on specified conditions, between all depositors was merely attempting to clarify its intention in theretofore deleting from the section the proviso that previously gave rise to a distinction between stockholders, thus removing any ambiguity in the section as previously amended. One interpretation of this most recent amendment of the section is as reasonable as the other, and we are therefore inclined to accept that which is in accord with the literal construction of the section as it read when the Bank of Oakley became insolvent in 1930 and which, in addition, precludes the harsh result which would follow were we to adopt appellant's theory.

The conclusion we have reached makes it unnecessary for us to here determine whether such a distinction as appellant contends for between stockholding and nonstockholding depositors of an insolvent bank would run counter, as respondent urges, to the case of Wood v. Hamaguchi, 207 Cal. 79, 277 P. 113, 63 A. L. R. 861, and to section 3 of article 12 of the state Constitution, as creating a personal liability against stockholders, who are also depositors of a bank in liquidation, in excess of and in addition to that created and authorized by the constitutional provision. In view of our conclusion, any expression of opinion on this point would be dictum. We therefore leave the question open.

The judgment is affirmed.

We concur: LANGDON, J.; PRESTON, J.; SHENK, J.; THOMPSON, J.

139 Cal.App. 331

CITY OF LOS ANGELES v. HARPER et al.

Civ. 8935.

District Court of Appeal, Second District, Division 1, California.

June 19, 1934.

1. Eminent domain ⇐69.

Owner of property condemned, unless he suffered actual loss, should receive no compensation (Code Civ. Proc. § 1248, subd. 6; Const. art. 1, § 14).

2. Eminent domain ⇐122.

Owner of property condemned should be made whole and recompensed in amount equal to actual loss suffered (Code Civ. Proc. § 1248, subd. 6; Const. art. 1, § 14).

3. Eminent domain ⇐69.

Where city condemned property for widening of alley in which spur track was located, and railroad relocated private switch at its own expense, property owner, having sustained no other pecuniary damage, *held* not entitled to compensation (Code Civ. Proc. § 1248, subd. 6; Const. art. 1, § 14).

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Condemnation proceeding by the City of Los Angeles against Robert B. Harper and others. From the judgment rendered, the defendant the Commercial Iron Works of Los Angeles appeals.

Affirmed.

Janeway, Beach & Hankey and G. Harold Janeway, all of Los Angeles, for appellant.

Erwin P. Werner, City Atty., Frederick von Schrader, Asst. City Atty., and Edward S. Shattuck, Deputy City Atty., all of Los Angeles, for respondent.

HOUSER, Justice.

From the record herein it appears that up to a certain time the Union Pacific Railroad Company had been operating its freight cars over a spur track which it had constructed in an alley that was 15 feet wide, and that, because of the narrowness of such alley, by an order issued by the State Railroad Commission, the railroad company was forbidden to continue the operation of its cars over and upon such spur track, unless and until the said alley was widened to a width of seventeen feet; that, because of such order, a condemnation proceeding was commenced by the plaintiff against several different defendants, including the defendant Commercial Iron Works of Los Angeles, who were the owners of respective properties that abutted upon said alley, and in said action the referees appointed made and returned their report to the trial court, to which report the said defendant duly excepted as to the failure of the referees to award to it any damages alleged to have resulted to said defendant, caused by the cost of relocating a "private switch" that was owned by said defendant and which connected its property with the spur track of the Union Pacific Railroad Company. On the trial of the issue before the superior court, the evidence disclosed the fact that, at an appropriate time that had preceded the institution of the condemnation proceedings in question, the said defendant had duly protested the proposed widening of the alley in which the spur track was located, but that subsequently thereto, following an understanding had between the defendant and the Union Pacific Railroad Company to the effect that the latter, at its own expense, would relocate the "private switch" of the defendant, the said protest of the defendant was withdrawn. It thus was made to appear that the defendant suffered no pecuniary damage on account of the expense incident to the relocation of defendant's "private switch." On such foundational facts judgment was rendered by the trial court in accord with the said report of the referees; and it is from such judgment that the appeal herein is prosecuted.

It is the contention of the appellant that, relying for authority therefor upon the provision of subdivision 6 of section 1248 of the Code of Civil Procedure, notwithstanding the fact that the relocation of its "private switch" was accomplished without cost to it, nevertheless, since the expense of such relocation of the "private switch" was borne by the railroad company in consideration of the withdrawal by the defendant of its protest to the widening of the alley, the defendant is entitled to have awarded to it the amount of money that was expended by the railroad company in that behalf.

[1-3] Although in effect by the terms of the statute to which appellant has directed attention, where, in a condemnation proceeding it appears that "the removal or relocation of structures or improvements is sought, the cost of such removal or relocation" is a proper item of damage, nevertheless this court is of the opinion that such a result may be proper only where it also appears that the cost of such removal or relocation was borne by the

owner of the affected property. Section 14 of article 1 of the Constitution, which is the basic law upon which compensation to the owner of property taken in condemnation proceedings depends, provides that for a public use private property shall not be taken or condemned without "just compensation" having been made to the owner thereof. But it is obvious that, unless by the condemnation of property the owner thereof has suffered an actual loss in some specified particular, he should receive no compensation on that account by reason of such condemnation. In other words, in the administration of ordinary justice, he should not be paid for a loss which he has not sustained. The fact that some one else may have borne the burden, together with any expense incident to making good to the owner that which otherwise would have resulted in a loss to him, affords no reason why the owner should be paid the amount laid out by another. The clear intention of the constitutional provision is that the owner of property taken under the power of eminent domain shall be made whole for his loss and shall be recompensed in an amount of money equal to the actual loss which he has suffered by reason of such condemnation. It does not contemplate that such an owner may make a profit over and above the detriment, expressed in dollars and cents, that he has sustained.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.



139 Cal.App. 303

PETERSEN et al. v. LYDERS.

Civ. 9094.

District Court of Appeal, First District, Division 1, California.

June 15, 1934.

Rehearing Denied July 14, 1934.

Hearing Denied by Supreme Court Aug. 13, 1934.

1. Ambassadors and consuls ⇐5.

In action for money had and received against attorney appointed by Danish consul to represent foreign heirs in collecting moneys due from estates, where consul was acting under power of attorney, attorney *held* not entitled to assert nonliability by virtue of the sovereign character of the consul, since consul was not acting in his sovereign capacity under treaty (Danish Treaty Aug. 10, 1826, 8 Stat. U. S. 340).

2. Principal and agent ⇐54.

Privity of contract between principal and subagent is unnecessary to authorize principal to proceed against his subagent as a beneficiary in fact of the contract of agency between the agent and subagent.

3. Set-off and counterclaim ⇐41.

In action by foreign heirs for money received against attorney, appointed by consular representative, to represent them, attorney could not set off claims against consul for other services, since there was no mutuality.

4. Set-off and counterclaim ⇐46(1).

Set-off may not be invoked unless the parties and the debts are mutual, which requires that the debts be due to and from the same persons in the same capacity.

5. Interest ⇐13.

In action by heirs for money had and received and to collect moneys due from estates, allowance of interest *held* proper.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action for money received by Inger Marie Petersen and others against Eric Lyders. From a judgment for plaintiffs, the defendant appeals.

Affirmed, with directions to modify judgment.

See, also, 25 P.(2d) 993.

Sawyer & Cluff, James F. Brennan, and John J. McMahon, all of San Francisco, for appellant.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, for respondents.

JOHNSTON, Justice pro tem.

This is an appeal from a judgment for plaintiffs, entered pursuant to a motion for a directed verdict. Plaintiffs sued the defendant on a common count for money had and received. Defendant was the attorney appointed by the Danish consul to represent plaintiffs in collecting certain moneys due from estates. Plaintiffs had executed a power of attorney to the Danish home office in Denmark, which was forwarded to the Danish consul in San Francisco, who in turn appointed defendant and gave him the power of attorney. Defendant admitted this procedure

and that at all times he knew that he was representing plaintiffs. Defendant attempted to set off in this action certain claims alleged to be due him from the Danish government; also from other foreign heirs for collecting moneys for them from other estates. He also contends that, by virtue of the sovereign character of his employer, the Danish consul, he is not amenable to plaintiffs in such a proceeding. He also bases his contention upon the grounds that they, as principals, have no right to proceed against him as a subagent.

[1] The recent case of In re Estate of Clausen, 202 Cal. 267, 259 P. 1094, decides that the consul of Denmark, in representing foreign heirs, does not do so in his sovereign capacity under and by virtue of the treaty between the United States and Denmark establishing consular offices and defining their duties. Danish Treaty, August 10, 1826, 8 Stat. U. S. 340. The Danish consul, therefore, in acting for foreign heirs, does so under a power of attorney and not in his official capacity. In re Estate of Servas, 169 Cal. 240, 146 P. 651, Ann. Cas. 1916D, 233; In re Estate of Ghio, 157 Cal. 552, 108 P. 516, 37 L. R. A. (N. S.) 549, 137 Am. St. Rep. 145. We must conclude, therefore, that the kingdom of Denmark in no way is interested in this action in its sovereign capacity.

[2] Appellant then contends that the plaintiffs, who have the character of principals, have no right to proceed in this forum against the defendant, who is a subagent. We are not impressed by this contention for the reason that there is no insistence in the law of agency in this state that there be a privity of contract between the principal and the subagent to authorize the principal to proceed against the subagent as a beneficiary in fact of the contract of agency between the agent and the subagent. Marshall v. Swaim, 102 Cal. App. 119, 282 P. 423; Second National Bank v. Grand Lodge, 98 U. S. 123, 25 L. Ed. 75; Hall v. Marston, 17 Mass. 575; Chung Kee v. Davidson, 102 Cal. 188, 36 P. 519. The court in the case of Chung Kee v. Davidson, supra, at page 196 of 102 Cal., 36 P. 519, 521, states, upon considering the authorities in a similar problem: "The supreme court of the United States, after conceding the general rule to be that privity of contract is necessary to the maintenance of the action of assumpsit, said: 'But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come to the promisor's hands, or under his control, which in equity belong to a third party. In such a case it is held that the third person may sue in his own name. *But then the suit is founded rather on the implied undertaking the law raises from the possession of the assets than on the express promise.*'" (Italics ours.)

The third person's right is not based on "an assumptual obligation created by the contract," but on "an obligation in the nature of an assumpsit created by law on the facts of the case. In other words, we here perceive a manifestation" of an obligation created by law, often referred to as a quasi-contract. 2 Street, Foundations of Legal Liability, 161. The leading case of Brewer v. Dyer (1851) 7 Cush. (61 Mass.) 337, the principle of which is followed in the Chung Kee Case, supra, states the rule to be that "* * * the law, operating on the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation, on which the action is founded." Lawrence v. Fox, 20 N. Y. 268; Meyerson v. New Idea Hosiery Co., 217 Ala. 153, 115 So. 94, 55 A. L. R. 1231; Dean v. Walker, 107 Ill. 540, 47 Am. Rep. 467; Kaufman v. U. S. National Bank, 31 Neb. 661, 48 N. W. 738; Feldman v. McGuire, 34 Or. 309, 55 P. 872; and many other cases in different jurisdictions.

[3, 4] We are also unable to agree with appellant to the effect that a set-off is proper in a proceeding like the one considered. It is elementary that a set-off may not be invoked unless the parties and the debts are mutual and that the doctrine of mutuality requires that the debts be due to and from the same persons in the same capacity. 23 Cal. Jur. 262; Kaye v. Metz, 186 Cal. 42, 198 P. 1047; Flynn v. Seale, 2 Cal. App. 665, 670, 84 P. 263; Montgomery v. Rauer, 125 Cal. 227, 57 P. 894.

We have already concluded that the kingdom of Denmark does not properly appear as a party to the proceeding in its sovereign capacity by virtue of the ruling in Re Estate of Clausen and Re Estate of Ghio, supra. The compensation that the defendant demands by way of set-off is properly an action incident to his contract of employment with the Danish consul as attorney for the kingdom of Denmark, acting in its sovereign capacity, through its consul, or on powers of attorney from other heirs in other estates. We must conclude, therefore, that the claim defendant asserts against the Danish government for compensation for services rendered to it or other foreign heirs is not properly set off against the claim of plaintiffs in this pro-

ceeding, because of the lack of mutuality of interests and parties.

It must also be concluded that the trial court did not err in directing a verdict for plaintiffs, because none of the testimony offered by the defendant in any way controverted the material issues developed by the plaintiff. There is but one conclusion from the evidence as presented, giving full force and effect to that of the defendant, to the effect that judgment should lie against the defendant for the benefit of the plaintiffs for the amount of money due, owing, and unpaid to the plaintiffs in the hands of the defendant.

[5] In directing a verdict for plaintiffs, however, the trial court refused to allow them interest on their respective claims, and they have taken a separate appeal from that portion of the judgment, which has this day been decided in favor of plaintiffs, with directions to the trial court to revise and re-enter its judgment in accordance with the views therein expressed. Petersen v. Lyders (Cal. App.) 33 P.(2d) 1032. Therefore, in conformity therewith, the trial court is directed to revise and re-enter its judgment so as to allow plaintiffs interest on their respective demands; and thereupon the judgment will stand affirmed, respondents to recover their costs.

We concur: KNIGHT, Acting P. J.; CASHIN, J.



139 Cal.App. 307

PETERSEN et al. v. LYDERS.

Civ. 9103.

District Court of Appeal, First District, Division 1, California.

June 15, 1934.

Rehearing Denied July 14, 1934.

Hearing Denied by Supreme Court Aug. 13, 1934.

1. Interest ⇐13.

In action for money had and received, refusal to allow plaintiffs interest *held* error, where it appeared that defendant had collected moneys belonging to them which he still retained, thus in effect converting them (Civ. Code, § 3336).

2. Interest ⇐19(2).

That plaintiffs did not know when filing original complaint exact amount of defendant's indebtedness to them did not render their claims unliquidated so as to preclude allowance of interest, where claims were certain or capable of being made certain under statute (Civ. Code, § 3287).

3. Costs ⇐18.

In actions for money had and received in superior court, plaintiffs were entitled to costs, though amounts recovered by some of them were within jurisdiction of municipal court.

Appeal from Superior Court, San Francisco County; Daniel C. Deasy, Judge.

Separate actions by Inger Marie Petersen and others against Eric Lyders, which were consolidated. From an adverse judgment, plaintiffs appeal.

Affirmed in part, with directions to modify, and reversed in part.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, for appellants.

Sawyer & Cluff, James F. Brennan, and John J. McMahon, all of San Francisco, for respondent.

JOHNSTON, Justice pro tem.

This appeal is companion to the one taken by defendant in the above-entitled cause, which this day has been decided in favor of plaintiffs. 33 P.(2d) 1030. The facts are fully set forth in the decision filed therein. As there stated, the defendant for many years has been the attorney for the consulate of Denmark. Plaintiffs were the heirs of different estates of decedents residing in the United States and in particular in California, in which matters connected with said estates defendant had represented them as attorney upon request of the Danish consul. The heirs of each of the five estates involved herein brought separate actions against defendant seeking to recover moneys he had collected in those several estates and belonging to said heirs. Each complaint was in form for money had and received.

Plaintiffs' case was largely made out by defendant's testimony, and at the trial plaintiffs amended their complaints to conform to the proof, thereby reducing the amounts prayed for. This reduction resulted at least in part by allowing defendant certain credits for disbursements in these matters and for fees and disbursements in other matters he had handled for the Danish consul. To each complaint defendant filed a second amended answer alleging that he had accounted to the Danish consul for all moneys received on be-

half of plaintiffs, and subsequently he filed a supplemental answer in each case alleging payment. The parties stipulated that these amended and supplemental answers be considered answers to the amended complaints. All the cases were by stipulation and order consolidated and tried before a jury. At the conclusion of the trial the court instructed the jury to bring in a verdict for plaintiffs for the amounts prayed for in the amended complaints, but refused to allow any interest. Defendant appealed from the judgment, but, as stated, his appeal has been decided adversely to him. The trial court likewise struck plaintiffs' cost bill from the files. From that portion of the judgment refusing them interest, and, from the order striking out their cost bill, plaintiffs have prosecuted this appeal.

[1] Plaintiffs contend, and we think rightly, that the court was in error in refusing to instruct the jury to allow them interest. The evidence showed that defendant had collected money belonging to plaintiffs and that he still retained it. It is true that he claimed to have accounted for it to the Danish consul and that he had paid it to the consul by delivering to him two promissory notes. However, this court has held in determining the other appeal that he did not account and that he had not paid over the money.

[2] The only grounds upon which defendant seeks to sustain the action of the trial court are that the amounts sued upon were unliquidated, and that plaintiffs recovered less than they prayed for in their original complaints. Neither of these contentions were tenable.

It is true that plaintiffs did not know at the time they filed their original complaints, the exact amount for which defendant was indebted to them. However, this fact alone does not render a claim unliquidated in the sense that no interest can be allowed. Defendant had the use of money collected for the use and benefit of plaintiffs and belonging to them, and it would be unjust and inequitable not to charge him with interest from the time the actions were brought. The correct amounts due were easily arrived at by allowing defendant certain credits, the amounts of which were at all times within his own knowledge. The claim of plaintiffs was certain, or capable of being made certain, by calculations within the meaning of section 3287 of the Civil Code. Engelberg v. Sebastiani, 207 Cal. 727, 279 P. 795; Courteney v. Standard Box Co., 16 Cal. App. 600, 117 P. 778; Cutting Fruit Packing Co. v. Canty, 141 Cal. 692, 75 P. 564.

Furthermore, the retention by defendant of money belonging to plaintiffs was in effect a conversion, and plaintiffs are entitled to interest. Section 3336, Civ. Code; New York Cloak & Suit House of Los Angeles v. Coston, 94 Cal. App. 94, 270 P. 695.

[3] The second point involved here is the action of the trial court in denying plaintiffs' costs because the amount recovered by certain of them was within the jurisdiction of the municipal court. The precise point involved here was decided adversely to defendant's contention in a late case. Duncan v. Torney, 125 Cal. App. 207, 13 P.(2d) 765.

It is therefore ordered that the judgment be modified by allowing plaintiffs interest at 7 per cent. per annum from the 3d day of December, 1928, on the respective amounts recovered by them; and the trial court is directed to revise and re-enter its judgment accordingly. It is further ordered that the order of the trial court striking out plaintiffs' cost bill be reversed. Plaintiffs will recover their costs of appeal.

We concur: KNIGHT, Acting P. J.: CASHIN, J.



139 Cal.App. 398

FLURY v. BEESKAU et al.

Civ. 5079.

District Court of Appeal, Third District, California.

June 22, 1934.

1. Automobiles ⇨212.

Traffic rules prescribed by California Vehicle Act and rules relative to contributory negligence apply to bicycles as well as automobiles (St. 1923, p. 517, as amended).

2. Automobiles ⇨245(82).

Contributory negligence of bicyclist who, in attempting to make left turn at intersection, after giving signal, collided with truck overtaking him from rear, *held* question for jury (St. 1925, p. 413, § 130; St. 1929, p. 541, § 129; St. 1931, p. 2126, § 131).

3. Appeal and error ⇨1050(1).
Evidence ⇨150.

In automobile accident case, admission of evidence concerning experiment which

showed that brakes of defendant's truck after accident were defective *held* not error and, in any event, not prejudicial, where defendant's evidence indicated that condition of brakes had not changed and there was ample evidence of truck driver's negligence.

4. Evidence ⇐150.

Whether instrumentality which caused accident is adequately shown to have remained in same condition to time of subsequent experiment showing defective condition thereof is matter within trial court's discretion.

5. Appeal and error ⇐1051(3).

Appellant may not predicate claim of reversible error upon evidence of negligence of which he tacitly concedes guilt.

6. Trial ⇐260(8).

Requested instruction on contributory negligence in automobile accident case *held* sufficiently covered by instructions given.

7. Automobiles ⇐246(28).

Requested instruction in intersection collision case that bicyclist observing defendant's truck approaching at exceedingly fast speed would be no longer entitled to rely on presumption that other would reduce speed *held* properly refused.

8. Damages ⇐130(1).

$7,500 for broken shoulder blade and ribs, dislocation of shoulder, scalp wound, and brain injury causing continued headaches and dizziness and for broken nose, which was still crooked, *held* not excessive, where plaintiff also suffered pain, loss of income, and incurred hospital and medical expenses.

9. Appeal and error ⇐1004(1).

Damages assessed will not ordinarily be disturbed on appeal unless so excessive as to indicate passion or prejudice of jury.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by J. Flury against Bennie Beeskau and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Len H. Honey, Lafayette J. Smallpage, and Charles H. Epperson, all of Stockton, for appellants.

Gumpert & Mazzera, of Stockton, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendants have appealed from a judgment rendered pursuant to the verdict of a jury, for damages for personal injuries sustained by the plaintiff as the result of a collision which occurred at the intersection of two streets in the city of Stockton, between the defendants' truck and the plaintiff's bicycle while the latter was attempting to make a left turn.

El Dorado and Channel streets intersect at a right angle in the business portion of Stockton. El Dorado street extends north and south and is 56 feet in width with two parallel street car tracks along the center thereof. Channel street extends east and west and is 40 feet in width east of El Dorado. The curbing which marks the northerly boundary of Channel street extends along a straight line both east and west of El Dorado, but the southerly curbing of Channel street, west of El Dorado, is 66 feet further south than that line of Channel street as it exists east of El Dorado. In other words, Channel street is 106 feet in width west of El Dorado street to the water front.

The testimony is conflicting, but there is ample evidence to support the following facts: At 5:30 p. m. on October 25, 1932, the plaintiff was riding a bicycle northerly along the proper side of El Dorado street with the purpose of going to the fish market near the water front on Channel street. It was daylight, and the atmosphere was clear. The bicycle was equipped with a coasting brake which was in good condition for use. There was some traffic on these streets at that time. When the plaintiff reached a point about 60 feet south of Channel street, he pulled his bicycle over to a course adjacent to the nearest rail of the street car track. He observed the defendant's Ford truck coming south on El Dorado street. It was being driven by the young man, Beeskau, who is also a defendant in this action. The truck was then about a block north of Channel street. The plaintiff reached the intersection of the streets before the defendants' truck entered that space. Beeskau saw the bicycle approaching when it was 120 feet south of Channel street. Before reaching the intersection, the plaintiff extended his left arm indicating his intention to make a left turn at that point. The bicycle was running at the rate of about six miles an hour. After passing the intersecting point of the streets, Flury turned his bicycle to the left and reached a point midway between the two parallel street car tracks when he saw the defendants' truck only about 10 feet away running at the rate of about twenty-five or thirty miles an hour and following a course near

the center of the street with its left wheels about the middle of the westerly street car track. Although the truck driver had seen the bicycle coming north at a point 120 feet south of Channel street and his vision was not obscured by intervening traffic, he neither watched the plaintiff nor observed his signal for a left turn. He admitted that he was running "pretty fast." He was only 10 feet away from the bicycle when he saw it headed across his pathway. A collision appeared to be imminent. The plaintiff pulled his bicycle abruptly to the left, and Beeskau turned the truck right to avoid the collision. The two machines struck at a point just back of the left front wheel of the truck. They collided at a point a few feet north and west of the intersecting point of the two streets, about 15 or 18 feet south of the northerly line of Channel street. The plaintiff was thrown from his bicycle, which was demolished. He was seriously injured as a result of the accident. He was picked up unconscious and taken to a hospital for treatment. Beeskau testified that he did not notice the plaintiff after he first observed him 120 feet south of Channel street until he suddenly saw his bicycle about 10 feet away headed directly across his pathway. He was looking for the approach of other machines as he entered the intersection of the streets and failed to observe the plaintiff's signal for a left turn or the change in the course of his vehicle. He promptly stepped on the foot brake and turned his truck to the right. He said: "We both came together,—he came into me and I went into him. * * * When I hit the bicycle it threw me out of the seat and my foot off the pedal and my hand off the wheel and I could not do any more." His truck turned slightly toward the west, then swerved back in a southeasterly direction, overturning on the easterly street car track 40 or 50 feet south of the point of collision. Beeskau was uninjured. In this suit for damages, a verdict of $7,500 and costs was returned against both the owner and the operator of the truck. Judgment was rendered accordingly. From the judgment the defendants have appealed.

It is conceded the evidence supports the implied finding that the defendants were guilty of negligence which resulted in the accident. A reversal of the judgment is, however, sought on the grounds that the plaintiff was guilty of contributory negligence evidenced by the alleged fact that his bicycle ran into the side of the truck; that the court erred in permitting the introduction of evidence over appellants' objection of an experiment which was conducted with the truck one day after the accident occurred, showing that the brake was then defective, without preliminary proof that the automobile was then in the same condition that it was at the time of the accident; that the court erred in modifying and refusing to give to the jury certain instructions which were offered by the defendants; and that the damages which were awarded are excessive.

[1, 2] We are of the opinion the evidence amply supports the implied finding that the plaintiff was not guilty of contributory negligence. That was a matter for the determination of the jury. There was some traffic at the intersection of the streets where the accident occurred. The plaintiff ran his bicycle over and along the easterly rail of the street car track for a distance of 50 or 60 feet before he reached the intersecting point where he proposed to turn west. He properly extended his left arm as a signal for his intended left turn as required by the provisions of section 130 of the California Vehicle Act (St. 1923, p. 558, § 130, as amended by St. 1925, p. 413). Beeskau failed to see the signal. The plaintiff's bicycle passed to the right around the central intersecting point of the streets in his effort to make a left turn as provided by section 129 of the last-mentioned act (St. 1923, p. 558, § 129, as amended by St. 1929, p. 541). The plaintiff looked in every direction for approaching machines before he attempted to make the turn. He saw the defendants' truck half a block away and reasonably anticipated he would have ample time to cross the street. The plaintiff had a right to anticipate he would be given the right of way, since he approached the turn before the truck entered the intersection, and that the driver of the truck would reduce his rate of speed to conform to the law before he crossed the intersection of the streets. There is substantial evidence that the plaintiff was entitled to the right of way for the purpose of making the left turn ahead of the truck pursuant to the rule prescribed by section 131 of the California Vehicle Act (St. 1923, p. 560, § 131, as amended by St. 1931, p. 2126) which provides in part:

"Sec. 131. (a) The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection. * * *

"(b) The driver of a vehicle within an intersection intending to turn to the left shall yield to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an

immediate hazard but said driver having so yielded and having given a signal when and as required by law may make such left turn and other vehicles approaching the intersection from said opposite direction shall yield to the driver making the left turn."

A bicycle or motorcycle is recognized as a legitimate means of traveling upon the highways or streets of a city either for business or pleasure. The traffic rules which are prescribed by the California Vehicle Act apply to bicycles and motorcycles as well as to automobiles and other vehicles. Hunt v. Los Angeles Ry. Corp., 110 Cal. App. 456, 294 P. 745; 5, 6 Huddy's Cyc. of Auto. Law, p. 330, §§ 190, 191. Under the circumstances of this case, the question regarding the alleged contributory negligence of the plaintiff was a problem for the determination of the jury. The rule of law regarding the effect of contributory negligence applies to a bicyclist just as it does to the operator of an automobile or other motor vehicle. 5, 6 Huddy's Cyc. of Auto. Law, p. 336, § 195. Conceding that the plaintiff's bicycle ran into the side of the truck, and that the truck did not run into the bicycle, although Beeskau, the driver of the truck, said, "We both came together, he came into me and I went into him," that fact alone is not sufficient to establish the contributory negligence of the bicyclist as a matter of law. Zuccone v. Main Fish Co., 104 Wash. 441, 177 P. 314; Glatz v. Kroeger Bros. Co., 168 Wis. 635, 170 N. W. 934.

In support of the judgment it is reasonable to assume the plaintiff used due diligence in watching for machines in all directions at this intersection of streets. As he made the left turn, he saw the defendants' machine approaching at a distance of 50 or 60 feet above the northerly line of Channel street. He may have underestimated the speed at which the automobile was approaching. If Beeskau had seen the plaintiff and had reduced the speed of his truck to the lawful rate of 15 miles an hour in crossing the intersection, Flury would have had ample time to traverse the 15 or 20 feet beyond the pathway of the defendants' machine. The bicycle was running five or six miles an hour, and the plaintiff had a right to assume that the speed of the defendants' truck would be regulated to conform to the lawful rate of speed. Since the plaintiff commenced to make the left turn before the defendants' machine entered the intersection of the streets, he had a right to assume Beeskau would recognize the fact that he held the right of way and that he would regulate the speed of the truck accordingly. He was not bound to anticipate that the driver of defendants' truck would violate the law by careless inattention to the traffic, and by running his machine across the intersection at the rate of thirty miles an hour as two disinterested witnesses testified that he did. After making the left turn, the plaintiff glanced back toward the north and was surprised to find the truck was nearly upon him. In the emergency he pulled his bicycle abruptly to the left to avoid the collision. At the same time Beeskau suddenly saw the bicycle about to attempt to cross his pathway. He was then but 10 feet away and traveling twenty-five or thirty miles an hour, too rapidly to stop his truck even with the best of brakes. He then pulled the machine to the right. Evidently the truck and the bicycle approached at an acute angle. The speed of the truck, which was traveling four or five times as fast as the bicycle, enabled it to run ahead of the bicycle. With the exercise of the utmost effort on the part of both drivers, their vehicles converged, and, in spite of the plaintiff's frantic effort to avoid the accident, the collision occurred. Apparently the automobile side-swiped the bicycle as it passed. The plaintiff did not heedlessly run into the truck. When he discovered it was upon him, he did everything within his power to avoid the collision, but failed to do so.

The appellants cite several cases wherein it is held that a pedestrian who runs into a passing automobile while crossing a busy thoroughfare is deemed to be guilty of contributory negligence which precludes a recovery of damages for injuries sustained as a result thereof. An examination of these cases discloses the fact that the pedestrians were invariably heedless in their conduct. Those cases determine no principle of law which is controlling of the facts in this case. They may be readily distinguished from the present case. One vital difference is that a pedestrian can stop almost instantly and even step aside or back up to avoid an emergency. A bicycle which is traveling five or six miles an hour may not be so immediately stopped or diverted in its course. If the plaintiff in this case had been walking across Channel street instead of riding a bicycle, when he suddenly saw the defendants' truck 10 feet away he could and undoubtedly would have stopped immediately and would thus have avoided the accident. Unfortunately he was not on foot at that critical moment. The pedestrian cases are of little aid as authority for the solution of the present action. Under the circumstances of this case, we are con-

vinced that the question of the plaintiff's contributory negligence was a problem for the determination of the jury, that there is ample evidence to support the implied finding that he was free of negligence, and that the verdict and judgment may not be disturbed on that account.

[3-5] It was not reversible error for the court to permit the introduction of evidence, over the objection of the defendants, of the defective condition of the truck brake after the accident occurred, because of the alleged absence of a preliminary showing that the brake was then in the same condition that it was at the time of the accident. Three witnesses testified that they found the defendants' truck at five o'clock on the evening following the accident, parked on the street near by, and that two men were able to shove the machine by hand a distance of 2 to 5 feet, while the third individual sat at the wheel with the foot brake shoved down to the frame of the floor as far as it would go. When the plaintiff sought to prove that fact by one of these witnesses, the defendants' attorney objected to the evidence on the ground that the foundation for its admission had not been established. Thereupon the driver of the truck, Beeskau, was recalled by the plaintiff under the provisions of section 2055 of the Code of Civil Procedure. He testified that the foot brake was working properly before the accident occurred, and that he drove the machine "down to the shop" after the accident. The attorney then said, "The old truck was working, was it not?" to which he replied "Yes sir." He also testified that the brakes were not relined until several months after the accident occurred. It thus appeared from the evidence of Beeskau that according to his contention the brake was in good working condition both before and after the accident. To be sure it appeared that the machine was otherwise damaged by the accident. But that was not material in determining the mere admissibility of evidence with respect to the brake only. Thereupon the court permitted the witness to testify that two men shoved the car by hand while the foot brake was pressed down as far as it would go. Later Beeskau was recalled by the court and testified that the truck was towed into the garage for repairs, but he reiterated the statement that he then used the brakes to stop the machine when he arrived at the shop. The court asked him in that respect, "And you did use the brakes to stop it? A. Yes sir, I did." There was no motion to strike out this evidence regarding the alleged defective brake. Subsequently the other two witnesses were permitted to testify fully to the same facts without objection. All of these witnesses were elaborately cross-examined by the defendants with respect to the experiment.

The record contains credible evidence that the defendants contended the brake was in substantially the same condition when the experiment was made that it was when the accident occurred. Moreover, that evidence was harmless for the reason that it was merely offered to show that the defendants were negligent in driving an automobile with a defective brake, and it appears by the admission of Beeskau that the accident occurred because he did not observe the plaintiff attempting to cross his pathway until the truck was within 9 or 10 feet of the bicycle, at which time it was impossible for him to stop the truck so as to avoid the collision, even if the brake had been in perfect condition. The evidence satisfactorily shows that the truck was running at the rate of twenty-five or thirty miles an hour. In the appellants' opening brief they admit that the truck was running at an excessive rate of speed. They say in that regard: "It is admitted that the evidence would justify the jury in concluding that Beeskau was exceeding the speed limit of 15 miles per hour when he entered the intersection." It is not contended by the defendants on appeal that they were not guilty of negligence. An appellant may not predicate a claim of reversible error upon evidence of negligence of which he tacitly concedes he is guilty. Independently of the question as to whether the brake was defective, the proximate cause of the accident appears to have been the excessive speed of the truck and the careless inattention of the driver of the truck.

It is true that evidence of the defective condition of the instrumentality by means of which an accident occurs, which is secured at a time subsequent to the accident complained of is admissible only upon a preliminary showing that it was in substantially the same condition at the time of the accident. County of Sonoma v. Stofen, 125 Cal. 32, 57 P. 681; 45 C. J. p. 1239, § 802. But the question as to whether that same condition has been adequately shown to have existed at the time of the accident so as to render the evidence admissible, is within the sound discretion of the trial court. 10 Cal. Jur. 861, § 141. The challenged ruling of the court upon the admissibility of the evidence regarding the defective brake was therefore not erroneous. But assuming that more satisfactory preliminary

proof should have been required that the brake was in the same condition before and after the accident occurred, the evidence was harmless for the reason that there is adequate proof that the excessive speed of the truck and the driver's inattention to the plaintiff's operation of the bicycle were the proximate causes of the accident. Since there does not appear to be a miscarriage of justice in this case, even though the evidence of the defective brake be deemed to have been erroneously admitted, it is not reversible error under the provision of article 6, § 4½, of the Constitution.

[6] The appellants assign as error the refusal of the court to give to the jury that portion of the following instruction offered by them, which is included within the parentheses, to wit: "The law of this state provides that the driver of any vehicle, including a bicycle, upon a public highway, before starting, turning or stopping such vehicle, shall first see that such movement can be made in safety, and if it cannot be made in safety, shall wait until it can be made in safety, (and you are instructed that if you find from the evidence that the plaintiff failed to observe this law, and that his conduct proximately contributed in the slightest degree to said accident and his resulting injuries, if any, the plaintiff is not entitled to recover, and your verdict must be for the defendants)."

It was not error to reject the portion of the foregoing instruction contained within the parentheses, for the reason that the subject-matter therein contained was fully covered by other instructions which were given to the jury. On page 32 of the Clerk's Transcript an instruction appears to have been given in almost the identical language of the preceding charge, as follows: "The law of this state provides that the driver of a vehicle including a bicycle, within an intersection, intending to turn to the left, shall yield to any vehicle approaching from the opposite direction, which is within the intersection, or so close thereto as to constitute an immediate hazard; therefore, if you should find from the evidence in this case that the plaintiff failed to observe this rule or law, and that his conduct in so doing proximately contributed in the slightest degree to the accident in question, then the plaintiff cannot recover, and your verdict must be for the defendants."

The jury was also instructed at the request of the defendants that: "The operator of a vehicle, including a bicycle, must at all times use due care to avoid colliding with another; he must be ever alert and watchful so as not to place himself in danger."

The jury was further instructed at the request of the defendants that they had affirmatively charged the plaintiff in their answer with contributory negligence, which was correctly defined. The jury was then charged that contributory negligence of the plaintiff, if proved, "is a complete defense to this action," and that "It is the law of this state that if the plaintiff was guilty of the slightest amount of negligence proximately contributing to said accident and his resulting injuries, if any, he cannot recover," regardless of how guilty of negligence the defendants may have also been. The jury was elaborately and fairly charged with relation to the law of all the issues necessarily involved in this action. Certainly the jury was charged as favorably to the defendants as they may reasonably expect.

The refusal of the court to give to the jury that portion of the following instruction which was offered by the appellants, hereafter quoted, is assigned as error, to-wit: "It was required of plaintiff at the time and place of the accident in question, to proceed across the intersection in a careful and prudent manner, ever watchful of the direction in which danger was most likely to be apprehended. It was his duty not to close his eyes so far as south bound traffic on El Dorado street was concerned. If you find from the evidence that said plaintiff Flury, had observed the automobile driven by defendant Beeskau, approaching at an exceedingly fast rate of speed for that vicinity, then he was no longer entitled to rely upon the presumption that the said defendant Beeskau would comply with the rules of the road, but he was bound to take such reasonable measures as he could under the circumstances to prevent the injury, and if you find from the evidence in this case that, measured by these standards, the plaintiff Flury failed to use ordinary care for his own safety, and that such failure proximately contributed in the slightest degree to said accident and his resulting injuries, if any, the plaintiff cannot recover, and your verdict should be for the defendants."

[7] The refusal of the court to give the preceding instruction did not constitute error. The portions thereof which properly announce the law applicable to the facts of this case were adequately covered by other instructions which were given to the jury. That portion of the preceding instruction which declares that, if the plaintiff had ob-

served the defendants' truck "approaching at an exceedingly fast rate of speed for that vicinity, then he was no longer entitled to rely upon the presumption" that he would thereafter reduce the speed of his machine to a safe or proper mileage, cannot possibly be the law with relation to the facts of this case. It was therefore properly rejected. The foregoing statement does not assume that the defendants' truck was seen approaching at an unlawful rate of speed. It does not pretend to fix the place or the distance from the point of collision that the truck was seen approaching at "an exceedingly fast rate of speed." The record shows that the plaintiff did see the machine nearly a block away coming at about twenty-five or thirty miles an hour. Because an automobile is seen approaching an intersection of streets or roadways at a distance of a block and running twenty-five or thirty miles an hour, neither law nor reason will warrant the assumption that the driver thereof will recklessly continue at that rate of speed across a traffic filled intersection in defiance of law. That portion of the instruction was properly rejected.

[8, 9] The award of damages in the sum of $7,500 does not appear to be excessive under the circumstances of this case, when we consider the serious injuries which he received, the pain which he suffered, the cost of hospital and medical care, the loss of income, and some apparent permanent disability. The plaintiff was picked up unconscious and taken to a hospital, where he remained for nearly a month. His nose was broken and is still crooked. His right shoulder blade was broken, and a dislocation of the same shoulder occurred. Three ribs were broken. He suffered a severe scalp wound and a brain injury from which he continued to endure severe headaches and dizziness to the time of the trial of the case. There were numerous bruises and contusions from which he suffered. His arm was kept in a plaster cast for nearly two months. X-ray pictures were taken.

A jury is intrusted with considerable discretion in assessing damages for personal injuries including serious fractures of the bones, together with pain and suffering incident thereto. Unless the damages which are assessed appear to be so excessive as to have been the result of passion or prejudice on the part of the jurors, they will not ordinarily be disturbed on appeal. Rannard v. Harris, 121 Cal. App. 281, 8 P.(2d) 864; 20 Cal. Jur. 101, § 65.

The amount of the judgment which was rendered in this case appears to be reasonable considering the serious injuries which were received by the plaintiff.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



139 Cal.App. 455

HALE v. HARBOR PETROLEUM CORPORATION et al.

Civ. 8980.

District Court of Appeal, First District, Division 1, California.

June 29, 1934.

1. Judgment ⇐707.

Judgment in suit brought for accounting, by buyers from lessee of undivided interests in oil and gas to be produced from lease, against lessee's assignee, adjudging such undivided interests void because sold without required permit, *held* not res judicata of rights of lessee, not party to action, against assignee of lease or of rights of buyers of undivided interests against lessee (St. 1917, p. 673, as amended).

2. Licenses ⇐39.

Evidence *held* not to require finding that lessee selling undivided interests in oil and gas to be produced from lease was ignorant of illegality of securities sold by him without license until after he assigned lease (St. 1917, p. 673, as amended).

3. Appeal and error ⇐931(1).

On plaintiff's appeal, testimony of defendants' witnesses must be taken to be true.

4. Appeal and error ⇐994(3).

Witness' credibility is for trial court, notwithstanding evidence of inconsistent declarations and conduct by witness.

5. Mines and minerals ⇐74.

Evidence sustained finding that assignment of oil and gas lease to corporation, subject to outstanding royalty claims, did not fail to reserve to assignor interest which securities, representing undivided interests in oil and gas to be produced from lease and previously issued by assignor without license, purported to convey because of mutual mistake of law as to validity of securities (St. 1917, p. 673, as amended).

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

6. Appeal and error ⇐1008(3).

Validity and effect of release *held* primarily for trial court.

7. Compromise and settlement ⇐23(3).

Evidence supported finding that instrument executed by assignor of oil and gas lease to assignee was intended to settle all claims of assignor against assignee.

8. Appeal and error ⇐1008(3).

Where trial court's construction of instrument appears consistent with true intent of parties as shown by attendant facts and circumstances, reviewing court will not substitute another interpretation, though equally tenable.

Appeal from Superior Court, Los Angeles County; Wm. Frederickson, Judge.

Action by Nathan W. Hale against the Harbor Petroleum Corporation and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Archie G. Cope, of Long Beach, and E. O. Leake and J. J. Leake, both of Los Angeles, for appellant.

Elliott & Aberle, of Los Angeles, for respondents.

PER CURIAM.

In 1925 the Flower Street Investment Company, a corporation, leased to plaintiff and another certain lots in Los Angeles county. The lease provided that the lessees should pay as rental 20 per cent. of all oil, gas, and other hydrocarbon substances produced therefrom. Later plaintiff acquired the interest of his colessee. Thereafter and prior to February 9, 1926, plaintiff assigned fractional undivided interests in all the oil and gas to be produced aggregating 15 per cent. thereof. These interests were sold without the permission of the state corporation commissioner. Wells were drilled and oil produced, and in January, 1926, plaintiff caused defendant Harbor Petroleum Corporation to be organized under the laws of Nevada. He then offered to the directors of the corporation, in consideration of the issuance to himself of certain preferred and common stock of the company, a conveyance of certain oil properties, including the lease of the lots first mentioned. The offer so far as material read as follows:

"The undersigned proposes to convey or cause to be conveyed to the Harbor Petroleum Corporation of Reno, Nevada, * * * the oil well known as Nathan W. Hale No. 3, situated on Ludy street on lots 15, 16 and the north half of Lot 17 Hunt Villa Tract. East Signal Hill, Los Angeles county, California, subject to landowners' and like royalties of thirty-five per cent. with an outstanding indebtedness of $100,000 (I think not over $75,000) on all three of the wells, with the following understanding, that $30,000 to $40,000, being the amount of cash put in by various people for certain profits made from each well, which additional amount must be taken care of with preferred and common stock in addition to the indebtedness, for the following consideration, to wit: $200,000 of the preferred stock and $100,000 of the common stock, such stock to be issued upon call and delivery of assignments of proportional interests as above proposed." The directors by resolution accepted the offer, and plaintiff on February 11, 1926, executed to the corporation an assignment, the material parts of which are as follows:

"Know all men by these presents: That we, Nathan W. Hale and Laura A. Hale, husband and wife, in consideration of the sum of ten dollars to us in hand paid, receipt whereof is hereby acknowledged, do hereby sell, assign, convey and set over unto the Harbor Petroleum Corporation, Reno, Nevada, all our right, title and interest in and to that certain oil and gas lease (description of lease and full description of property omitted).

"This assignment covers and includes only Lots 15, 16 and the north half of Lot 17 in Hunt Villa Tract, county of Los Angeles, State of California. * * *

"This agreement is made upon the consideration of the Harbor Petroleum Corporation strictly performing all of the covenants and conditions in said lease provided as to all matters therein.

"This assignment also conveys and assigns all improvements, including the well now standing cemented, and all personal property on said lease, including pipe lines, derricks and other equipment, with the agreement and understanding that said Harbor Petroleum Corporation assumes all debts and obligations against said lease and its equipment as per written proposition submitted to and accepted by said Harbor Petroleum Corporation."

The corporation until August, 1928, paid sums monthly to the holders of the securities previously sold by plaintiff as their portion of the oil and gas produced on the property. On September 28, 1928, it notified the holders that no further payments would be made, and in January, 1929, the latter brought

suit against the company for an accounting. It was stipulated in the present action that a judgment, which became final, was entered in the suit mentioned, adjudging these interests to be void in that the same were sold without the permit required by law. By the present action plaintiff sought to reform the assignment mentioned. He alleged that by a mutual mistake of the parties and their interpretation of the law with respect to the validity of the securities sold by him the assignment to the company did not correctly set forth the agreement, it being the intention that the percentage of such oil and gas represented by said securities should be reserved to plaintiff.

The trial court found against these allegations and entered judgment for defendants. From this judgment the plaintiff has appealed.

[1] The Corporate Securities Acts in force at the time the securities were sold prohibited such sales without a permit from the corporation commissioner. Stats. 1917, p. 673; Stats. 1923, pp. 87, 88, 89; Stats. 1925, p. 962. Nevertheless it has been held that, where instruments embracing fractional interests in oil or gas to be produced under a lease are sold by the operating lessee without a permit, and the purchasers are not in pari delicto with the defendant issuing them, the latter cannot as against the holders of such securities take advantage of their illegality, and that a transferee of the lease with notice is likewise bound. Eberhard v. Pacific Southwest, etc., Co., 215 Cal. 226, 9 P.(2d) 302; Western Oil, etc., Co. v. Venago Oil Co., 218 Cal. 733, 24 P.(2d) 971. What facts, if any, other than that the securities were issued without a permit, led to the rendition of the judgment mentioned do not appear. However, plaintiff was not a party to the suit and was not bound by the judgment; nor would the security holders be concluded thereby in an action against him. Freeman on Judgments, § 442; 34 Cor. Jur. "Judgments," § 1407, p. 988; Victor Oil Co. v. Drum, 184 Cal. 226, 193 P. 243.

So far as shown, the security holders have not sought to rescind their contracts with plaintiff, nor has he reimbursed them for the amounts they paid. Defendant company asserts that it paid them in dividends sums equivalent to the investment; but, however this may be, there was no finding thereon. In 1930 after said judgment was entered the present action was commenced.

[2, 3] Plaintiff contends that the evidence reasonably supports but one conclusion, namely, that by a mutual mistake of law the assignment to defendant company failed to reserve to him the interest which the securities issued purported to convey. He claims that he had no information or knowledge of any infirmity in the securities until after the assignment was made. However, much of his testimony on this point was not of the direct and positive character which might reasonably be expected. Nowhere does he state that he was unaware of the provisions of the statute which prohibited such issues, and he testified that as early as 1926, and after consulting an attorney regarding their legality, certain of these stocks were issued; further, that previous to such consultation he had heard that such issues were illegal but that the attorney advised him to the contrary. The attorney, however, testified that as early as 1925 he advised plaintiff that in his opinion such securities were unlawful, and that, if their sale continued, "he would get himself into trouble"; further, that in August and September, 1928, before the assignment was made to the company, he advised plaintiff of a decision by a department of the superior court of Los Angeles holding such securities to be invalid. The testimony on this question was sharply conflicting, and we find nothing in the record which would compel the conclusion that at the time the assignment was executed either party was ignorant of the provisions of the act; or, taking the testimony of defendants' witnesses to be true, which we must on appeal (Dreyer v. Cole, 210 Cal. 339, 292 P. 123), that anything was said or done to mislead the plaintiff.

[4] In connection with the testimony of the attorney, evidence was adduced which tended to show that during and after this period he believed the securities to be valid. Notwithstanding evidence of inconsistent declarations and conduct by a witness, the question as to what extent his testimony should be believed is for the trial court to determine. Withers v. Massengill, 148 Cal. 769, 84 P. 153; In re Estate of Gird, 157 Cal. 534, 108 P. 499, 137 Am. St. Rep. 131.

[5] It was shown with respect to the portion of plaintiff's offer, which reads, "with the following understanding that $30,000 to $40,000, being the amount of cash put in by various people for certain profits made from each well, which additional amount must be taken care of with preferred and common stock in addition to the indebtedness," that plaintiff and his associates subsequently received from the company on this account preferred stock of the value of $30,000 and com-

mon stock of the par value of $15,000. While the plaintiff testified that the parties believed that the securities issued to him were valid, nevertheless the evidence adduced by defendants was sufficient to show that plaintiff as a reasonably intelligent man knew or had reason to believe that their issuance without a permit was contrary to the Corporate Securities Act. This being true the assignment, which was merely made subject to outstanding royalty claims, fully expressed the intention of the parties. Whether the refusal of the defendant oil company to perform these agreements would have constituted a ground for rescission by plaintiff we need not decide, as he is not seeking such relief. We are satisfied that the finding against the alleged mistake is fairly supported.

Moreover, it appears that the court found that on September 12, 1928, for a valuable consideration plaintiff transferred to the attorney for the company all his right and title, claim or interest in any of the stock or properties of the corporation, and discharged the latter from any and all claims which plaintiff might have asserted by reason of any matter whatsoever. This document was later assigned to the company. It was executed following a telegram from said attorney dated September 7, 1928, and addressed to the plaintiff offering $4,500 for certain stock and notes held by plaintiff, and the surrender of "all other notes, claims and demands, in satisfaction of all obligations against the company; also assignment and transfer to company of all interest in Athens well or Ludy well, making complete extinguishment and release of all claims against or interest in the company or its properties. * * *" The Ludy well referred to is the well drilled on the leased property involved in this action, and the offer thus made was accepted by plaintiff.

[6-8] According to the president of the company, H. W. Elliott, this transaction grew out of the fact that after the termination of the suit first mentioned plaintiff asserted that he had not received the amount of stock to which he was entitled; and after negotiations, during which all his claims, including those in the present suit, were considered, the above offer was made and accepted. Plaintiff denied that the claims asserted in the present action were so considered, or that he intended to release or compromise the same. The questions of evidence, and of the validity and effect of the instruments, were primarily for the trial court. 53 Cor. Jur. "Release," § 117, p. 1290. The document fairly shows an intention to settle all claims against the company; this was the conclusion of the trial court; and, in view of the circumstances disclosed by the evidence, we cannot say that its finding is unsupported. Where the construction given an instrument appears to be consistent with the true intent of the parties as shown by the attendant facts and circumstances, another interpretation will not be substituted on appeal though it seem equally tenable. Kautz v. Zurich, etc., Co., 212 Cal. 576, 300 P. 34.

The evidence believed by the trial court sufficiently sustains its conclusions, and no error has been shown which would warrant a reversal.

The judgment is affirmed.



139 Cal.App.320

SEABOARD DAIRY CREDIT CORPORATION v. HERMAN.

Civ. 1235.

District Court of Appeal, Fourth District, California.

June 18, 1934.

1. Chattel mortgages ⇐173(3).

In chattel mortgagee's action in claim and delivery against seller to compel delivery of hay under contract of sale, issues involving fraud or mistake in execution of contract or bill of sale, and validity of both, *held* not available, where not pleaded.

2. Contracts ⇐245(2).

All stipulations or negotiations preceding execution of written contract must conclusively be deemed to be merged in writing (Civ. Code, § 1625; Code Civ. Proc. § 1856).

3. Evidence ⇐441(9).

In action in claim and delivery for hay sold by defendant under written bill of sale and accompanying contract, alleged telephone conversation showing prior oral contract for sale and delivery of hay *held* inadmissible (Civ. Code, § 1625; Code Civ. Proc. § 1856).

4. Evidence ⇐468.

In action in claim and delivery for hay sold by defendant under written bill of sale and accompanying written contract, parol testimony showing that quantity of hay was delivered prior to execution of bill of sale, and

that such hay was accepted as part performance of contract, *held* incompetent (Civ. Code, § 1625; Code Civ. Proc. § 1856).

5. Evidence ⇐397(1).

Statutory inhibition against attempt to vary written contract by extrinsic evidence of prior dealings expressly applies, not only as between parties, but also as between their successors in interest (Code Civ. Proc. § 1856).

6. Evidence ⇐419(7).

Where bill of sale covering hay, and contract accompanying bill of sale, were contradictory on question of payment of consideration, it was competent, in absence of estoppel, to show by extrinsic evidence what had been actually paid, since recitals in writings are not conclusive on question of consideration (Code Civ. Proc. § 1962, subd. 2).

7. Sales ⇐305.

Seller of hay, where title to hay passed under bill of sale and accompanying contract, but seller retained possession of hay, *held* entitled to special lien to secure payment of balance of purchase price (Civ. Code, § 3049).

8. Chattel mortgages ⇐138(1).

Seller of hay, entitled to special lien against hay while in his possession to secure payment of balance of purchase price, *held* not estopped, under facts shown, to assert lien as against claim under chattel mortgage executed by buyer (Civ. Code, § 3049).

Appeal from Kern County; Allan B. Campbell, Judge.

Action by the Seaboard Dairy Credit Corporation against D. M. Herman. From a judgment in favor of the defendant, the plaintiff appeals.

Judgment modified, and, as modified, affirmed.

Walter J. Little and W. Eugene Craven, both of Los Angeles, and Aldrich & Mack, of Bakersfield, for appellant.

M. G. Brittan, of Bakersfield, W. E. Kalbfleisch, of Corona, and Alfred Siemon, of Bakersfield, for respondent.

HAINES, Justice pro tem.

As of date July 25, 1930, respondent D. M. Herman, of Wasco, Cal., a grower of alfalfa hay, executed to one George E. Martin, operating at Los Angeles, Cal. (apparently under the fictitious name Vernon Feed & Milling Co.), a bill of sale acknowledging receipt from Martin of $5,500, and, in consideration thereof, conveying to Martin:

"Five hundred (500) tons No. 1 quality baled alfalfa hay, now stored in barns located on lots 90 and 211-31 Fourth Extension Colony.

"Said hay to be loaded on cars F.O.B. Wasco, California, as ordered by the buyer, on or before January 1st, 1931."

The parties also executed a contract in writing headed "Hay Contract." This contract began as follows:

"In conjunction with Bill of Sale made on this day at Wasco, California, ——— 1930, Geo. E. Martin buys and D. M. Herman sells 500 Tons No. 1 quality alfalfa hay @ $11.00 per ton (a little more or less) said hay being located in barns located on land described as follows: ———.

"I agree to deliver the hay purchased in good order and in accordance with contract terms and conditions as herein specified.

"F.O.B. cars as ordered by Buyers, by January 1st, 1931, which time may be extended with Buyer's consent but not otherwise."

After certain further provisions, including those concerning the manner of delivery, there appears a paragraph as follows:

"Part payment of $1.00 is hereby acknowledged in consideration of above. Advance of $3.00 per ton is to be made as soon as all papers are signed. Balance to be paid when hay is unloaded in good order."

Then follow certain other provisions which we need not recite. The contract is signed "D. M. Herman, Address Wasco, Calif.," and "Vernon Feed & Milling Co. By Geo. E. Martin." Respondent Herman testified that he received from Martin the contract and bill of sale at the same time, that the contract was actually signed on July 25, but that he kept the bill of sale and did not sign and deliver it until some days later.

At the time these writings were executed, respondent Herman had upon his premises more than 500 tons of alfalfa hay in barns and a further quantity in the fields. All of it was mortgaged to the Bank of Italy by a chattel mortgage on which there was an unpaid balance of $3,070.58.

Under date July 29, 1930, Martin contracted in writing to sell 500 tons of U. S. grade No. 1 leafy alfalfa hay to one Luckensmeyer at $18 per ton, 13 tons to be delivered at once and the rest during December, 1930, and January and February, 1931, Luckensmeyer to pay for each shipment within 30 days after delivery.

At some time late in July, 1930, Martin approached appellant, Seaboard Dairy Credit Corporation, for a loan, and told one Knox, its secretary and manager, that he (Martin) could get 500 tons of hay, but that it was then mortgaged to the Bank of Italy (the idea evidently being to pay off the bank from what appellant was to loan). Knox was made acquainted with the Luckensmeyer contract, and was evidently given to understand that it covered the same hay that Martin was getting from respondent, because, under date August 8, 1930, Martin executed to appellant corporation a chattel mortgage to cover advances to be made to him by it and to secure repayment of such advances from the payments to be made under the Luckensmeyer contract; it being provided in the chattel mortgage that releases from the mortgage should from time to time be made as deliveries were made to Luckensmeyer. The description of the hay covered by this chattel mortgage is therein given as "Five Hundred (500) tons United States Grade No. 1 leafy alfalfa hay now stored in the warehouse of D. M. Herman on lots 91, 211 and 311 Fourth Extension Colony, Wasco, Kern County, California." The mortgage was in due form and recorded in Kern county on August 15, 1930.

Before accepting this chattel mortgage, Knox had sent a representative of appellant's Fresno office to Herman's premises to report on the hay. What investigation he made there does not appear, but his report was to the effect that the hay was all there and that none had yet been shipped. According to Knox, Martin also assured him in person that none of the hay had yet been shipped.

Some six days intervened between appellant's receipt of the chattel mortgage made to it and its disbursement of any funds on Martin's account. In the meantime Knox insisted on having delivered to him the bill of sale from Herman to Martin which he says that he had previously seen. After the situation had reached this posture, appellant proceeded to advance $5,000, of which $3,070.58 was paid to the Bank of Italy whereby respondent's indebtedness to that institution secured by the earlier chattel mortgage of the hay to it was satisfied. The remaining $1,929.42 was paid by appellant to Martin direct.

Shortly subsequent to these transactions it was discovered that Martin was in financial straits, and that a month, more or less, before the making of the bill of sale from Herman to him of July 25, 1930, with the accompanying written contract of sale, he had received from respondent Herman 106 tons of hay, for which Herman was now claiming credit as part of that which he was, under the bill of sale and contract, bound to deliver. Herman did deliver, after the making of the arrangement between Martin and appellant, 132 tons of hay, for which it is conceded that he is entitled to credit and about which there is no dispute. Of the $5,500 which respondent, Herman, was to have received for the 500 tons of hay sold by him to Martin (reckoned on the basis of the agreed price of $11 per ton), the record shows that Herman actually got in all $4,070.58, which we take to have been made up of the $3,070.58 paid by appellant to the Bank of Italy in settlement of Herman's mortgage indebtedness to it, and of $1,000 received by Herman from Martin, though respondent says at one point in his testimony that Martin paid $4,000 down, whatever he may mean by that. The remaining $1,429.42 of the selling price of his 500 tons of hay respondent, Herman, never actually got at all.

Of the hay bought from Martin by Luckensmeyer there was, in late July or early August, 1930, actually shipped to Luckensmeyer some 22 tons, inclusive as we take it, of the 13 tons that, according to Martin's bill of sale to him, Luckensmeyer was to have received coincidently with the execution of that document. The effect of Martin's chattel mortgage to appellant Seaboard Dairy Credit Corporation was to subrogate appellant to Martin's right to collect the proceeds of the hay delivered to Luckensmeyer from the latter. Luckensmeyer, however, failed to pay for the 22 tons of hay delivered to him, the result of which was to bring him in default on his contract of purchase from Martin, and coincidently to bring Martin into default under his chattel mortgage to appellant, and to entitle appellant as against Martin to take possession under the terms of this chattel mortgage of the whole 500 tons of hay therein described. Thereupon appellant, recognizing that respondent, Herman, was entitled to credit for the 132 tons that he had delivered after making his written contract with Martin and his bill of sale to the latter, but claiming that Herman was obligated under these instruments to deliver to it, as subrogated to Martin, the rest of the 500 tons, brought against him the present action in claim and delivery for 350 tons of the hay stored in his (that is, respondent's, Herman's) barns. Why appellant asked only for 350 tons instead of the 368 tons that would result from a deduction from the 500 tons of the said 132 tons not in dispute we do not know. At any rate, under a writ issued pendente lite, the sheriff took from respondent

and delivered to appellant 350 tons of said hay, and on the trial the superior court found appellant entitled to 132 tons only of this amount (that is, 132 tons other than the 132 tons that Herman was admittedly entitled to credit for having delivered). Judgment was therefore rendered for the return to the respondent of the rest of the 350 tons taken by the sheriff from his possession, that is, for 218 tons, or, if such redelivery could not be had, for its value, found to be $2,398, and from this judgment the present appeal is prosecuted.

In support of the judgment respondent, Herman, claims: "First, that the writings of July 25, 1930, did not fully express the real arrangement between himself and Martin, but that what actually occurred was that about July 1, 1930, a verbal contract was made by the terms of which he sold Martin 500 tons of his hay, not necessarily out of what Herman had in his barns, but with the idea of clearing his fields because his barns were already full; that he thereupon, not from his barns, but from his fields, delivered to Martin 106 tons to apply on the 500 tons, for which he is entitled to credit as against the amounts claimed by appellant; and second, that having in fact been paid only $4,070.58, which at the agreed price of $11 per ton would call for the delivery of but 370 tons, he is entitled to have credited against that amount the two items of 106 tons delivered by him prior to the time the writings were made and 132 tons delivered by him afterward, aggregating 238 tons, leaving him obligated to deliver only 132 tons more, and that he is entitled to have the remaining 218 tons taken out of his possession by the sheriff and delivered to appellant returned to him or in default thereof to recover from appellant their value.

The findings of fact and conclusions of law show that these contentions on respondent's part were adopted by the trial court, and their soundness is what we are now called upon to review.

[1-3] We are unable to perceive on what theory the action of the trial court in allowing respondent credit for the delivery of the 106 tons of hay can be sustained. Over appellant's objection, Herman was allowed to testify that in June or early in July Martin talked to him over the telephone, and that in this conversation it was agreed that he should sell Martin 500 tons of the hay for $11 per ton, that he said "We will call this a sale," to which Martin said "Yes," upon which he said to Martin, "You send the papers up later, this is a sale," also that in course of the conversation he said to Martin, that, as his barns were full, the first shipment would be made from his fields; that the transaction was reduced to writing later. This brings the situation squarely within the rule that "the execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." Civ. Code, § 1625. The answer raises no question of any fraud or mistake in the formulation or execution on July 25, 1930, of the bill of sale, or of the accompanying contract, nor is there any question about the validity of either instrument. The pleadings are utterly bare of any such issues. They may only be urged if pleaded. Harding v. Robinson, 175 Cal. 534, 543, 166 P. 808. Not only are they not here pleaded, but it does not even appear to be claimed that these writings were induced by any fraud, and there is no other evidence of mistake than the mere circumstance that, if the conversation could be shown, its effect would be to vary the terms of the later writings. If that were ground for its admission, section 1625 of the Civil Code and section 1856 of the Code of Civil Procedure would be automatically repealed. Respondent did not even seek to have the writings reformed. In this case the oral arrangement must conclusively be deemed to be merged in the writing, and under the provisions of section 1856 of the Code of Civil Procedure it was error to admit evidence of the telephone conversation.

[4, 5] On the part of the respondent, however, it is urged that, "even if the preliminary negotiation and understandings of the defendant and George E. Martin were merged in a bill of sale and contract between the parties, this does not preclude parol testimony as to the amount of hay delivered prior to the execution of the bill of sale," and that, "in the absence of an estoppel," or in any suit between Herman and Martin, Herman could show that Martin had accepted hay delivered from the field as part performance of the contract to deliver hay from Herman's barns. With the latter proposition, in itself considered, there can be no quarrel. But, as applied to this case, it encounters the obstacle that, notwithstanding the 106 tons of hay had long since been delivered, the written contract and bill of sale import, as of a later date, an executory obligation to deliver 500 tons, and to say that an executory contract has in whole or in part been carried out before it was made is a contradiction in terms. Such a contention is tantamount to saying that the contract

did not involve what it purported on its face to involve—an obligation to deliver in futuro 500 tons of hay—but that the obligation that it did involve was to deliver in futuro 500 tons less 106 tons, and that is to directly vary the written contract; and it is equally obnoxious to the language of a bill of sale purporting as of July 25 to convey 500 tons of "baled alfalfa hay now stored in barns located on lots 91 and 211 and 311 Fourth Extension Colony" to assert that, if it conveyed anything, it was not more than 394 tons of hay there situate, and that it should be read as meaning that 106 tons of the hay affected by it had been delivered from somewhere else at some time in the past. That no such showing is competent is well illustrated by such cases as Third Street Improvement Company v. McLelland, 23 Cal. App. 369, 137 P. 1089, cited in behalf of appellant, where, after a building had been completed, an account was stated in writing between the owner and the contractors as to the sums remaining due under the contract, and, in the absence of any pleading of mistake, the trial court was held to have acted correctly in striking out evidence that had found its way into the record purporting to show that $500, constituting part of the sum recognized as due in the account stated, had been paid before the account was struck. The appellate court (page 371 of 23 Cal. App., 137 P. 1089, 1090) said that "the moment it appeared that the parties had stated their account in writing, a presumption arose that the payment of the $500 made prior thereto, together with all previous oral negotiations, were merged in the written agreement." What arose might, in our opinion, have been characterized as more than a presumption. It was, in the absence of a pleading of fraud or mistake, the inescapable legal consequence of the account stated. Respondent, indeed, claims that these principles have no application to the case at bar because the circumstance that Martin resold the hay created a new relation, and appellant is a stranger to the contract between respondent and Martin, and that "strangers are at liberty to show that the written instrument does not disclose the true and full relations between the parties." The point is not to be taken seriously. The inhibition of section 1856 of the Code of Civil Procedure, of any attempt to vary a writing by extrinsic evidence of prior dealings, expressly applies, not only as between the parties, but also as between them and their "successors in interest." Since, even as between the original parties, the provisions of section 1625 of the Civil Code and section 1856 of the Code of Civil Procedure would preclude respondent from undertaking to show that the 106 tons of hay delivered before the written contract and bill of sale were made ought to be credited on the deliveries therein provided for, it is manifestly unnecessary, as to that 106 tons, for appellant to rely on any estoppel of respondent to assert the right to such a credit, and we need therefore consider what is said in the briefs about an estoppel only with reference to the remaining features of the case about to be discussed.

[6-8] It has been seen that for the hay described in the writings referred to respondent has in fact been paid only $4,070.58. That would, at the agreed price of $11 per ton, pay for only 370 tons. If, therefore, respondent is only obligated to deliver the hay that he has actually been paid for, it being admitted that he actually delivered 132 tons under the contract, the extent of his obligation to make further deliveries without further payment would be limited to 238 tons, whereas, at appellant's behest, the sheriff took from him and delivered to appellant 350 tons. We must determine, therefore, whether respondent is entitled to so much of the hay awarded to him by the judgment (or, if it cannot be redelivered, to its value) as is measured by the difference between 350 tons and 238 tons; that is, 112 tons. The bill of sale dated as of July 25 purports, indeed, to acknowledge receipt by respondent, Herman, of the whole $5,500 necessary to pay for the entire 500 tons of hay. But the written contract between the parties purporting on its face to be executed "in conjunction with Bill of Sale made on this day" acknowledges, as made, only a part payment of $1, provides for an advance of $3 per ton to be made as soon as "all papers are signed," and provides for the balance "to be paid when hay is unloaded in good order." Since, moreover, the contract provides in terms that it is "in conjunction" with the bill of sale, it must be so considered, but on the question of payment they contradict each other in terms, and, since recitals in writings are not conclusive on the question of consideration (Code Civ. Proc. § 1962, subd. 2), it was, unless some estoppel forbade it, competent by evidence extrinsic to the writings to show what had been actually paid. Such evidence having in fact been received, and the actual amount paid to respondent being shown to have been only $4,070.58, it is now claimed in his behalf that, notwithstanding the language of the bill of sale, the fair construction of it and the contract, when read in conjunction with each other and in the light of the surrounding circumstances, is that the

parties did not intend the title to pass, and that in fact title never did pass to Martin to the whole 500 tons of hay nor to any hay except as Martin from time to time ordered deliveries to be made and paid for them, and therefore that, except to the extent that payment has been made, appellant never became entitled to any hay from respondent. The trial court's findings upheld these contentions. It is doubtless true that, unless the title to the hay had passed to Martin, that is, if the transaction between respondent Herman and himself could be treated as in the nature of a conditional sales contract, respondent would be under no obligation to deliver any hay for which he was not paid. Much space is devoted in the briefs to the question whether the court's finding that the title to hay neither delivered nor paid for remained in respondent can be upheld, and it is apparently assumed by respondent's counsel and asserted in the reply brief for appellant that the test of appellant's right to any hay for which respondent has not been paid is "whether or not the documents transferred title from respondent to Martin and whether, assuming they did not, respondent is entitled to contend otherwise." But we do not agree that this is the test at all, and consider it immaterial to the rights of the parties whether the trial court was correct in this portion of its findings or not. At the time the sale to Martin was made, section 3049 of the Civil Code (since repealed) was in force, reading as follows: "One who sells personal property has a special lien thereon, dependent on possession, for its price, if it is in his possession when the price becomes payable, and may enforce his lien in like manner as if the property was pledged to him for the price."

It had been expressly held in Eads v. Kessler, 121 Cal. 244, 53 P. 656, that under this enactment the personal property on which the seller retained a lien was not personal property as to which the seller retained the title, since as to that, having the title, he needed no lien, but personal property to which he had already parted with the title but of which he retained the possession. The court in that case says (page 246 of 121 Cal., 53 P. 656): "But that section (3049) contains nothing which changes the common-law rule upon the subject. It was a mere statement, in a convenient form, of what the common law is. * * * And the common law is that a lien such as is contended for in the case at bar exists only under a complete sale which passes the title to the property."

It follows that respondent retained a lien on any part of the hay for which he had not in fact been paid, and that that lien must prevail unless by some application of the doctrine of estoppel he is not permitted to rely on it, but we cannot see that under the facts of this case there can be any such estoppel. Appellant, when he acquired his chattel mortgage, knew that respondent was still in possession of the hay, and he is charged with knowing the rights with which respondent was clothed under the law by reason of such retained possession. It is indeed claimed that respondent's daughter, as his representative, visited appellant's office in connection with respondent's chattel mortgage to the bank and familiarized herself with appellant's arrangements to pay off that mortgage, and that her knowledge of these arrangements must be imputed to her father. It is doubtful whether the evidence would support such a contention but in any event the amount appellant paid in discharging the mortgage was, as we saw, only $3,070.58, which would, at $11 per ton, pay for only a fraction over 279 tons of hay, and, even if respondent were charged by reason of information believed to have been imparted to his daughter with notice of that payment, such notice could hardly estop him from denying appellant's right to as much of the hay as it now claims.

Our conclusion is that appellant became entitled to the hay for which respondent was actually paid, that is, 370 tons, as against which respondent is entitled to credit for 132 tons delivered by him after the making of the bill of sale and prior to the seizure by the sheriff, leaving the appellant entitled to retain 238 tons of the hay so seized and delivered to it, and that the judgment should be so modified as to provide for the return to respondent of only the residue of 112 tons of the hay seized by the sheriff, or, in case it cannot be redelivered, for its value stipulated to be $11 per ton, making $1,232, together with his costs in the superior court, instead of the 218 tons or the alternative of $2,398 and costs awarded by the trial court.

The judgment of the trial court, is therefore so modified, and as modified is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

139 Cal.App. 355

WATERBURY v. ELYSIAN SPRING WATER CO. et al.

Civ. 8871.

District Court of Appeal, Second District, Division 2, California.

June 20, 1934.

1. Death ⇐104(5).

In action for death of minor child, where only damages pleaded were loss of society and comfort of deceased, instruction that plaintiff could recover for loss of support *held* not error, since such recovery could be had under general allegation of damages.

2. Death ⇐104(5).

In action for death, instruction that monetary loss to parent was not confined to period of minority of child, as child had legal obligations to support poor parent, *held* not erroneous as informing jury that plaintiff was poor person or as permitting jury to speculate whether plaintiff would be poor person after child reached majority (Civ. Code, § 206).

3. Death ⇐104(5).

In action by mother for death of child, instruction that she could recover probable earnings of child which would have been accumulated and given to mother, considering child's age, ability, health, habits of industry, and probable length of life, *held* proper (Code Civ. Proc. § 377).

4. Negligence ⇐85(2).

Contributory negligence of child is determined in view of its age and capacity.

5. Appeal and error ⇐216(2).

Appellants who did not offer additional instructions to supplement instruction on contributory negligence could not complain that instruction given was not sufficiently explicit.

6. Trial ⇐133(6).

Where witness admitted soliciting personal injury cases for claims bureau, questioning witness as to whether bureau had been virtually placed out of commission by state bar for ambulance chasing *held* not misconduct where court struck question and answer thereto and admonished jury to disregard them.

7. Automobiles ⇐245(8).

Truck driver's negligence in not seeing boy leaning over to pick up object in front of truck and in not realizing that boy was unaware of approach of truck *held* for jury.

8. Automobiles ⇐226(2).

Negligence of boy unaware of approaching truck in stooping over to pick up object before truck *held* not to have contributed proximately to injuries sustained when run over by truck.

9. Automobiles ⇐162(1).

Motorist must operate motor vehicle within prescribed limits of speed and be alert to observe other vehicles and pedestrians on highway, and be attentive to safety of children observed to be playing in or near street.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Action by Dollie Waterbury against the Elysian Spring Water Company and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Lasher B. Gallagher, of Los Angeles, for appellants.

Edwards & Taylor, of Los Angeles, for respondent.

SCOTT, Justice pro tem.

This is an action by the mother, being the sole heir at law, of a minor child, Harmon Little, to recover damages for the death of said child which is alleged to have been caused by the negligence of defendants. The jury gave a verdict in favor of plaintiff in the sum of $5,500, and a motion for new trial was denied. Defendants appeal.

The evidence showed that the deceased was in the street at about 3:45 p. m. on February 8, 1932, when he was struck by a truck operated by defendant Rodgers, an employee of his codefendant, Elysian Spring Water Company, and that he died the same day. At the time of his death he was eleven years of age. The accident occurred on Court street in the city of Los Angeles, at a point several yards west of its intersection with Hope street.

The points made for reversal are set out in appellants' brief as follows: (1) Errors in instructions; (2) prejudicial misconduct of plaintiff's counsel; (3) insufficient evidence; (4) contributory negligence of deceased as a matter of law.

[1, 2] Appellants complain of the following language in an instruction embraced within the court's charge to the jury: "You are not confined, however, in your estimate of the monetary loss to the parent to the period of minority of the child, for the relation of parent and child, of course, does not terminate

when the child reaches its majority, and thereafter there remain certain legal obligations of support that are recognized in the laws and are enforceable by appropriate legal proceedings. For it is the duty of the father and mother, and the children of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability. You have a right to take into consideration the probable length of life of the parent and the probability, if such you find from the evidence, that the child even after its majority might do that which the law did not require, namely, aid in the support of the parent." The specific criticism of the foregoing language as an instruction to the jury is: (1) That the instruction in so many words informs the jury that the plaintiff is a poor person; (2) it permitted the jury to award damages for the loss of support, although the only elements of damage claimed in the complaint were society and comfort; and (3) it permitted the jury to speculate and surmise as to whether the plaintiff would, after the child reached its majority, be a poor person and unable to maintain herself by work.

The portion complained of as informing the jury that plaintiff is a poor person, and which merely states the substance of section 206 of the Civil Code, cannot be said to have that effect. The case of Green v. Southern Pacific Co., 122 Cal. 564, 55 P. 577, cited by appellant, is authority for the exclusion of evidence as to plaintiff's financial condition, but no such evidence was offered or admitted here. The plaintiff's allegation "that by reason of the death of the said Harmon Little, a minor, plaintiff herein has been deprived of his love, society and comfort to her damage in the sum of $15,000.00," was sufficient basis on which to recover for loss of support. "It was not necessary to specifically allege the loss of society, comfort, protection, or services. Evidence could be given of the facts relating thereto, and allowance could be made therefor under the general allegation of damages." Bond v. United Railroads, 159 Cal. 270, 286, 113 P. 366, 373, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50. The question whether plaintiff would be a poor person after the child had attained his majority is merely one of the circumstances concerning which the jury was called upon to exercise its judgment under the evidence. The instruction as given was approved by the court in Wong Kit v. Crescent Creamery Co., 87 Cal. App. 563, 579, 262 P. 481, and was properly given in this case.

[3] The trial court instructed the jury: "If your verdict shall be for the plaintiff, such damages may be given by you as, under all the circumstances of the case, may be just; and in determining the amount of such damages you have the right to take into consideration the pecuniary loss, if any, suffered by the plaintiff Dollie Waterbury, mother of Harmon Charles Little, resulting from the death of said Harmon Charles Little. The loss which the plaintiff is entitled to recover in such a case as this is what the deceased would have probably earned and accumulated by his labor in his business or calling during the residue of his life and which would have gone to the benefit of his mother, taking into consideration his age, health, habits of industry, ability and disposition to labor and the probability of his length of life." This instruction correctly states the law with reference to the measure of damages, and was properly given under the evidence and in connection with other instructions. Code Civ. Proc. § 377; McKeever v. Market St. Ry. Co., 59 Cal. 294.

[4, 5] The jury was further instructed: "The question as to whether or not the deceased, Harmon Charles Little, was guilty of negligence is one of the facts to be determined by the jury from all the evidence in the case, taking into consideration the age and capacity of the deceased, and all the other facts and circumstances appearing in the evidence. You are further instructed that the law only requires of a child the care and prudence equal to the child's capacity." Appellants contend that this instruction is an incorrect statement of the law relating to the duty of care required by children. It is, however, but a condensed statement of the law as announced in Merryman v. Chicago, etc., R. Co., 85 Iowa, 635, 52 N. W. 545, 546, and quoted with approval in Bolar v. Maxwell Hardware Co., 205 Cal. 396, 401, 271 P. 97, 60 A. L. R. 429, as follows: "The law imposes upon minors the duty of giving such attention to their surroundings and care to avoid danger as may fairly and reasonably be expected from persons of their age and capacity." If the instruction was not sufficiently explicit to satisfy appellants, it was incumbent upon them to offer additional instructions to supplement it, and, having failed to do so, they cannot now complain. Peluso v. City Taxi Co., 41 Cal. App. 297, 182 P. 808.

With reference to the remaining instructions assailed by appellants, it would require

a strained and unreasonable construction of them, in the light of the court's entire charge, to say that they had misled the jury on any element of law involved in the case.

[6] Complaint is made of alleged misconduct of plaintiff's counsel. A defense witness, Shiffman, was called by defendants solely to impeach the testimony of a witness for plaintiff. Shiffman on cross-examination testified without objection that he and his brother worked for the West Coast Claims Bureau as investigator and solicitor respectively, and was asked, "If you or your brother heard of someone sustaining a personal injury or heard of a boy getting killed, or a person getting killed, you immediately went out to their home and solicited that case, is that true?" To this the witness replied: "Well, that isn't quite true but it is approximately the idea." Plaintiff's counsel then asked: "In other words, the West Coast Claims Bureau is one of these companies that The State Bar has virtually placed out of commission for ambulance chasing?" to which the witness responded, "That isn't true." Defendants assigned the asking of the last question as misconduct, and moved for a mistrial. The court promptly ordered the question and answer stricken from the record, instructed the jury to disregard both, and at the conclusion of the trial instructed them that they must not consider for any purpose evidence stricken out. It was probably distasteful to the witness Shiffman and to defendants to have the former's occupation described by a colloquial expression to which opprobrium has rightly attached. Without objection, however, he had admitted in effect that he was thus engaged, and it does not appear that any prejudice could have resulted in view of the prompt ruling of the court.

[7-9] Appellants' remaining contentions, that evidence of negligence of defendants was lacking and that deceased was guilty of contributory negligence as a matter of law cannot be sustained.

Defendant Rodgers was driving the bottled water truck of his employer west on Court street. The weather was misty and it started to rain. At the corner of Hope street he stopped the truck and got a rag with which he wiped the windshield. He then proceeded west on Court street in second gear, at 4 to 5 miles per hour; the right side of the truck being about a foot and a half out from the cars parked at the curb. He saw some boys skating around a pool of water in the street, but did not see deceased and did not sound his horn. When he had proceeded 150 feet from the intersection, he heard a horn sound to his rear, stopped his car within 3 feet, alighted, and went back. He found the boy lying in the street 75 feet to the rear between the tracks which the truck had made. The boy had been in the street a short distance from the curb, stooped over as though picking up something, and was facing the center of the street when the bumper of the truck struck him and the right front wheel passed over him. Some other testimony was adduced at the trial, but the foregoing sets out the matters concerning which there is no substantial conflict and which were impliedly found by the jury to be true.

The jury had evidence from which it could determine that by the exercise of ordinary care defendant Rodgers should have seen deceased and realized that the latter was unaware of the approach of the truck, and his failure to do so placed upon him the whole blame for the accident. Whatever negligence deceased may have been guilty of cannot be said to have contributed proximately to his injury and death. Scandalis v. Jenny, 132 Cal. App. 307, 22 P.(2d) 545. The law imposes upon drivers of motor vehicles the duty, not alone of operating their machines within prescribed limits of speed, but also of using due caution and circumspection, being watchful and alert at all times to observe the presence on the highway of other vehicles and pedestrians. This duty requires attention to the safety of children when it is observed by a driver that they are playing in or near a street. If Rodgers had exercised the degree of care which the law demands, he would have seen the boy and could have averted the tragedy.

Judgment affirmed.

We concur: STEPHENS, P. J.; DESMOND, J.

BANK OF AMERICA OF CALIFORNIA v. CITY OF GLENDALE.*

Civ. 8250.

District Court of Appeal, Second District, Division 2, California.

June 26, 1934.

Rehearing Granted July 19, 1934.

1. Eminent domain ⇐153.

Right to compensation awarded in eminent domain proceedings is a personal one, which does not run with land, and does not pass to a vendee of the land after the right accrues, in the absence of an express agreement to the contrary.

2. Eminent domain ⇐153.

Where the right to compensation awarded in eminent domain proceedings accrues after a conveyance, vendee or optionee is entitled to compensation for the damage he has suffered.

3. Eminent domain ⇐167(1).

In proceedings by city under the Street Opening Act, general provisions of the Code relating to eminent domain do not apply, where they are contrary to, or inconsistent with, such act (St. 1903, p. 376, as amended; Code Civ. Proc. §§ 1251, 1255a).

4. Eminent domain ⇐153.

Where right to compensation awarded by interlocutory judgment to owner for taking of part of lots under Street Opening Act did not accrue until owner's immediate grantee of lots, and assignee, under separate unrecorded instrument, of owner's interest in such award, had parted with title, city properly allowed subsequent grantee to offset assessment against lots by amount of judgment (St. 1903, p. 385, and p. 379, § 14).

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Bank of America of California against the City of Glendale. From a judgment for plaintiff, defendant appeals.

Reversed, with directions.

Bernard Brennan, Aubrey N. Irwin, and A. L. Lawson, all of Glendale, for appellant.

Freston & Files, of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

A proceeding was commenced by defendant city under the Street Opening Act of 1903 (Stats. 1903, p. 376, as amended) to condemn for street purposes ten feet on the front of certain lots owned by one Khodigian. November 1, 1926, an interlocutory judgment was entered in favor of Khodigian for the sum of $2,937.20. December 14, 1926, he deeded said lots to one Brown, and by separate assignment, "not recorded," transferred his interest in said award to Brown, who was an officer of and acting in behalf of the bank to whose rights plaintiff herein succeeded, and who assigned said award to plaintiff's predecessor February 28, 1927. April 29, 1927, plaintiff's predecessor filed its petition in said condemnation suit praying that it be substituted as a party defendant in the place of Khodigian and that the award to him be paid to such bank. Duplicate originals of said assignment were filed with said petition, and copies of the petition and assignment were served on the city attorney of Glendale. Such petition was never heard or considered by the court. By mesne conveyances title to said lots was finally vested in one Jewett, May 26, 1927. All of such deeds included the portion sought to be condemned for street purposes without any exception thereof, but each conveyance was "subject to conditions, restrictions, reservations, rights, rights of way and easements of record." In due time an assessment was levied by the city against the portions of the lots not sought to be taken under the provisions of the act, amounting to $3,202.03. Jewett, who owned the property at the time and "had no notice or knowledge" of the assignment of the award "nor of any agreement that he should not be entitled to the award except such as might be implied by law," obtained from Khodigian a "satisfaction of judgment in duplicate for the aforementioned award, together with a written demand to offset said assessment by the amount" thereof. The city's street superintendent complied with such demand for offset, and Jewett paid the difference in cash, whereupon said street superintendent filed a duplicate satisfaction of judgment and demand with the clerk of the superior court. The superintendent had no knowledge of said assignment prior to the time the assessment was paid and satisfied, nor any notice except "such as might be implied by law." April 18, 1928, final judgment was made and entered in said condemnation suit confirming in all respects the interlocutory judgment as to said lots and condemning said frontage for street purposes. Defendant did not enter into possession of the property until after said final judgment. A claim was filed by plaintiff's predecessor with defendant for the amount of the award, which was denied.

The facts above mentioned were stipulated

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 50 P.2d 1035.

and judgment was entered in favor of plaintiff for said sum, with interest from the date the award was offset and paid, from which judgment defendant has appealed.

The principal question involved is whether under the stipulated facts the assignment of the award after entry of the interlocutory judgment carried the right to it as against subsequent purchasers of the property under deeds not expressly reserving such right and without notice of any claim of such right.

[1-3] The very late case of McDaniels v. Dickey (Cal. Sup.) 25 P.(2d) 404, 405, restates the law applicable here in the following words: "The right to compensation is a personal one which does not run with the land, and does not pass to a vendee of the land *after the right accrues*, in the absence of an express agreement to that effect. *Where the right accrues after a conveyance, a vendee or optionee is entitled to compensation for the damage he has suffered.*" (Italics ours.) The question to be determined here is the same as in that case, viz., whether the *right* to the award *accrued* prior to the deed to Jewett. The conveyance in such case was made more than thirty days after the entry of the interlocutory judgment. The Supreme Court there, following the case of Vallejo, etc., R. R. Co. v. Reed Orchard Co., 177 Cal. 249, 251, 170 P. 426 (which it is to be noted was a proceeding in eminent domain under sections 1237–1264 of the Code of Civil Procedure), determined that "the right to compensation accrued to respondents prior to their sale of the property to the appellant (regardless of whether the accrual actually occurred at the entry of the interlocutory judgment or upon the expiration of the thirty days therefrom, during which period, under section 1255a of the Code of Civil Procedure, the condemnor would have the right to abandon the proceedings)." The opinion does not show under what act the proceedings involved there were taken, but we must assume that it was some act to which sections 1255a and 1251, Code of Civil Procedure, were applicable. That the general provisions of the Code relating to eminent domain do not apply where the Street Opening Act of 1903 has contrary or inconsistent provisions is well settled. City of Los Angeles v. Agardy (Cal. Sup.) 33 P.(2d) 834; City of Los Angeles v. Abbott, 217 Cal. 187, 17 P.(2d) 993; Frank v. Maguire, 201 Cal. 414, 257 P. 515.

[4] Turning to the act involved here, we find that section 31 thereof (St. 1903, p. 385) provides that awards allowed under the act shall be paid when there is sufficient money in the special assessment fund to pay them, and section 14 (St. 1903, p. 379, § 14), that the city council may "at any time prior to the payment of the compensation awarded the defendants, abandon the proceedings, by ordinance, and cause the said action to be dismissed, without prejudice." Under the principle of law laid down in the case of McDaniels v. Dickey, supra, it would seem that under such act and the facts of this case no *right* to the award could possibly have arisen that would separate it from the land until long after plaintiff's predecessor had parted with the title to the property without reserving the same to itself, if and when made.

Considering the deeds of conveyance and the fact that plaintiff's predecessor, prior to its conveyance, abandoned its attempt to be substituted as plaintiff in the case and to have the award paid to it, and the fact that it obtained no greater right by the separate assignment of the award than it had under Khodigian's deed, and in view of the further fact that its *right* to the award had not yet accrued, we fail to see how such attempted substitution could constitute notice to any one of a claim that the award had been separated from the land itself, against which special benefits would be assessed to pay the cost of condemnation. Nor does respondent make such a claim, resting as it does on the proposition that its right to the award was so separated by the interlocutory judgment itself and so became a personal right instead of one pertinent to the land. In our opinion, there is no merit in such claim.

Undoubtedly, if deposit of security had been made and possession taken at the commencement of the proceedings, upon the entry of the interlocutory judgment, the right to the award would then have accrued and the situation would have been different, and the separate assignment would then have been necessary to take the right of Khodigian.

Judgment reversed, with directions to the trial court to enter judgment in favor of defendant.

We concur: STEPHENS, P. J.; DESMOND, J.

MALLERY v. CHAPMAN et al.

Civ. 7948.

District Court of Appeal, Second District, Division 1, California.

June 30, 1934.

Hearing Denied by Supreme Court Aug. 29, 1934.

1. Mines and minerals ⇐74.

Assignment of oil lease whereby assignee agreed, if drilling were not commenced within eighteen months from date of lease, to pay assignor monthly rental until drilling was commenced, *held*, where time for drilling had been legally extended, and assignment had contemplated extensions, to entitle assignor to rental until date lease was canceled, where no drilling had been commenced, although this was more than thirty months from date of lease and lease had originally provided that it was to be void if drilling were not commenced within thirty months.

2. Mines and minerals ⇐74.

Assignor's right to rents under assignment of oil lease whereby assignee agreed to pay assignor monthly rental of $5 per acre until drilling should be commenced, after first deducting from that rental the rental paid lessor, according to terms of lease, *held* not affected by subsequent modification of lease, without consent of assignor, whereby lessor's monthly rental was increased to amount in excess of $5 per acre.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Ellis Mallery against Lillian Agnes Chapman, the Shell Oil Company of California, A. R. Bradley, as trustee for the Shell Oil Company of California, and others. From a judgment for plaintiff, the Shell Oil Company of California and A. R. Bradley, as trustee for the Shell Oil Company of California, appeal.

Affirmed.

O'Melveny, Tuller & Myers and Warren S. Pallette, all of Los Angeles, for appellants.

John W. Loucks, of Los Angeles, for respondent.

HOUSER, Justice.

It appears that the essential facts herein, in substance, are that a man by the name of Specht made an oil lease of certain property of which he was the owner, to one Emery, who thereupon assigned his interest in the lease to Shell Oil Company. The lease was for a period of twenty years; but it contained a provision to the effect that the lessee was to commence the drilling of an oil well upon the premises within eighteen months from the date of the lease; also that "in addition to the foregoing time and considerations, the lessee may have twelve (12) months after said eighteen (18) months period to begin drilling by paying to lessors the sum of one thousand ($1,000.00) dollars quarterly in advance as rental for said lands, but it is understood that if lessee does not begin the drilling of an oil well within thirty (30) months from date hereof, then this lease shall become null and void." Before the time limit of thirty months succeeding the date of the lease had expired, Shell Oil Company procured from the lessor a modification of the lease by which the time within which drilling operations were to be commenced was extended for a considerable period beyond the date when by the terms of the lease as originally drawn the drilling operations should have been commenced. (In that agreement the Shell Company was the party of the first part, Emery, the party of the second part, and Bradley, the party of the third part.) Among the provisions of the assignment of the lease from Emery to Shell Oil Company was the following:

"Should the parties of the first and third parts, or should their successors or assigns, fail to commence drilling operations on the demised premises under said lease within eighteen (18) months from the date of said lease, then they will pay to the party of the second part (Emery), a cash rental equivalent to five dollars ($5.00) per acre per month, until such time as drilling is commenced, as in said lease provided, after first deducting from said five dollars ($5.00) per acre per month, the amount due and payable to the original lessors, according to the terms of said lease."

In addition thereto, the following provision of the assignment is important, to wit: "The parties of the first and third parts stipulate and agree that they will, so long as they or either of them, or their successors in interest, or assigns, hold title to the leasehold estate derived by them from said assignment, well and truly keep and perform each and all of the covenants of said lease to be by them kept and performed, provided, however, that it shall be a sufficient compliance of said covenants, if, in lieu of performance of drilling operations, they procure from the lessors or their successors in interest, proper and legal extensions of time."

After the execution of such assignment, Emery transferred a portion of his rights

thereunder to Mallery, the plaintiff herein. For a period of thirty months following the date of the lease, Shell Oil Company paid to Mallery everything to which he was entitled under the provisions of the respective instruments; but thereafter, and up to the date when the lease was canceled, Shell Oil Company made no payments to Mallery thereunder. Following the cancellation of the lease, Mallery instituted the instant action to recover from Shell Oil Company a judgment for damages to which he claimed he was entitled in the premises. From a judgment rendered in favor of Mallery, the defendant Shell Oil Company and A. R. Bradley, as its trustee, have appealed to this court.

[1] Contrary to the effect of the finding of fact made by the trial court, in substance, appellants contend that by the terms of the assignment the right of Mallery to any payment of rent was limited to the date when the thirty-month period succeeding the date of the lease expired. We think that the conclusion reached by the trial court was correct. The assignment was explicit to the effect that if the drilling of the proposed oil well on the leased premises should not be commenced before a specified date, Shell Oil Company would pay to the assignor of the lease a fixed rental per month "until such time as drilling is commenced, as in said lease provided"; also, following a provision by which Shell Oil Company was obligated to "keep and perform each and all of the covenants of said lease," that it would be a sufficient compliance of said covenants "if, in lieu of performance of drilling operations, they procure from the lessors, or their successors in interest, proper and legal extensions of time." From the evidence presented with reference thereto, it is obvious that in the absence of the commencement of drilling operations by Shell Oil Company, the intention of the parties to the assignment was that as long as the lease remained in force and effect, the rent reserved to the assignor of the lease should be paid to him, or to those rightfully claiming under him.

[2] However, in effect appellant urges the further point that, even though it should be held that in accord with its agreement with the assignor of the lease it was liable to him for the difference between what was paid in rental to the original lessor and the sum of $5 per month per acre, since by subsequent modification of the lease Shell Oil Company agreed to pay to the original lessor a rental in excess of $5 per month per acre, it should follow that plaintiff was not entitled to recover from defendant a judgment for any sum of money whatsoever.

Although it is possible that the terms of the assignment made by the assignor of the lease to Shell Oil Company will admit of a construction such as is suggested by appellant, it also is within the realm of reason that the instrument should be given the construction that was placed thereon by the trial court. Reverting to the pertinent provisions of the assignment of the lease, it becomes apparent that the purpose of the parties to such assignment was to provide for a compensation to be paid to the assignor by the assignee "until such time as drilling is commenced"; and that such monthly compensation so fixed by said parties was the difference between "the amount due and payable to the original lessors, according to the terms of said lease," and the sum of $5 per month. The fact that by a subsequent agreement entered into between the original lessor and Shell Oil Company (and to which agreement the assignor of the lease was not a party), in consideration of an extension of the time by the original lessor within which drilling operations might be commenced, a different rental was also agreed upon, could not in itself divest the assignor of the benefits that theretofore were to accrue to him by the terms of the assignment. His rights were fixed and determined by that instrument; and any subsequent arrangement or understanding by whomsoever entered into, unless also agreed to by the assignor of the lease, could have no effect upon him or his rights in the premises. Since it does not appear that either the assignor of the lease, or the plaintiff herein, ever agreed to any modification of the compensation which either of them was to receive for the assignment of the lease, it follows that the compensation as provided by the assignment was the correct basis for a determination of the amount due to plaintiff.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

139 Cal.App. 161

TUCKER v. HOWE.

Civ. 8987.

District Court of Appeal, First District, Division 1, California.

June 8, 1934.

1. Pleading ⇐428(6).

Objection to introduction of any evidence on ground of insufficiency of complaint should be determined upon same principles as general demurrer, regardless of grounds of special demurrer or defenses set up in answer.

2. Pleading ⇐428(3).

Complaint which did not allege that note sued on was secured *held* sufficient as against objection to introduction of any evidence thereunder, notwithstanding recital in note concerning deed of trust security, and failure of complaint to allege that security had failed or been exhausted (Code Civ. Proc. § 452).

3. Mortgages ⇐218.

Generally, independent action cannot be maintained on note secured by deed of trust until security is exhausted or shown to be valueless (Code Civ. Proc. § 726).

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by May E. Tucker against George W. Howe. From a judgment of dismissal, plaintiff appeals.

Reversed.

See, also, 17 P.(2d) 103, 217 Cal. 23; (Cal. App.) 25 P.(2d) 832.

Vinetz & Gitelson and A. Gitelson, all of Los Angeles, for appellant.

William J. O'Brien, of Los Angeles, for respondent.

PER CURIAM.

This action was brought upon a promissory note which contained the recital, "this is a deed of trust note subject to a first deed of trust note." The complaint contained no averment that the note was secured by a deed of trust or otherwise. A demurrer upon general grounds and upon the special ground that the complaint was uncertain in that the nature of the writing securing the note could not be determined from the complaint was overruled, and defendant answered. The cause came on regularly for trial before a jury and plaintiff was sworn as a witness, whereupon the defendant objected to the introduction of any evidence in the case on the ground that the complaint failed to state facts sufficient to constitute a cause of action. The specific objection appears to have been that the complaint showed that the note was secured, but not that the security had failed or had been exhausted. The objection was sustained and a judgment of dismissal entered. Plaintiff has appealed therefrom.

[1-3] Such motions are to be determined upon the same principles as would be a general demurrer to the complaint upon the same ground, and this regardless of any grounds of special demurrer or any defense set up in the answer. Hibernia Sav. & Loan Society v. Thornton, 117 Cal. 481, 49 P. 573; Elmore v. Tingley, 78 Cal. App. 461, 248 P. 706. Pleadings must be liberally construed (Code Civ. Proc. § 452), and, as held in the cases cited, a complaint upon a promissory note which contains the usual and proper allegations is not rendered insufficient to constitute a cause of action because of a recital in a copy of the note that "this note is secured by a mortgage of even date herewith," as such recital is not equivalent to an averment to that effect. The same rule was applied and the decision first above cited followed and approved in Hayt v. Bentel, 164 Cal. 680, 130 P. 432. It has been held generally that the fact that a note is secured by a mortgage is an affirmative defense. Brophy v. Downey, 26 Mont. 252, 67 P. 312; Bank of Paso Robles v. Blackburn, 2 Cal. App. 146, 83 P. 262. See, also, Thompson v. Koeller, 183 Cal. 476, 191 P. 927. As a general rule there can be but one action for the recovery of any debt or the enforcement of any rights secured by a mortgage (Code Civ. Proc. § 726); and in the absence of unusual circumstances an independent action on a note secured by a deed of trust cannot be maintained unless and until the security is exhausted or shown to be valueless. Bank of Italy, etc., v. Bentley, 217 Cal. 644, 20 P.(2d) 940, 945.

In the case last cited the court, in discussing the similarity between mortgages and deeds of trust, said: "Fundamentally, it cannot be doubted that in both situations the security for an indebtedness is the important and essential thing in the whole transaction. The economic function of the two instruments would seem to be identical."

But two cases have been brought to our attention where questions of pleading in actions involving similar facts have been considered. In Pitzel v. Maier Brewing Co., 20 Cal. App. 737, 130 P. 705, 706, it was alleged as the basis for a counterclaim seeking a per-

sonal judgment that the plaintiff had executed in favor of the defendant a promissory note "secured by a deed of trust, etc." It was held that a general demurrer thereto was properly sustained; it not having been alleged that the security had been exhausted. Brink v. Benton, 131 Cal. App. 275, 21 P.(2d) 455, was an appeal taken on the judgment roll from a judgment in favor of defendant based upon a finding that the note sued upon was secured by a deed of trust. The note recited that it was so secured, but the complaint contained no allegation that the security had been exhausted. The plaintiff, who appealed, contended that since the evidence had not been brought up the appellate court could not conclude from the recital alone that the note was secured. But, as pointed out in the opinion, the finding was conclusive. These cases did not involve the question here presented and are not controlling.

What was said in the Bentley Case as to the similarity between the two forms of security and the identity of their economic functions appears to us to be equally applicable where the question of pleading is involved; and we see no reason for holding that the rule with respect to recitals in the one case should not in principle apply in the other. There is nothing in any of the decisions cited which suggests the contrary, and the rule itself has never been departed from.

We are of the opinion that the complaint sufficiently stated a cause of action and that the dismissal was erroneous.

The judgment is reversed.



139 Cal.App. 350

MITCHELL et al. v. RASEY et al.

Civ. 9333.

District Court of Appeal, First District, Division 2, California.

June 20, 1934.

1. Appeal and error ⇐110.

Order granting defendants new trial after judgment for plaintiffs in equity suit, wherein jury trial is not matter of right, is not appealable (Code Civ. Proc. § 963).

2. New trial ⇐163(2).

Trial court, granting defendants new trial in general terms after judgment for plaintiffs, exhausted its jurisdiction to enter different or further judgment, though notice of motion to vacate judgment and enter judgment for defendants was filed before entry of order granting new trial (Code Civ. Proc. § 662).

3. New trial ⇐163(2).

Order modifying judgment after granting new trial in general terms by order not entered prematurely or inadvertently is without court's jurisdiction and void (Code Civ. Proc. § 662).

4. Judgment ⇐256(1).

Judgment entered for defendant on amended conclusions of law, filed after granting of new trial in general terms and vacation of judgment for plaintiffs on findings of extrinsic fraud in suit to impress trust on property purchased by defendant at probate sale, *held* erroneous as not supported by any findings.

5. Trusts ⇐362.

Fact that reasonableness of appraisement of testator's interest in realty was technically in issue on confirmation of probate sale thereof to one of three devisees *held* no defense to other devisees' suit to impress trust thereon.

6. Judgment ⇐445.

Unsuccessful party, prevented by successful party's extrinsic fraud from fully exhibiting his case, cannot be refused equitable relief because fact on which his defense or claim in original action depended was technically in issue or necessarily decided by court therein and concluded by original judgment beyond reach on collateral inquiry.

7. Appeal and error ⇐80(4).

Judgment directing accounting between parties to suit to impress trust on realty, purchased by defendant at probate sale, *held* not final judgment, binding on parties in absence of appeal, but interlocutory judgment not appealable.

Appeal from Superior Court, Ventura County; Pat R. Parker, Judge.

Suit by Mabel A. Mitchell and another against Esther Peck Rasey and another. From an order, granting defendants a new trial after judgment for plaintiffs and a judgment for named defendant, plaintiffs appeal.

Judgment reversed, and appeal from order granting new trial dismissed.

Robertson, Crawford & Nichols, of Santa Barbara, for appellants.

Sheridan, Orr, Drapeau & Gardner, of Ventura, for respondent.

NOURSE, Presiding Justice.

The plaintiffs sued to impress a trust upon certain property held by the defendant Rasey, as purchaser in a probate sale, and the defendant bank, as administrator.

The defendant Rasey is the widow of C. W. Rasey, deceased. The plaintiffs are daughters of the deceased by a former marriage. Under the terms of his will certain real properties situated in the county of Ventura were left to the widow and the two daughters in equal shares. At all times referred to in the litigation the plaintiffs resided in the state of Massachusetts and the defendant Rasey was a resident of Ventura county and was thoroughly familiar with the business and properties of the estate. One of the holdings of the estate consisted of a one-fourth interest in a large tract of land in the city of Ojai, the remaining portions of which were held by the former associates of the deceased. Sales were pending for subdivisions of this tract, and these parties desired to have the one-fourth interest transferred from the estate to enable them to make quick sales and to avoid proceedings in the probate court. For this purpose an appraisement of the one-fourth interest in the sum of $3,500 was secured, a sale to the widow was effected at that price and confirmed by the probate court. On the trial of this action the trial court found: That this appraisement was not the true or fair market value of the property and was not carefully made; that the reasonable market value of the property was not less than $9,500; that the true and reasonable value of the property was known to the defendant Rasey and was unknown to the plaintiffs; that the plaintiffs relied upon the representations made by defendant Rasey that said appraisement was carefully made, that said property had been fairly and accurately appraised, that said sale price was the fair market value of said property, and that the sale was for the best interest of the estate and the beneficiaries thereof; that the plaintiffs had no information regarding said sale except such as they received from the defendants and their attorneys; and that, solely by reason of and in reliance upon said representations, the said plaintiffs neglected to seek further information concerning the true value thereof.

As conclusions of law from these findings the trial court ordered that the plaintiffs have judgment against the defendant Rasey, declaring her to be a trustee of that portion of the property involved and directing her to account for the proceeds of any portions of the property sold after the interest was acquired by her, and also decreeing that she held an undivided one-fourth interest in the property in trust for the benefit and use of the plaintiffs.

An interlocutory judgment was entered upon these findings on December 29, 1931, and thereafter the defendant Rasey filed an account showing that upon her purchase of the interest for $3,500 she had made a profit to date of $2,912. Upon the hearing of this account the trial court charged her with an additional profit, and on May 18, 1932, entered a final judgment reaffirming its conclusions as to the trust and ordering defendant Rasey to pay specific amounts to the plaintiffs as profits theretofore made on the properties held by her. In both judgments it was ordered that the plaintiffs take nothing against the defendant bank.

On July 20, 1932, pursuant to a motion made by the defendants, the trial court in general terms granted them a new trial upon the ground that the judgment was against law and upon the further ground that the evidence did not support the judgment. From this order the plaintiffs filed a notice of appeal. On September 19, 1932, the trial court, pursuant to a notice theretofore given, entered its order vacating the judgment of May 23, 1932, and directed the defendant to prepare a new judgment and conclusions of law. On the same day amended conclusions of law were filed concluding that the defendant Rasey was owner of all the property involved and that neither of the plaintiffs had any right, title, or interest in or to the same. On September 21st a final judgment was entered based upon these amended conclusions of law, wherein it was decreed that the defendant Rasey was the owner of the property free from any title or interest on the part of plaintiffs. From this judgment the plaintiffs have appealed upon a typewritten record.

[1] The appeal from the order granting a new trial must be dismissed, because, the action being in equity and one where a trial by jury is not a matter of right, an appeal does not lie within the provisions of section 963, Code of Civil Procedure.

[2, 3] The judgment appealed from must be reversed for two reasons: First, the trial court having granted a new trial in general terms, "the action stood in the exact condition in which it was before any trial thereof had been had" (Bloomquist v. Haley, 204 Cal. 258, 261, 268 P. 364), and thereupon the trial court exhausted its jurisdiction to enter any other or further judgment. Holtum v. Greif,

144 Cal. 521, 524, 78 P. 11; Bloomquist v. Haley, supra; Quevedo v. Superior Court, 131 Cal. App. 698, 703, 21 P.(2d) 998. It is immaterial that the notice of motion to vacate and to enter a different judgment was filed before the order granting a new trial was entered, just as it was immaterial in the Bloomquist Case that the judgment entered after a new trial was granted was entered upon stipulation of the parties. Section 662, Code of Civil Procedure, gives definite specifications of the powers of the trial court in proceedings of this kind. It may change or add to the findings, modify the judgment in whole or in part, vacate the judgment in whole or in part, and grant a new trial on all or part of the issues; but when a new trial has been granted in general terms and the order has not been shown to have been entered prematurely or by inadvertence, a subsequent order attempting to modify the judgment previously entered is without the jurisdiction of the court and void.

[4-6] The judgment must be reversed for another reason; it is not supported by any findings. Assuming for the purpose of argument only that the original findings are applicable to the said judgment notwithstanding the order granting a new trial, these findings do not support the judgment entered. The facts found present a typical case of extrinsic fraud within the rule of Bacon v. Bacon, 150 Cal. 477, 491, 89 P. 317; Monk v. Morgan, 49 Cal. App. 154, 163, 192 P. 1042, and supporting cases. In Monk v. Morgan the acts complained of were almost identical to those found to have occurred here; the representations on the part of the administrator and those concerned with the confirmation of the probate sale designed to lull the heirs into a sense of security and to prevent them from making a timely appearance in the probate court to contest the sale. The gravamen of the rule as stated in Bacon v. Bacon, supra, page 491 of 150 Cal., 89 P. 317, lies in the fact that the unsuccessful party has been prevented from exhibiting fully his case so that there has been no real contest at the trial or no fair submission of the controversy, nor is it any defense that the fact of the reasonableness of the appraisement was technically an issue upon the confirmation of the probate sale. As said in the Bacon Case, page 491 of 150 Cal., 89 P. 317, 323: "Where the unsuccessful party has been thus hindered, he is not to be refused relief on the ground that the fact on which his defense or claim in the original action depended, and by which he expects to bring about a different result in the new suit for equitable relief, was technically in issue in the original action or proceeding, or was necessarily decided by the court in that action and concluded by the original judgment beyond reach on collateral inquiry." Caldwell v. Taylor, 218 Cal. 471, 23 P.(2d) 758.

[7] We are not in accord with appellants' argument that the interlocutory judgment was in fact a final judgment and, as such, binding on the parties in the absence of an appeal. That judgment directed an accounting between the parties to the litigation in very much the same manner as was done in Middleton v. Finney, 214 Cal. 523, 6 P.(2d) 938, where the earlier cases were reviewed and the judgment was held to be interlocutory and not appealable.

For these reasons, the judgment is reversed. The appeal from the order granting a new trial is dismissed.

We concur: STURTEVANT, J.; SPENCE, J.



139 Cal.App. 368

LOS ANGELES WAREHOUSE CO. v. LOS ANGELES COUNTY.

Civ. 8246.

District Court of Appeal, Second District, Division 2, California.

June 20, 1934.

1. Counties ⇐140.

Enforcement of criminal law is governmental function, expense of which state imposes on county, and right to do so must be found in legislative sanction.

2. Counties ⇐140.

Measure of power to bind county for expense of enforcing criminal law must be found in legislative authorization.

3. Counties ⇐140.

District attorney's authority to bind county for expense of storing automobiles, seized on criminal charges against owners, being limited to expenses necessarily incurred in detection and prosecution of crimes, ended when prosecutions terminated (Pol. Code, § 4307, subds. 2, 3, as amended).

4. Evidence ⇐65.

Warehouse company, storing automobiles seized on criminal charges against owners,

was charged with knowledge that district attorney's authority to bind county for payment of storage charges was limited to expenses necessarily incurred in detection and prosecution of crimes, and hence ended when prosecutions terminated (Pol. Code, § 4307, subds. 2, 3, as amended).

5. Counties ⇐125.

District attorney having no power to make contract binding county to pay for storage of automobiles, unless used in prosecution of crime, no contract for payment by county of charges for storing automobiles seized on criminal charges against owners could be implied (Pol. Code, § 4307, subds. 2, 3, as amended).

6. Contracts ⇐4.

Law never implies agreement against its own restrictions and prohibitions.

7. Estoppel ⇐62(3).

County, exercising governmental function in storing automobiles seized on criminal charges against owners, *held* not estopped to deny liability for storage charges incurred after termination of prosecutions (Pol. Code, § 4307, subds. 2, 3, as amended).

8. Counties ⇐140.

Warehouse company, being charged with knowledge of limitation on district attorney's power to bind county for payment of charges for storing automobiles seized on criminal charges against owners, was bound to inquire as to necessity of continued storage for prosecution of crimes after bills neared value of cars stored or carry them further at its own risk (Pol. Code, § 4307, subds. 2, 3, as amended).

9. Appeal and error ⇐909(6).

Appellate court, being bound to assume from evidence that proceedings were pending against drivers of automobiles, seized on criminal charges, when placed in storage, and that disposition of such cases was not shown, cannot say on appeal from judgment against county for storage charges that county had no power to incur them (Pol. Code, § 4307, subds. 2, 3, as amended).

10. Corporations ⇐518(1).

Corporation, seeking to avoid its contract for want of power to contract, must plead and prove defense of ultra vires.

11. Counties ⇐140.

Warehouse company *held* entitled to judgment against county for balance due for storage of automobiles, seized on criminal charges against owners, in absence of evidence of disposition of proceedings pending against them when cars were placed in storage.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Action by the Los Angeles Warehouse Company against Los Angeles County. Judgment for plaintiff, and defendant appeals.

Reversed, with directions.

Everett W. Mattoon, Co. Counsel, and Robert A. Cushman, Deputy Co. Counsel, both of Los Angeles, for appellant.

Sherman Anderson, of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

Appeal by defendant from a judgment on an open book account for storage alleged to be due, owing, and unpaid on certain automobiles stored at its request.

It was stipulated that the drivers of the twenty cars involved were arrested at the various times the machines were seiezd, upon charges which included in each instance the transportation of intoxicating liquor in violation of the Wright Act (St. 1921, p. 79), and that the cars were delivered to plaintiff by the arresting officers for storage at an agreed price per month. The evidence shows that the cars were ultimately sold by plaintiff for the unpaid storage charges and that the amounts received less expenses of sale were deducted by it from the total charge; that a claim for the balance was presented to the board of supervisors of Los Angeles county, which allowed it for the sum of $542.47 but rejected it for the balance, suit therefor being brought by plaintiff; that "no agreement was made as to how long the county was to pay the charge for storage of the cars" nor "as to how long the cars should stay in there"; only "that my [Mr. Contreras, chief enforcement officer] signature be on all releases" and "that no one could be released without my signature." Nor can we find evidence of any express contract to pay storage after the termination of criminal proceeding instituted against the drivers of such cars. The registered and legal owners were different on all but a few of such machines.

Many cars other than those here involved were stored by the officers under the same arrangement, but such cars were either released to the driver after acquittal or dismissal of the pending charges on an order signed by Contreras, the driver paying storage charges, or were sold by the county "where the criminal charge resulted in a conviction of transportation or a plea of guilty." On some occasions, where the driver pleaded guilty to

one count, the transportation charge was dismissed and a release order given the driver, who "would present that order to the [plaintiff], pay the charges and get his car back." It also appears that as to fourteen of the cars here involved the amount in which plaintiff's claim was allowed covered the entire time prosecutions were pending against either the drivers or the cars. As to the remaining six, prosecutions were commenced, but the evidence does not show what disposition was made of the cases, if any. All of the seized automobiles were to be used as evidence, if necessary, in prosecutions against the persons possessing them at the time of seizure. Apparently no notice of the termination of any of the charges connected with the twenty cars mentioned was given plaintiff by any one, and the sales were made at the suggestion of defendant's counsel.

It is admitted by appellant that subdivisions 2 and 3 of section 4307 of the Political Code, as amended, afford authority for making such an expense a charge against the county where it is in aid of the detection or prosecution of crime; the material part of such section reading as follows: "The following are county charges: * * * 2. * * * And all other expenses necessarily incurred by him [the district attorney] in the detection of crime and prosecution of criminal cases. * * * 3. The expenses necessarily incurred * * * for other services in relation to criminal proceedings for which no specific compensation is prescribed by law." Appellant urges, however, that, inasmuch as the storage charges for which the judgment was rendered accrued subsequent to the termination of criminal proceedings, no representative of the county had any authority to bind it to pay them.

[1-7] That the enforcement of the criminal law is a governmental function the expense of which the state imposes on the county, and that the right to make such expense a county charge must be found in legislative sanction, hardly needs the citation of authority. We think it is equally fundamental that the measure of the power to bind the county must be found in the legislative authorization. In other words, in the present case the district attorney's authority did not extend beyond expenses necessarily incurred in the detection and prosecution of crime. When such prosecution ended, in our opinion his authority to bind the county ended, and respondent was charged with knowledge of the limits of his authority. Foxen v. City of Santa Barbara, 166 Cal. 77, 82, 134 P. 1142. Being in excess of the power of such officer to make a contract binding the county to pay for the storage of automobiles except where they were to be used in the prosecution of crime, no contract to make such payment other than when stored for such purpose could be implied. Reams v. Cooley, 171 Cal. 150, 153, 152 P. 293, Ann. Cas. 1917A, 1260. "The law never implies an agreement against its own restrictions and prohibitions." Zottman v. City and County of San Francisco, 20 Cal. 96, 106, 81 Am. Dec. 96. Nor can the doctrine of estoppel be invoked in view of the fact that appellant was exercising a governmental function and the act, if it is an act, attempted to be so enforced is in excess of the power of the corporation. Sutro v. Pettit, 74 Cal. 332, 336, 16 P. 7, 5 Am. St. Rep. 442; Warren Bros. Co. v. Boyle, 42 Cal. App. 246, 260, 183 P. 706; Foxen v. City of Santa Barbara, supra, page 82 of 166 Cal., 134 P. 1142. Cases cited in which the doctrine of estoppel was applied seem to be those where authority to make the contract existed and the municipality benefited by it but attempted to defeat being compelled to pay by reason of some technical irregularity not amounting to a lack of power.

[8] Of the fourteen cars sold, five brought $1 each, one $2, one $2.50, one $3, one $4.50, one $8, one $15, one $45, one $38.50, and one $75, and they were stored from approximately fifteen to fifty-seven months, most of the least valuable cars, naturally, for the longest periods. Respondent, being charged with knowledge of the limitation on the power of the district attorney to make such storage a county charge, and of the fact that a contract could not be implied by law where no authority to make an express contract existed, was bound to inquire as to the necessity of continued storage after the accrued bill had neared the value of the car stored, or carry it further at its own risk.

[9-11] As to the remaining six cars, the evidence shows the storage charges amounted to $541, and that they were sold for $38.50, leaving a balance due of $502.50. Inasmuch as we must assume from the evidence that proceedings were pending against the drivers of such cars at the time they were placed in storage and that it does not show any disposition of such cases, we cannot say that such charge was in excess of the power of appellant to incur. The answer sets up the defense of ultra vires. In that case, as did the Supreme Court in Brown v. Board of Education, 103 Cal. 531, at page 534, 37 P. 503, we say that "when a corporation seeks to avoid its own contract

on the ground of its want of power to contract, it must make good its defense of ultra vires by plea and proof." Not having done so by proof, it would seem that respondent is entitled to judgment for the sum of $502.50.

We therefore amend the findings made by the lower court by striking out paragraphs V, VI, and VIII and inserting in lieu thereof the following:

V. That the storage charged on fourteen of said cars was incurred after criminal proceedings against the drivers thereof were terminated, and no contract existed between plaintiff and defendant whereby defendant was obligated to pay such charges, and any such contract would have exceeded the power of said defendant and would have been void.

VI. That as to six of the cars so placed in storage it does not appear that the contract to pay storage thereon was in excess of the power of said corporation, and the amount of storage due thereon is the sum of $502.50.

VIII. That defendant became and is now indebted to the plaintiff in the sum of $502.50, with interest from January 27, 1930, at the rate of 7 per cent. per annum, no part of which has been paid.

Judgment reversed, with directions to the trial court to enter judgment in favor of plaintiff in accordance herewith.

We concur: STEPHENS, P. J.; DESMOND, J.



139 Cal.App. 133

FERGUSON v. LARSON et al.

Civ. 8981.

District Court of Appeal, First District, Division 1, California.

June 7, 1934.

1. Fraudulent conveyances ⇐91.

Debt evidenced by note constituted good and valuable consideration for conveyance from debtor to creditor, though note was barred by statute.

2. Assignments ⇐55.
Sales ⇐19, 20.

Extinguishment of security or pre-existing debt constitutes valuable consideration for sale or assignment.

3. Fraudulent conveyances ⇐115(1), 159(4).

Debtor's preference of one creditor is not rendered void by fact that it hinders or delays other creditors to knowledge of preferred creditor (Civ. Code, §§ 3431, 3432).

4. Fraudulent conveyances ⇐298(1).

Evidence sustained finding that conveyance by debtor to creditors holding note barred by statute was made without intent to defraud other creditors.

Appeal from Superior Court, Los Angeles County; K. Van Zante, Judge.

Action by Morris M. Ferguson against Alfred Larson and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Victor Ford Collins, of Los Angeles, for appellant.

A. L. Rowland, of Pasadena, for respondents.

JAMISON, Justice pro tem.

This is an action to set aside a deed executed by defendant Larson to defendants Hannah S. Youngren and Alma L. Yeager upon the ground that it was executed in fraud of existing creditors. Judgment was rendered for defendants and from this judgment plaintiff appeals. The facts are as follows:

On July 7, 1915, defendant Alfred Larson and his wife, Berdena Larson, were the owners of the land in controversy. On June 20, 1921, Berdena Larson deeded her interest in said land to Alfred Larson. This deed was recorded March 19, 1929. On January 23, 1929, Berdena Larson died. On February 6, 1929, the said Alfred Larson deeded said land to Hannah S. Youngren and Alma L. Yeager. This deed was recorded on March 19, 1929.

On July 1, 1915, Larson and his wife borrowed from said Hannah S. Youngren $500 and gave their promissory note for same. On November 1, 1916, they borrowed from said Youngren $1,800 and gave their joint note due November 1, 1927, to secure which loan they executed their mortgage on said land. On September 1, 1925, Larson gave to said Alma L. Yeager his promissory note for $2,000, payable September 1, 1928, for money loaned to him by her. At the date of the deed executed by Larson to the said Youngren and Yeager, to wit, on February 6, 1929, the debts he owed to said Youngren and Yeager, including interest and $100 he had borrowed from said

Youngren, amounted, after deducting $540 owing to him by said Youngren, to the sum of $6,658.77.

On April 27, 1923, Larson and his wife executed to the First Trust & Savings Bank of Pasadena their note, secured by a mortgage on the land in controversy, for the sum of $7,000. This note and mortgage was renewed on April 3, 1928, for a period of three years, and was duly recorded. Since the date of the execution of the deed from Larson to Youngren and Yeager, Youngren has paid on the principal of this mortgage the sum of $1,200, interest amounting to $990.62, and taxes amounting to $394.81.

On June 21, 1928, Katherine E. Weygandt filed an action against Larson et al. for an accounting from them of the rents and profits received by them from certain lands situate in Placer county, Cal., the record title to which stood in the name of said Larson, but which he held as trustee. In this action appellant was appointed receiver. On June 17, 1929, a judgment was rendered therein in favor of said Weygandt for $308.86; and thereafter, on March 3, 1931, a deficiency judgment was rendered against said Larson for the sum of $9,989.73. The judgment for $308.86 was included in and made a part of said deficiency judgment. The defendant appealed from this judgment, but it was affirmed. See Weygandt v. Larson, 130 Cal. App. 304, 19 P.(2d) 852.

The land in controversy was worth no more than $10,680 according to the evidence produced by respondents. Therefore the equity that Larson conveyed to respondents Youngren and Yeager was of a value less than $5,000.

[1-3] While it is true that the note executed by Larson and wife to Youngren for the $500 was barred by the statute of limitations, yet the moral obligation for its payment still remained. The fact that the debt may be barred by the statute of limitations can affect the remedy only, but in no degree can it release the debtor of the moral duty of paying it. Although the note was barred by said statute it constituted a good and valuable consideration. Hoover v. Wasson, 11 Cal. App. 589, 105 P. 945; Manchester v. Tibbetts, 121 N. Y. 219, 24 N. E. 304, 18 Am. St. Rep. 816; 12 R. C. L. 576. It is well settled in this state that the extinguishment of security or a pre-existing debt constitutes a valuable consideration for the sale or assignment of property. Hart v. Church, 126 Cal. 471, 480, 58 P. 910, 59 P. 296, 77 Am. St. Rep. 195. It is also a well-settled law of this state that in the absence of fraud a debtor may prefer one creditor in preference to another. Section 3431 of the Civil Code provides: "In the absence of fraud every contract of a debtor is valid against all his creditors, existing or subsequent, who have not acquired a lien on the property affected by such contract." Section 3432 of the same Code provides: "A debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another." The statutory right of a debtor to prefer one creditor to another is based upon the principle that in the absence of fraud the owner of property may do with it as he pleases (Heath v. Wilson, 139 Cal. 362, 73 P. 182), nor does the fact that such preference hinders or delays other creditors in the collection of their claims render it void, nor the fact that the preferred creditor had knowledge that such consequence would follow the preference. 12 Cal. Jur. 1010, 1011; In the Matter of Muller & Kennedy, 118 Cal. 432, 50 P. 660; Priest v. Brown, 100 Cal. 626, 35 P. 323.

[4] The trial court found that there was a valuable and sufficient consideration passing to Larson for his conveyance of the land to Youngren and Yeager and that it was made and accepted without intent to defraud appellant or any other creditor of Larson; that it was accepted in good faith by the said grantees in full and complete satisfaction of the indebtedness owing to them and each of them by said Larson, and this finding is supported by the evidence. In the recent case of Reidy v. Collins (Cal. App.) 26 P.(2d) 712, 715, the court said: "Appellant claims that the testimony shows beyond reasonable question that the transaction was fraudulent, and that it was the intention to hinder, delay, and defraud creditors. As is usual in cases of this character there were circumstances from which this conclusion might have been drawn. However, this was not the necessary effect of the evidence, and the court's findings to the contrary are not unsupported. Where this is true the findings cannot be disturbed on appeal (Atkinson v. Western Development Syndicate, 170 Cal. 503, 150 P. 360), even where another finding could have been made on the issue. Ryder v. Bamberger, 172 Cal. 791, 158 P. 753; Johnston v. DeBock, 198 Cal. 177, 244 P. 330. Nor is insolvency conclusive on the question of fraud as a fact. Hasenjeager v. Voth, 91 Cal. App. 394, 267 P. 146."

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

PACIFIC STATES SAVINGS & LOAN CO. v. STROBECK.

Civ. 1139.

District Court of Appeal, Fourth District California.

June 26, 1934.

Hearing Denied by Supreme Court Aug. 23, 1934.

1. Chattel mortgages ⇐17.

Interest of buyer under conditional sales contract may be made subject of chattel mortgage which will be good except as against seller.

2. Chattel mortgages ⇐124.

Rights of mortgagee under chattel mortgage given by buyer on goods purchased under conditional sales contract become complete on buyer's performance of condition.

3. Chattel mortgages ⇐41.

Instrument in form of assignment or bill of sale, which recited that it was given as security for note set out verbatim, and was accompanied by affidavit and acknowledged and certified, *held* "chattel mortgage," recordation of which gave constructive notice to public, though instrument failed to state date of execution or residence or occupation of mortgagors and mortgagees (Civ. Code, §§ 2956, 2957, 2973).

[Ed. Note.—For other definitions of "Chattel Mortgage," see Words & Phrases.]

4. Chattel mortgages ⇐283.

Transferee of chattels subject to conditional sales contract and subsequent chattel mortgage *held* not entitled on foreclosure of mortgage to reimbursement for payments made on contract.

5. Subrogation ⇐31(1).

Transferee of chattels subject to conditional sales contract and lien of subsequent mortgage *held* subrogated to right of conditional seller as to amount of final payment on contract, where transferee in return therefor took assignment of seller's title.

6. Estates ⇐10(1).

Merger is largely question of intention, dependent on circumstances, and courts will presume against it when it operates to disadvantage of a party.

"Merger" generally is defined as the absorption of a thing of less importance by a greater whereby the lesser ceases to exist but the greater is not increased, and rights are said to be merged when the same person who is bound to pay is also entitled to receive.

[Ed. Note.—For other definitions of "Merge; Merger," see Words & Phrases.]

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Suit by the Pacific States Savings & Loan Company against G. L. Strobeck and others. From the judgment, plaintiff appeals.

Modified and affirmed.

John L. Mace, of Los Angeles, for appellant.

Philip Storer, Thacher, of El Cajon, and Lester J. Penry, of San Diego, for respondent.

HAINES, Justice pro tem.

The record in this case shows that on February 28, 1929, one Benbough, referred to in respondent's answer as now operating under the name "H. L. Benbough Ltd.," and in the findings as "Benbough Furniture Company," sold to one Todd, under a conditional contract of sale, certain listed furniture and furnishings placed in the premises known as the Todd Apartments at San Diego, Cal., for $10,331.88. There were also placed in the said apartments electric refrigerators and refrigeration units having no connection with the conditional sales contract. Todd, in November of the same year, sold the apartment house property to Charles O. Matthews and Eunice B. Matthews, who financed in part their purchase by a loan in the sum of $38,000, obtained from appellant, Pacific States Savings & Loan Company, to secure the repayment of which they executed three instruments running to Pacific States Auxiliary Corporation as trustee and to appellant as payee, to wit, a deed of trust on the real property with the improvements thereon, constituting the Todd Apartments, a chattel mortgage, in the usual form and with the statutory affidavit of good faith, on the electric refrigerators and refrigeration units, and a third instrument which is in form an assignment or bill of sale of the furniture and furnishings, but which recites that it is given in consideration of the loan and as additional security for the $38,000 promissory note which is thereupon set out therein in full. To the third instrument was appended the affidavit of good faith required by law in the case of chattel mortgages. This third instrument is not formally dated, but the attached affidavit bears even date with those on the mortgage affecting the refrigerators and refrigeration units, to wit, December 2, 1929. Both the chattel mortgage affecting the refrigerators and refrigeration units and the instrument affecting the furniture and furnishings were on that date regularly acknowledged and shortly thereafter recorded in the recorder's office,

where they were copied into the record of chattel mortgages. Benbough knew of the transfers from Todd to the Matthews and consented to them, and he transferred the account on his books to the names of the Matthews.

After the execution of these instruments the Matthews made various payments on account of the conditional sales contract to Benbough, and then transferred both the real and personal property to one Kistner for whom they seem to have been really acting from the outset. After this transfer Kistner made further payments to Benbough on the conditional sales contract. On July 3, 1930, there remained an unpaid balance due Benbough on this contract of $4,932.31, and on that date Kistner, having sold the Todd Apartments, also executed a bill of sale of the furniture and furnishings, but not of the refrigerators or refrigeration units to the purchaser of the apartments, Strobeck Finance Company, a corporation, in which respondent G. L. Strobeck was a stockholder and of which he was the president. The transfers from Kistner to the Strobeck Finance Company were in pursuance of a written contract which recited that the realty was incumbered by the trust deed made to secure appellant's note, but that the furniture and furnishings were unincumbered other than by the balance owing to Benbough. Strobeck acted personally for the Strobeck Finance Company in negotiating this purchase, and, though he then knew that the realty was mortgaged to secure the $38,000 note to appellant, the evidence conflicts as to whether he was at the time actually told that the furniture and furnishings were incumbered by the instrument affecting them executed by the Matthews to appellant. In view of the findings, it must now be assumed that he was not. Benbough consented to the transfer to the Strobeck Finance Company, and changed on his books the account with respect to the conditional sales contract to the name of Strobeck Finance Company. The latter was heavily indebted to Strobeck, and placed considerable property, including the interest so acquired in the conditional sales contract, in some sort of a trust to secure him. Subsequently the Strobeck Finance Company changed its name to Prudential Guaranty Corporation. Under both names it continued the making of payments on the conditional sales contract. While matters were in this condition, Strobeck, apparently for the purpose of assisting the Prudential Guaranty Corporation and protecting his security under the trust that it had constituted on this and other property, by virtue of which he is described in the findings as having then been "mortgagee thereof," paid from his own funds $500 to Benbough on the conditional sales contract; that is, $200 on August 23, 1931, $100 on January 21, 1932, and $200 on March 9, 1932. At some time not definitely fixed in the record, after making at least the first two of these payments, but while a balance still remained owing to Benbough, Strobeck actually learned that appellant, Pacific States Savings & Loan Company, held the instrument affecting the furniture and fixtures, and after that, to wit, on June 16, 1932, having severed his connection with the Prudential Guaranty Corporation, he received from it, still as security for the indebtedness which it owed him, a bill of sale on the furniture and fixtures. On the next day he paid to Benbough $974.79 in lieu of a balance of $1,020.79 then still owing on the conditional sales contract and took from him an assignment of the vendor's rights under that contract.

Default having been made on the $38,000 note after certain payments both of principal and interest had been made thereon, appellant, Pacific States Savings & Loan Company, caused proceedings to be commenced to foreclose the deed of trust upon the real estate and improvements constituting the Todd Apartment property and at the same time filed the present action against respondent Strobeck, the Matthews, and the Prudential Guaranty Company, designated in its complaint by its former name, Strobeck Finance Company, to foreclose the chattel mortgage on the refrigerators and refrigeration units and also to foreclose, as a chattel mortgage, said instrument executed by the Matthews to appellant affecting the furniture and furnishings. In the complaint it was alleged that the value of the realty, that is, the Todd Apartment property, had so far deteriorated as not to be in excess of $20,000, and that appellant proposed to bid that sum or less for it, and that it would be necessary for appellant to resort to what were claimed to be the two chattel mortgages in order to realize the rest of the indebtedness due it. Pending the litigation, the realty was sold at trustee's sale for $21,457.60, resulting in a deficiency on the Matthews' note to appellant in excess of $14,000. The instant action being brought to trial, Strobeck having answered, but the other defendants being in default, judgment was rendered by the trial court that appellant, Pacific States Savings & Loan Company, recover from the Matthews $14,488.37, plus attorney's fees and costs, all of which were adjudged to constitute a lien in appellant's

favor on both the refrigerators and refrigeration units and also on the furniture and furnishings, except as against Strobeck, as to whom appellant's right to a foreclosure as against any of the personal property was by the judgment made conditional on appellant's payment to him within thirty days after its entry of $4,932.31, constituting the aggregate still owing on the conditional sales contract when the Strobeck Finance Company took it over, and treated in the findings as the aggregate of all the payments made on the conditional sales contract either by Strobeck in person or by his immediate predecessor in interest, the Strobeck Finance Company, now known as the Prudential Guaranty Corporation, although, as we saw, the evidence shows that in his final adjustment with Benbough, Strobeck in fact paid him for his remaining interest in the contract somewhat less than the amount then actually due him. It is from this judgment that the appeal before us is taken.

It is conceded that appellant should have been given an unconditional decree of foreclosure as to the refrigerators and refrigeration units upon which it held a duly recorded chattel mortgage of unquestioned validity and which was neither any part of the property involved in the conditional sales contract nor yet, so far as the record before us shows, ever conveyed to either the Strobeck Finance Company or to respondent Strobeck at all.

[1-3] The interest of a purchaser under a conditional contract of sale, though it does not amount to a legal title, may be made the subject of a chattel mortgage which will be good otherwise than as against the vendor. **11 C. J. 428; Chase v. Ingalls, 122 Mass. 381;** Dame v. Hansen & Co., 212 Mass. 124, 98 N. E. 589, 40 L. R. A. (N. S.) 873, Ann. Cas. 1913C, 329; Keepers v. Fleitmann, 213 Mass. 210, 100 N. E. 333; Federal Trust Co. v. Bristol County Street Ry. Co., 222 Mass. 35, 109 N. E. 880, 886. Semble, see Merriman v. Martin, 113 Cal. App. 167, 174, 298 P. 95. The mortgagee's rights become complete on the performance of the condition by the mortgagor. Crompton v. Pratt, 105 Mass. 255. There is, of course, no doubt that, as between the Matthews and appellant, the instrument affecting the furniture and furnishings executed by the former to the latter is good as a chattel mortgage. Civ. Code, § 2973. The question is of its effect as respects respondent. Section 2956 of our Civil Code is as follows:

"A mortgage of personal property may be made in substantially the following form:

"This mortgage, made the ——— day of ———, in the year ———, by A B, of ———, by occupation a ———, mortgagor, to C D, of ———, by occupation a ———, mortgagee, witnesseth:

"That the mortgagor mortgages to the mortgagee (here describe the property), as security for the payment to him of ——— dollars, on (or before) the ——— day of ———, in the year ———, with interest thereon (or, as security for the payment of a note or obligation, describing it, etc.) A B."

The instrument here involved does not strictly follow the statutory language, but is cast in the form of an assignment or bill of sale and is headed "Assignment." It was, however, accompanied, as we saw, by the affidavit required by section 2957 of the Civil Code and was acknowledged, certified, and recorded as contemplated in the case of chattel mortgages by that section. It was held in Harms v. Silva, 91 Cal. 636, 638, 27 P. 1088, 1089, that "section 2956 provides a form with which such mortgage must substantially comply," although, in that case, as against a subsequent incumbrancer who had actual knowledge of its existence, a mortgage which, as appears from a reference to it in the opinion in the late case of Kahriman v. Jones, 203 Cal. 254, 256, 263 P. 537, did not state the due date of the obligation secured by it, was held to substantially comply with the statutory requirements. In Kahriman v. Jones, supra, another mortgage which not only omitted to state such due date, but also omitted to give either the date of the note secured by it or the rate of interest that such note bore, was held insufficient to sustain an action of conversion brought by its holder against a sheriff who had seized the property attempted to be mortgaged, and, after citing Cardenas v. Miller, 108 Cal. 250, 39 P. 783, 41 P. 472, 49 Am. St. Rep. 84; Simpson v. Ferguson, 112 Cal. 180, 40 P. 104, 44 P. 484, 53 Am. St. Rep. 201; Ruggles v. Cannedy, 127 Cal. 290, 53 P. 911, 59 P. 827, 46 L. R. A. 371; Hopper v. Keys, 152 Cal. 488, 493, 92 P. 1017; and Bell v. Sage, 60 Cal. App. 149, 212 P. 404, the court concluded by saying (page 257 of 203 Cal., 263 P. 537, 538), that "we do not feel that the rule of strict compliance, announced by the authorities herein cited, should be further relaxed. That rule has the advantage of certainty in its application, and we think it is necessary to effect the purpose of the statute." It seems to us, however, that, even though full effect be given to this expression, the particular instrument that we have to consider in the case at bar is sufficient substantially to comply with the statutory re-

quirements. Though it purports to be an assignment, any one can ascertain from its face that it is given as security only. Though the date of its execution is not stated, yet it sets out verbatim the note which it secures, thereby giving both the date of the obligation and the date of the maturity thereof, and must evidently have been executed either on the same date with the note or at some time between that date and the time when the affidavit of good faith and the acknowledgment, both of which are dated, were attached to it. In these circumstances the omission of the date of execution does not appear to us material. The instrument does not state the residence or occupation either of the mortgagors or the mortgagee corporation unless, indeed, the occupation of the latter can be sufficiently elicited from its name, and its domicile from the recital that it is organized under the laws of California. But these statements, if made, could have no other purpose than one of identification and we do not think that their omission ought necessarily to be held fatal to the character of the instrument as a mortgage even as to those who were not parties to it. With respect to the provision for the statement of the occupations of the parties in a former statute much more stringent in its terms than the present section 2956, it was said in Ede v. Johnson, 15 Cal. 53, 57: "This requirement of the statute must be regarded as matter of description, intended for the purposes of identification, and not as an indispensable requisite of the mortgage, without which it can have no effect as against third persons." Generally speaking, statutory requirements are substantially complied with when everything prescribed by them which can affect substantial rights has been complied with. We are unable to say that the substantial rights of any one could be prejudiced by such variations from the statutory form as there are in the instrument here involved. We therefore hold that it amounted to a chattel mortgage not only as between the parties to it, but as to others as well, and that its recordation imparted notice of its contents to the world. From what has been said, it follows that the Strobeck Finance Company, subsequently known as the Prudential Guaranty Corporation, and Strobeck himself, must be deemed to have had constructive notice of the existence and contents of the said instrument executed by the Matthews to appellant affecting the furniture and furnishings, from the time of its recordation. The findings do not expressly negative actual knowledge, as well, of the existence and contents of this instrument on the part of Strobeck Finance Company when it acquired Kistner's interest in the property though Kistner contracted to deliver the furniture and furnishings free of anything of the sort, and, as we saw, it is found that Strobeck himself had no such actual knowledge thereof until a subsequent time and the testimony shows that the negotiations for the Strobeck Finance Company were conducted by him.

[4-6] From our conclusion that the instrument under discussion amounted to a chattel mortgage and that its recordation resulted in constructive notice to the public of its contents, it follows that on the present foreclosure Strobeck is not entitled to reimbursement as allowed him by the trial court's judgment for all or any part of the $500 which he paid to Benbough from his own funds on the conditional sales contract while that was held by the Prudential Guaranty Corporation, whether under that name or its former name Strobeck Finance Company, and certainly not entitled to have repaid to him anything which that corporation had disbursed from its own funds in making payments on that contract. With respect to the final $1,020.79 owing to Benbough, the situation is, however, different. Benbough, who could not be prejudiced by appellant's chattel mortgage, had, as vendor under the conditional sales contract, the absolute right to this money as a condition to parting with his legal title and his assignment to Strobeck for which the latter paid $974.79 subrogated Strobeck to this right. Having acquired Benbough's legal title, which was qualified only by the conditional sales contract under which all of appellant's rights were acquired, Strobeck is, so far as appellant is concerned, in precisely the situation that Benbough occupied immediately prior to the assignment of June 17, 1932. The result of his taking this assignment was to unite in him, so far as appellant is concerned, merely the right of the Prudential Guaranty Corporation to complete its purchase, which, when completed, would still be subordinate to appellant's mortgage, with the right up to that time existing in Benbough to retain the legal title if the $1,020.79 were not paid. "Rights are said to be merged," said the former Supreme Court in Strout v. Natoma Water & Mining Co., 9 Cal. 78, 80, quoting Bouvier's Law Dictionary, "when the same person who is bound to pay is also entitled to receive. This is, more properly, called a confusion of rights, or extinguishment." Merger generally is defined in 40 C. J. 649, as the "absorption of a thing of less importance by a greater whereby the lesser ceases to exist but the greater is not

increased." Manifestly, the legal title existing prior to the assignment in Benbough was the greater in the sense of being more perfect, and therefore, if it were necessary to treat a merger as having occurred at all, it would be more logical to hold that Strobeck's previous rights were merged in those acquired on June 17, 1932, from Benbough rather than vice versa. We cannot, therefore, appreciate appellant's claim that this assignment from Benbough to respondent of June 17, 1932, inures to its benefit. However, it is also the law that merger is largely a question of intention and to a great extent depending on the circumstances surrounding each particular case and that the courts will always presume against it whenever it will operate to the disadvantage of a party. 40 C. J. 650. In the possible, but, we fear, remote contingency that, when its sale is permitted, the mortgaged property bring more than is due appellant, it might be of some advantage to Strobeck to treat his rights under his assignment from the Prudential Guaranty Corporation as still existent and unmerged in those derived by him directly from Benbough. In the circumstances we see no legal obstacle to so treating them. To do so, in the situation here presented, can work no diminution of appellant's rights if the instrument held by appellant is, as we hold it to be, good as a chattel mortgage, imparting by its recordation notice of its existence and contents.

It is ordered that the trial court's judgment be so modified that paragraph 3 thereof shall read as follows: "That the foregoing sums be and they are adjudged to be a lien upon the property described in the mortgage mentioned in plaintiff's complaint and made exhibit 'B' thereof prior and superior to any lien, charge, claim, right, title or interest of the defendants or any of them; and that said sums be and they are adjudged also to be a lien on the property described in the mortgage mentioned in the plaintiff's complaint and made exhibit 'A' thereof prior and superior to any lien, charge, claim, right, title or interest of the defendants or any of them excepting only as to the answering defendant G. L. Strobeck, and as to said defendant that said sums be and they hereby are adjudged to be a lien upon said mortgaged property described in said instrument and made exhibit 'A' of the complaint prior and superior to any lien, charge, claim, right, title or interest of the defendant G. L. Strobeck upon the payment to the said defendant G. L. Strobeck of the sum of $1,020.79, and the plaintiff is hereby given a period of thirty days from the date this judgment shall become final to pay said sum."

It is ordered also that the judgment be further modified by inserting after the word "That," being the first word of paragraph 4 thereof, the words "subject to the provisions of paragraph 3 hereof."

The judgment is so modified, and, as modified, is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

CALIFORNIA REPORTER

IN VOLUME

34 PACIFIC REPORTER

SECOND SERIES

1 Cal.(2d) 202

CALIFORNIA TEACHERS' ASS'N et al. v. COLLINS, Registrar of Voters.

S. F. 15192.

Supreme Court of California.

June 30, 1934.

1. Constitutional law ⇐9(2)

Substantial compliance, not doing violence to reasonable construction of technical requirements of Constitution and Political Code as to size of type used in title on first and subsequent pages of initiative petition proposing constitutional amendment, is sufficient (Const. art. 4, § 1, as amended in 1933; Pol. Code, §§ 1197a, 1197b).

2. Constitutional law ⇐9(2)

That short title appearing on top of each page after first page of initiative petition proposing constitutional amendment was printed in 12 point blackface type *held* sufficiently substantial compliance with statute requiring 18 point gothic type (Pol. Code, § 1197b).

3. Constitutional law ⇐9(2)

In initiative petition proposing constitutional amendment, short title at top of second and subsequent pages *held* to comply sufficiently with statute limiting short title to 20 words, since words "Constitutional Amendment" and phrase "Submitted Directly to the Electors" contained in the title could be disregarded as nondescriptive surplusage, and without such phrases number of words was less than twenty (Pol. Code, § 1197b).

In Bank.

Original mandamus proceeding by the California Teachers' Association and others against Charles J. Collins, Registrar of Voters in and for the City and County of San Francisco, State of California. On demurrer to the petition.

Demurrer overruled, and peremptory writ granted.

J. M. Mannon, Jr., Allan P. Matthew, John O. Moran and McCutchen, Olney, Mannon & Greene, all of San Francisco, for petitioners.

John J. O'Toole, City Atty., and Walter A. Dold, Deputy City Atty., both of San Francisco, for respondent.

WASTE, Chief Justice.

Petitioners apply for a peremptory writ of mandate, directed to respondent, ordering him to receive and file a section of an initiative petition which respondent refuses to accept upon the ground that it does not comply with the law, in that the "short title," appearing on the top of each page after the first page of the petition, is not printed in 18 point gothic type, and exceeds 20 words in length. Respondent demurs to the petition.

The pages, after the first, of the petition tendered respondent for filing, contain, across the top, printed in 12 point black face type, the following: "Initiative Constitutional Amendment, Submitted Directly to the Electors, Making State Board of Education Elective; Abolishing Superintendent of Public Instruction, Providing for Director of Education." The Constitution (art. 4, § 1) provides that initiative petitions proposing a law or amendment to the Constitution, to be submitted to the electors, shall have printed across the top (first page) thereof in 12 point black face type the following: "Initiative measure to be submitted directly to the electors." Such legend, in 12 point type, appears on the initiative petition in this case, followed by the title and summary prepared by the Attorney General, as required by section 1197a of the Political Code. The statute (Pol. Code, § 1197b) provides that "across the top of each page after the first page of every initiative * * * petition or section thereof which may be prepared and circulated in accordance with law there shall be printed in eighteen-point gothic type a short title, in not to exceed twenty words, showing the nature of the petition and the subject to which it relates." In this case. the provision of the Constitution appears, from our examination of the first page, to have been correctly complied with. The requirements of the Code section as to the pages "after the first page," a matter on which the Constitution is silent, are not met, in the opinion of the respondent, as to the size of the type and the number of words used.

[1, 2] The requirement of both the Constitution and the statute are intended to and do give information to the electors who are asked to sign the initiative petitions. If that be accomplished in any given case, little more can be asked than that a substantial compliance with the law and the Constitution be had, and that such compliance does no violence to a reasonable construction of the technical requirement of the law. In two instances in the matter of the use of type on initiative petitions, the Constitution requires and permits the use of 12 point type. One instance is noted above; the other pertains to initiative measures to be presented to the Legislature. In the printing business, the

size of type, as we understand it, is measured by a given number of points, there being numbered 72 points to an inch. "Twelve-point" type (the designation used in the Constitution) implies that when set up there will be 6 lines of type to an inch. "Eighteen-point," as used in the statute, supra, implies that there will be 4 lines of type to the inch when set. In actual size there is a difference of but 6/72 of an inch. Only one with very poor eyesight would be unable to read a line printed in 12 point type as readily as one printed in 18 point type. As to the first objection raised by the respondent, we are of the view there has been a sufficiently substantial compliance with the statute to require him to accept and file the petition.

[3] The second objection, the use of more than 20 words in the "short title" appearing on each page after the first page of the petition, presents a more serious question, but one which we believe should be resolved in favor of petitioners in the present instance. At this point, let us say that, in applying to this proceeding "the rule of substantial compliance," we do so with the reservation that such interpretation as we have given must not be relied upon to determine every proceeding of similar nature. The procedure set up by the Constitution and the statute is simple, clearly expressed, and may be exactly followed with little difficulty. "Substantial compliance" may be carried too far, in which case its application may not be relied upon to save carelessly or negligently prepared petitions.

In a recent proceeding in the District Court of Appeal of the Third Appellate District, the court applied the rule of liberal construction to the "short title" on an initiative petition then before it, and held that certain words included therein might "be disregarded as not descriptive for any purpose." Hunt v. Jordan, Secretary of State (June 11, 1934).[1] In the proceeding before us, the Attorney General was able to summarize the title of the proposed measure in 17 words. We are of the view that the omission in the "short title" of the words "Constitutional Amendment" and the phrase "Submitted Directly to the Electors" would detract nothing from its descriptive feature. Therefore, regarding the inclusion of these words and the phrase as surplusage, we are of the view that the mandate of the Legislature has been substantially complied with, and that the purpose of the "short title," which is to prevent the deceiving of electors by the use of misleading pages and titles after the first page, which may strictly comply with the law, has been served. We are more strongly inclined to so hold in view of the fact that the present initiative petition was prepared and is being circulated in good faith, that many thousands of signatures thereto have already been secured, and the time is short within which the large number of required signatures can be again secured.

The demurrer is overruled. Let a peremptory writ of mandate issue as prayed.

We concur: SEAWELL, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; TYLER, Justice pro tem.



1 Cal.(2d) 259

GERTH et al. v. DOMINGUEZ, City Clerk.

S. F. 15145.

Supreme Court of California.

July 3, 1934.

Rehearing Denied Aug. 2, 1934.

1. Schools and school districts ⇐53(5)

In determining whether electors of school district have right to recall members of city school board, School Code governs, and city charter provisions must be interpreted in conformity therewith (School Code).

2. Schools and school districts ⇐53(5)

Members of Los Angeles board of education may be recalled by electors of school district including territory outside city, and therefore signatures of electors residing in district but outside city were proper on recall petition, as were signatures secured by circulators residing in district but outside city (School Code, §§ 2.55, 2.113, 2.114, 2.470, 2.471, 2.472, 2.54, 2.971 as added by St. 1931, p. 2511, § 2).

3. Schools and school districts ⇐53(5)

Names on petition to recall members of city school board should not be considered where precinct numbers were incorrectly designated, but proponents of petition should be given reasonable time for furnishing correct precinct numbers.

In Bank.

Petition for writ of mandate by Otto A. Gerth and others against Robert Dominguez, Clerk of the City of Los Angeles.

Writ issued.

[1] No opinon. By the Court. The writ is granted. Pursuant to stipulation of counsel, it is ordered that the peremptory writ issue forthwith.

Roy C. Linn and Otto A. Gerth, both of Los Angeles, for petitioners.

Ray L. Chesebro, City Atty., Frederick von Schrader and William H. Neal, Asst. City Attys., all of Los Angeles, for respondent.

Ralph G. Lindstrom, Macfarlane, Schaefer, Haun & Mulford, Hulme, Hastings & Bartlett, and Marshall Stimson, all of Los Angeles (Louis W. Myers, of Los Angeles, of counsel), amici curiæ.

PER CURIAM.

This is a petition for a writ of mandate to compel respondent, clerk of the city of Los Angeles, to count in favor of a recall the names of certain electors signed to recall petitions. The parties have stipulated to the facts, and questions of law alone are presented.

Under the provisions of the School Code, the board of education of the city of Los Angeles is the governing body of three school districts, the boundaries of which extend beyond the city. The Los Angeles city school district, for elementary schools, includes the city and several other municipalities, together with some unincorporated territory. The Los Angeles city high school district includes all of the territory of the elementary school district, and additional incorporated cities and unincorporated territory. The Los Angeles city junior college district has the same boundaries as the high school district, and these are about twice the size of the city itself. It is further provided in the School Code that any such annexed territory shall be deemed a part of the city for the purpose of holding a general municipal election at which any member of the board of education is to be elected (section 2.471); that the members of such a city board of education shall be elected at large from the territory within the boundaries of the districts under the jurisdiction of the board (section 2.971, as added by St. 1931, p. 2511, § 2); and that all qualified electors in a school district, "whether residing within or without the boundaries of the incorporated city or town, shall be entitled to vote for members of the board of education at any election held for that purpose" (section 2.55).

Pursuant to these statutory provisions, members of the city board of education were elected by voters throughout the districts on May 5, 1931. On April 2, 1934, petitions were filed seeking the recall of three members of the board. The petitions followed the procedure set forth in the Los Angeles city charter (article 27, § 290 et seq.). A total of 96,567 names were subscribed. A few thousand names were rejected for various irregularities, but the remaining signatures would be ample in number, were it not for the position taken by respondent on the validity of two classes: (1) Those of electors residing in the district but outside the city, and those obtained by circulators who were not residents of the city but were residents of the district; (2) those in which the precinct numbers were incorrectly designated.

[1, 2] The chief question is whether the electors of the district have the right to recall members of the city school board. Respondent relies upon the city charter, which provides that circulators shall be qualified electors of the city (section 290), and that at the recall election the question shall be submitted to the electors of the city. Section 290 (c). Amici curiæ appearing on behalf of respondent contend that there is, under the existing constitutional, statutory, and charter provisions, no procedure at all for the recall of members of the city board of education. They reach this conclusion by pointing out that the charter provisions on recall in terms apply only to the city of Los Angeles, but that to restrict the right of recall to electors of the city would deprive residents of the district outside the city of constitutional rights. Respondent also urges the unfairness of placing the entire expense of conducting the election upon the city.

In our opinion, there is a sufficient statutory basis for the right claimed by petitioners. It is settled in this state that the school system is a matter of general concern, and not a municipal affair. Consequently, the School Code governs, and charter provisions must be interpreted in conformity therewith. See Kennedy v. Miller, 97 Cal. 429, 32 P. 558; Hancock v. Board of Education, 140 Cal. 554, 74 P. 44; Los Angeles City School District v. Longden, 148 Cal. 380, 83 P. 246; Board of Education v. Davidson, 190 Cal. 162, 210 P. 961; Whitmore v. Brown, 207 Cal. 473, 279 P. 447; Esberg v. Badaracco, 202 Cal. 110, 259 P. 730. Since the Legislature has, by express language in the School Code, declared that residents of the district but outside the city may vote at the election of members of the city board, this right is established beyond question. If the charter were construed to deny or abridge it, the charter provisions would be void by reason of conflict with the state law.

The School Code contains no express statement on the right of recall in this situation.

But it does contain sections which, reasonably construed, protect the right. One, to which reference has already been made, provides that the annexed territory "shall be deemed a part of the city for the purpose of holding the general municipal election." Section 2.471. See, also, sections 2.113, 2.114, 2.470, 2.472. Another provides that, in cases where the electors of a school district have voted at a school election under a city charter, under the circumstances present here, "then the electors of such school district shall be deemed to have submitted to be governed in all matters relating to the management of public schools within such school district or high school district as fully and to all intents and purposes as though the electors of such school district or high school district had by their votes elected to be governed by the provisions of such charter." Section 2.54. See, also, section 2.50.

We see no reason why the recall provisions of the Los Angeles charter, applicable to the members of the board of education, may not be deemed a matter relating to the management of the public schools; and, if it is, then the electors of the district residing outside the city have subjected themselves to these provisions, and are entitled to avail themselves of them. This conclusion avoids the extraordinary results which would follow from a failure to give the above-quoted section this broad construction; either a right of recall limited to the electors resident in Los Angeles, an unwarranted and no doubt an unconstitutional discrimination against residents of the district outside the city; or an immunity of such boards of education from any recall. We cannot ascribe to the Legislature the intention to create either of these conditions, and we believe that the manner in which we have resolved the uncertainties is in accord with the general legislative purpose in establishing these peculiar districts governed by city boards of education.

The case of Ackerman v. Moody, 38 Cal. App. 461, 176 P. 696, contains the brief statement that the right to recall members of the board of education of the city of San Diego is, equally with the right to elect them, vested in the city. It does not appear from the opinion that any attempt was made to deny the right to persons in the annexed territory within the district, the sole point at issue being whether the members of the board were subject to recall at all. See Ward v. San Diego School District, 203 Cal. 712, 716, 265 P. 821. The Ackerman Case is not an obstacle to the conclusion we have reached.

It follows that the signatures of electors residing in the district, though outside the city, were proper; and it is equally clear that no valid objection can be made to signatures secured by circulators residing in the district though outside the city.

[3] With respect to the precinct numbers, we think that the action of respondent was justified. The charter requires the numbers, as an aid to checking signatures, and the difficulties involved in searching the alphabetical register of voters to check names having incorrect precinct numbers are numerous. There is no reason why this added expense should be cast upon the city. It is true that in Ley v. Dominguez, 212 Cal. 587, 299 P. 713, we pointed out that the failure to designate correct precinct numbers did not invalidate the signatures. However, the proponents of the petition in that case offered to supply the correct numbers, and were refused permission to do so. In the instant case, respondent called the errors to the attention of the sponsors, and offered them the opportunity to correct them, which they failed to do. This brings the case within the views expressed by us in Mayock v. Kerr, 216 Cal. 171, 13 P.(2d) 717, and, in consonance with that decision, we hold that the names may be considered if and when the correct numbers are furnished by the sponsors of the petition.

It is therefore ordered that a writ of mandate issue requiring the city clerk of the city of Los Angeles to count in favor of the recall all names signed by qualified electors of the Los Angeles city high school district, including both qualified electors of the city and qualified electors of the territory in the district, but outside the boundaries of the city; and to count also in favor of said recall the names of all electors otherwise qualified, appearing on petitions circulated by qualified electors residing in the district, but outside the boundaries of the city; and to permit a reasonable time for the furnishing of correct precinct numbers by the sponsors of the recall for any names with incorrect or no precinct numbers, if requested by such sponsors; and thereafter to certify to the city council of the city of Los Angeles the result of his examination of the sufficiency of the petitions.

1 Cal.(2d) 222

GRAF v. MONTECITO COUNTY WATER DIST.

PAYTON v. SAME.

SANDELL v. SAME.

PADILLA v. SAME.

L. A. 13029.

Supreme Court of California.

July 2, 1934.

Rehearing Denied July 31, 1934.

Master and servant ⇐375(1)

Employees of water district injured on conveyance furnished by employer while on pleasure trip *held* not subject to Compensation Act (St. 1917, p. 831, as amended).

Facts disclosed that employees were neither going to nor returning from work at time of accident, but that they lived at camp site and had been to their abode, changed their clothes, and boarded train for excursion of pleasure wholly aside from duty.

SHENK, J., dissenting.

In Bank.

Appeals from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Actions for damages for personal injuries by George Graf, Curtis Payton, Edward W. Sandell, and Bacilio Padilla against the Montecito County Water District. From judgments of nonsuit, plaintiffs appeal.

Reversed.

See, also, 126 Cal. App. 178, 14 P.(2d) 336.

For prior opinion, see 26 P.(2d) 29.

Butcher & Haines, of Santa Barbara, for appellants George Graf, Curtis Payton, and Edward W. Sandell.

Robertson & Crawford and Maxwell Nichols, all of Santa Barbara, for appellant Bacilio Padilla.

Heaney, Price & Postel, of Santa Barbara, for respondent.

PER CURIAM.

A hearing was granted in these consolidated cases after decision by the District Court of Appeal, Second Appellate District, Division 2. Upon further consideration we are satisfied that said court has correctly determined the issues, and we hereby adopt the following opinion of Mr. Justice Stephens as the opinion of this court:

This is an appeal from a judgment of nonsuit. The appellants have consolidated their cases on appeal. Substantially the facts are as follows: On June 14, 1930, appellants were injured while riding on a railroad owned and operated by the respondent upon respondent's premises; they brought suits for damages for personal injuries, and upon conclusion of their cases in chief respondent upon motion therefor was granted a nonsuit upon the ground that the superior court did not have jurisdiction of the subject-matter of the actions because appellants, at the time they incurred their injuries, were employees of the respondent, and that both appellants and respondent were subject to the provisions of the Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 831 as amended), and that the Industrial Accident Commission of the state of California has sole and exclusive jurisdiction of the claims of appellants. The record shows that appellants as employees of respondent resided at a camp maintained by the respondent near the site of Juncal dam in Santa Barbara county; that said dam was being constructed by respondent at the time of the accident, and appellants' work was in connection with the construction thereof. On the day of the accident, at the customary hour of 4:30 o'clock in the afternoon, appellants ceased work, returned to their homes in the camp, changed their clothing, and made other preparation to go to the city of Santa Barbara over respondent's railroad. They boarded the train, which was called the "Saturday Special," and at 4:50 o'clock in the afternoon the train left the camp with appellants on board. The train had been in operation for approximately a year prior to the accident, its rolling stock consisting of flat cars about three feet wide, and the record shows that, while its primary purpose was to aid in the construction work, it was in operation for one trip every Saturday evening for the purpose of accommodating the employees of the district, their families and invitees, without cost to them, to ride from the camp site to the south portal of what is known as the Doulton tunnel, some four or five miles from the camp, at which place other means of transportation was procured by the passengers to take them on to Santa Barbara. While some of the employees testified that sometimes during the week they walked through the tunnel, the evidence shows that the tunnel was dark, the floor uneven and wet. The appellants testified that some of the trips they made to Santa Barbara were for the purpose of recreation and to secure supplies for their use at the camp, but on the day of the accident they were

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

going to Santa Barbara for the sole purpose of visiting friends and relatives, or to attend a theater.

The issue on this appeal is whether the transportation furnished appellants by respondent was so connected with the employment that injury received by appellants while riding on the train arose out of or was incidental to their employment. Respondent contends that the transportation was furnished appellants as a matter of right, and was an implied term of their contract of employment. The record does not disclose what the exact terms of their employment were; there was no testimony that such transportation was promised the employees as a part of their contract.

Respondent cites many cases in support of its contention that an injury received while going to or coming from work by means of a conveyance furnished by the employer as an incident of the employment and in pursuance of the contract of hire arises out of and in the course of the employment, and is compensable under the Workmen's Compensation, Insurance and Safety Act. But we think the facts of the instant case remove it from any influence of such cases. The injured employees were neither going to nor returning from their work, they lived at the camp site, and had been to their abodes, changed their clothes, and boarded the train for an excursion of pleasure wholly aside from their duties as employees. We cite the following two cases which cover the situation of the instant case and which are clearly and correctly reasoned to a like conclusion with ours: California C. I. Exchange v. Industrial Accident Com., 190 Cal. 433, 213 P. 257, and Hama Hama Logging Co. v. Department of Labor and Industries, 157 Wash. 96, 288 P. 655.

Other contentions made by respondent are inapplicable to the facts of this case.

Judgment reversed.

SHENK, Justice (dissenting).

I dissent. It appeared by both pleading and proof on behalf of the plaintiffs that as a part of the working rules and contracts of employment the defendant water district permitted, and the circumstances of location of work and hours of employment required, the use of the defendant's train as a means of access to and from lodgings provided by the employer. The railroad is not a common carrier and the passage was free of charge. The trial court applied the "premises" rule approved by this court in State Compensation Ins. Fund v. Industrial Accident Com., 194 Cal. 28, 227 P. 168, and numerous other cases to like effect. The judgment has been reversed on the theory of the "going and coming" rule notwithstanding the showing, clear to my mind, that the "premises" rule should apply to the facts appearing in the record.



1 Cal.(2d) 121

LUSITANIAN-AMERICAN DEVELOPMENT CO. v. SEABOARD DAIRY CREDIT CORPORATION et al.

Sac. 4818.

Supreme Court of California.

June 22, 1934.

1. Trover and conversion ⇐40(1)

In action for conversion of cattle, evidence showed that corporation acting as auctioneer participated in execution of agreement respecting auction sale.

2. Appeal and error ⇐1051(1)

In action for conversion of cattle, admitting testimony of auctioneers selling cattle that they were agents of defendant corporation *held* not error, where facts showed active participation of corporation in auction sale as auctioneer and its receipt of share of profits.

3. Sales ⇐480(4)

In action by conditional seller for conversion of cattle, evidence sustained finding that plaintiff did not consent to auction sale of cattle by defendant corporation which acted as auctioneer.

4. Estoppel ⇐52

"Estoppel" arises where party estopped was apprised of facts and intended that his conduct should be acted upon and acted so that party asserting estoppel had right to believe it was so intended, and where such party was ignorant of true facts and relied to his injury upon conduct of party estopped.

[Ed. Note.—For other definitions of "Estoppel," see Words & Phrases.]

5. Estoppel ⇐56

It is essential to "equitable estoppel" that person asserting estoppel shall have done or omitted act, or changed position in reliance upon representations or conduct of person sought to be estopped.

[Ed. Note.—For other definitions of "Estoppel in Pais," see Words & Phrases.]

6. Sales ⇐480(2)

Conditional seller of cattle *held* not estopped to claim damages for conversion from corporation acting as auctioneer, where there was no evidence showing that corporation acted upon any word or conduct of conditional seller's officers.

7. Trover and conversion ⇐10

Where corporation acting as auctioneer exercised dominion and control over cattle and made sale thereof without consent of owner, this amounted to "conversion."

[Ed. Note.—For other definitions of "Conversion," see Words & Phrases.]

8. Trover and conversion ⇐4

Any act of ownership or exercise of dominion over property of another in defiance of his rights is "conversion."

9. Sales ⇐480(4)

In action for conversion of cattle sold at auction sale, evidence supported finding that cattle sold were cattle belonging to plaintiff, the conditional seller thereof.

In Bank.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by the Lusitanian-American Development Company against the Seaboard Dairy Credit Corporation and others. From a judgment for plaintiff, defendant named appeals.

Affirmed.

Walter J. Little, of Los Angeles, A. J. Carlson, of Modesto, and Robert W. Anderson, of Los Angeles, for appellant.

Edmund de Freitas, of Oakland, and C. H. Hogan, of Stockton, for respondent.

PLUMMER, Justice pro tem.

The plaintiff had judgment in this action for the sum of $8,585 against the defendants George W. Smith, Ella Smith, Jacob Kooyman, Peter Kooyman, W. Feinstein, John Kooyman, the Seaboard Dairy Credit Corporation, Ed Haecker and Ord L. Leachman, for and on account of the alleged conversion of a certain herd of cattle. From this judgment, the defendant Seaboard Dairy Credit Corporation appeals.

The record shows that prior to the 15th day of February, 1928, the plaintiff was the owner of certain real estate situate in the county of San Joaquin, and also of a certain herd of cattle then running, being and kept on said real estate. On the 15th day of February, 1928, the plaintiff and the defendants Kooyman entered into a conditional contract of sale for the purchase of real estate, and also of the herd of cattle referred to, consisting at that time of 140 milk cows, 82 heifers, ranging in age from one month to two years, and two bulls two years old, most of the herd being branded "R-X" on the right hip. The contract price for the property covered by the conditional sales contract was the sum of $100,000, of which sum $18,000 was the agreed purchase price of the cattle.

The conditional contract specified that the purchaser should not transfer or sell said property without the written consent of the plaintiff. The Kooymans remained in possession of said property until on or about the 7th day of December, 1929, on which date, with the consent of the plaintiff, the Kooymans transferred their interest in the conditional sales contract to George W. Smith and Ella Smith, his wife, subject, however, to the payments and covenants contained in the conditional contract of sale.

On the 27th day of December, 1929, the Smiths, without the consent of the plaintiff, assigned their interest in said contract, and delivered possession of both the real and personal property described therein to the defendants Otto Prinz and Rose Prinz. Subsequently, and on or about the 27th day of January, 1930, the defendants Prinz sold and transferred their interest in said herd of cattle to the defendant Feinstein. Feinstein was familiar with the ranch and the personal property, and had previously had dealings with the Kooymans, and also with Mr. Nunes, president of the plaintiff corporation. Feinstein purchased the cattle without making any investigation as to the ownership thereof. After the purchase just recited the cattle were left upon the ranch for the purpose of disposing of them at public auction. For this purpose the defendant Feinstein secured the services of the Seaboard Dairy Credit Corporation to act as auctioneer.

On the 3d day of February, 1930, the cattle were sold at public auction at the ranch referred to and covered by the conditional contract of sale. Defendants Haecker and Leachman acted as auctioneers and employees of the defendant Seaboard corporation. After the sale the Seaboard Dairy Credit Corporation paid to the defendant Feinstein the proceeds derived from said auction sale, after having deducted an agreed percentage for commissions in payment of its services in conducting the sale.

The appellant's preliminary statement of

the questions involved upon this appeal are: (1) Whether the plaintiff and respondent knew of the pendency of the sale of the cattle; (2) whether the cattle sold were actually cattle belonging to the plaintiff; and (3) whether the appellant was guilty of acts amounting to conversion.

Elaborating upon these points, it is contended that the evidence is insufficient to support the finding that the plaintiff did not acquiesce in the sale; that the evidence is insufficient to support the finding that appellant sold 101 head of cattle described in the conditional contract referred to herein; also, that the evidence is insufficient to support the finding of conversion of the cattle on the part of the Seaboard Dairy Credit Corporation. For convenience we will reverse the order of the points listed by the appellant, and answer the third objection first.

The record shows, in connection with the testimony of Mr. Harden, who stated that he was the manager of the Seaboard Dairy Credit Corporation, having its offices at Modesto, that an agreement was entered into between W. Feinstein and the Seaboard corporation for the sale of 101 head of dairy cattle and two bulls; the cattle being described as then being one-half mile north of Bethany, which the testimony shows to be the location of the real property described in the agreement.

[1] To show the agency and the active participation of the Seaboard Dairy Credit Corporation in the conversion of the cattle, we quote from the agreement the following:

"Party of the first part to provide an auctioneer and do the advertising and promotion of said sale; unless total proceeds of sale amount to less than $2,000.00 then party of the second part shall pay for advertising. Posting of bills and any local advertising, shall be done by party of the second part. Party of the second part shall be responsible for all representations made by him, as to property offered for sale, and agrees to indemnify the party of the first part and buyers at said sale for any damages sustained by reason of any misrepresentations made by him regarding property sold. Party of the first part assumes no responsibility for any stock sold which is not settled for. Party of the second part agrees that all of said property above mentioned shall be offered for sale at said auction, and also agrees not to dispose of or sell any part of the property herein listed before said auction sale without first obtaining permission from party of the first part, and agrees that if any of said property is so sold, to pay to the party of the first part 7 per cent commission on selling price of same.

"Party of the first part agrees to turn over to party of the second part, proceeds of sale, less the above charges, as soon as checks clear, or not later than twelve days. Party of the first part agrees to give terms to purchasers of cattle at sales which shall be: Sums of $100.00 or under, cash. On sums over $100.00 purchaser may pay all cash, or pay one-third cash and the balance in 9 equal monthly payments. It is understood that the clerking of the sale and handling of the paper is to be done by The Seaboard Dairy Credit Corp.

"Witness the signature of the parties hereto. Seaboard Dairy Auctioneers
"W. Feinstein."

Following the execution of this agreement the defendant Feinstein indorsed on the agreement the following (omitting date): "I hereby authorize Seaboard Dairy Credit (Corporation) to pay to Kooyman and Connors the sum of $2800.00 from my auction sale described on other side of this contract. W. Feinstein."

The record then shows that the manager of the corporation testified that the $2,800 was paid by the Seaboard Dairy Credit Corporation to either Kooyman or Connors. The manager of the Seaboard Dairy Credit Corporation testified further that he made no investigation as to the title of the cattle sold at the auction sale. While testifying that the sale was held at the ranch referred to as belonging to the plaintiff, he did not know who owned the ranch. The record further shows that an employee of the Seaboard Dairy Credit Corporation acted as clerk at the sale.

In relation to the agreement which we have just set out, we quote the following testimony given by Mr. Harden, to wit: "Q. I mean leading up to your auction sale held on or about February 2, 1930, or immediately preceding that auction sale, did you have any business dealings with Mr. Feinstein? A. Mr. Feinstein, Mr. Prinz and Mr. J. Kooyman came into the office, and Mr. Feinstein had purchased from Mr. Prinz so many head of dairy cattle—I forget the exact number—and Mr. Feinstein asked if our auctioneers that were working with us would handle the sale, and said he was going to sell the cows, and wanted us, if there should be any paper, to handle that paper in the sale." We think this testimony sufficiently shows the participation of the appellant in the execution of the agreement which we have set out,

whether the agreement was arranged by Mr. Harden or by the auctioneers.

Mr. Harden further testified that the contract for the auction sale was executed by the auctioneers and Feinstein in his office; that the auctioneers worked on a commission basis.

Plaintiff's Exhibit No. 7 shows a sale of the cattle to the value of $7,547, and in making settlement with Feinstein there was deducted from this sale cattle bid in by Feinstein of the value of $2,275, leaving the sum of $5,272, upon which commissions were calculated at the rate of 7 per cent. interest, amounting to the sum of $369.04. Of this sum $50.70 was deducted on account of advertising and telephone expenses, leaving $318.34, of which the auctioneers received the sum of $159.17 and the Seaboard Dairy Credit Corporation a like sum of $159.17.

[2] In the face of what we have recited, the objection that the court erred in allowing the two auctioneers to testify that they were the agents of the corporation does not seem to us to be well taken, as the facts which we have stated are sufficient to show the active participation of the corporation in the auction sale, and its receipt of its share of the profits of the transaction.

[3] Through the medium of a conversation had between Mr. Smith and Mr. Nunes, the president of the plaintiff corporation, the appellant sought in the trial court and also here seeks to establish the fact of consent on the part of the plaintiff to the sale of the cattle, and also to establish an estoppel as against the plaintiff. The testimony is too lengthy to be set forth herein, but the following excerpt is sufficient to show the position taken by the appellant, and which, with other testimony to the same effect, sustains the finding of the court negativing the contention of the appellant. We quote from Mr. Nunes' testimony as to the alleged conversation:

"A. I remember while Mr. and Mrs. Smith were there he told me that those cows had been inspected by the State Inspector and they found quite a few T. B., and he wanted to get a permit from the company to dispose of those cows, those T. B.'s, and buy other cows to put in their place. I told Mr. Smith that I had no time to investigate anything, that I had to leave and I could not give him any permit whatsoever.

"Q. You told him that you would not consent? A. Yes, sir.

"Q. Mr. Nunes, when did you first learn that there had been a sale, an auction sale on the ranch in question? A. Well, it was long after the sale, after the cows were sold, I don't remember just when it was when I learned that the cows were not on the ranch and that they had disposed of the cows, they were gone, and I don't know just when."

This witness further testified that he did not tell any one that he knew of the auction sale prior to the sale. Mr. Smith's testimony was to the effect that in a conversation with Mr. Nunes he told him of the impending auction sale. Nunes' testimony as to his version of the conversation is corroborated by the testimony of another witness.

As to the question of estoppel, we have searched the record from beginning to end, and failed to find any testimony set forth therein to the effect that the appellant in this action was ever advised of the alleged conversation either as to the version given by Mr. Smith or the version thereof testified to by Mr. Nunes. Nor is there any testimony in the record to the effect that the appellant acted on any information as to whether the president, the plaintiff, did or did not consent to the sale, or did or did not know of the sale. There is not a scintilla of evidence in the record that the action of the appellant was influenced in any particular by any act or word of any of the officers of the plaintiff.

[4, 5] As set forth by the respondent in its brief, in order to invoke the doctrine of estoppel it must be shown, first, that the party to be estopped was apprised of the facts; second, that the party to be estopped must have intended that his conduct should be acted upon, and must so act that the party asserting the estoppel had a right to believe it was so intended; third, that the party invoking the estoppel was ignorant of the true state of facts; and, fourth, that the party invoking the estoppel must have relied upon the conduct of the other party, to his injury.

In 21 C. J., page 1133, the basis of an estoppel is thus set forth: "It is essential to an equitable estoppel that the person asserting the estoppel shall have done, or omitted some act, or changed his position in reliance upon the representations or conduct of the person sought to be estopped." To the same effect is the language of the court in the case of Gajanich v. Gregory, 116 Cal. App. 622, 3 P. (2d) 389, where a number of authorities are cited supporting the rules which we have just set forth. See, also, 10 Cal. Jur., pp. 630–639.

[6] Without further elaboration it must be held that the appellant's contention that the plaintiff consented to the sale is not well tak-

en, and likewise, that there is no merit in the argument that the plaintiff is in anywise estopped.

In view of the facts which we have recited, and the lack of any testimony in the record showing that the appellant acted upon any word or conduct of the officers of the plaintiff, it is unnecessary to review and show the inapplicability of the cases where the doctrine of estoppel has been invoked, as in all those cases the facts set forth show that the party in whose favor the doctrine was upheld acted upon representations and conduct of the adverse party.

[7] The foregoing facts, gleaned from the record, show that the appellant exercised dominion and control over the property, and made sale thereof without the consent of the owner. This amounts to conversion. "A sale of personal property to another is an actionable conversion where it is wrongful or unauthorized by law, or without the consent of the owner and in defiance of his rights." 35 C. J. p. 38. "This rule has been applied to sales by commission merchants and auctioneers." 24 Cal. Jur., p. 1026.

[8] In Mier v. Southern California Ice Co., 56 Cal. App. 512, 206 P. 83, 85, the opinion states the rule in this language: "Any act of ownership or exercise of dominion over the property of another, in defiance of his rights, is a conversion of that property." And further: "And the general rule is that one who sells the property of another, even though he believes he has the right so to do, is liable in trover to the true owner"—citing Swim v. Wilson, 90 Cal. 126, 27 P. 33, 13 L. R. A. 605, 25 Am. St. Rep. 110; Clark v. Whiteus, 69 Okl. 318, 171 P. 746; 28 Am. & Eng. Ency. of Law (2d Ed.) 702.

The rules above stated as to what constitutes conversion have been the settled law of this state since the decision in the case of Swim v. Wilson, 90 Cal. 126, 27 P. 33, 13 L. R. A. 605, 25 Am. St. Rep. 110. In that case a broker sold stock in good faith, thinking it belonged to the person who tendered it for sale. The person who brought the stock to the broker for sale appears to have stolen the same. It was held that the broker was liable to the true owner.

No issue is tendered as to the value of the cattle, or as to the fact that the conditional contract of sale reserved ownership in the plaintiff.

[9] It is finally contended that the testimony does not support the finding that the appellant sold cattle belonging to the plaintiff. Our attention has been called to the testimony of several witnesses pertaining to this subject. However, only a few excerpts need to be taken therefrom to show that the finding of the trial court as to the identity of the cattle sold is amply supported.

The testimony of Peter Kooyman, one of the parties to the original contract, is to the effect that he was on the ranch where the cattle were kept, on the 31st day of January, 1930, just three days before the sale; that the cattle there were the same cattle that were on the ranch which he bought from the plaintiff, and the same cattle that were assigned by the Kooymans to Smith. This witness testified that he milked the cattle every day for a period of 22 months. The testimony of this witness shows that the cattle were mostly Holsteins; that there had been some replacements in the herd of cattle. This witness further testified as follows: "After my brothers and I sold, and after I assigned the contract to the Smiths, I continued to live on the ranch." After testifying as to there being 127 head of milk cows, the following question was put to this witness: "Now, the question is, were those 127 head of milk cows a part of the herd that was on the ranch when you and your brother took it from the Lusitanian-American Development Company, a corporation? A. Yes."

The testimony of Mr. Feinstein shows that he bought the cattle on the ranch identified by the witness Kooyman. Feinstein testified as follows: "I bought them on the 27th day of January, 1930, and I left them at the ranch until the 3rd day of February, when I sold them at auction. From the 27th day of January, to the 3rd day of February. I made visits to the ranch to see the cattle." There is further testimony corroborative of what we have just set forth, which shows that the identity of the cattle sold at public auction was sufficiently established as being the cattle belonging to the plaintiff herein.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; CURTIS, J.; PRESTON, J.

1 Cal.(2d) 136

JOHNSON et al. v. EHRGOTT et al.

S. F. 14821.

Supreme Court of California.

June 22, 1934.

1. Limitation of actions ⇐100(1), 177(3)

Action for fraud must be commenced within three years after discovery of fraud, and, if plaintiff does not discover it when it is perpetrated, he must set forth the circumstances to explain the late discovery (Code Civ. Proc. § 338).

2. Limitation of actions ⇐179(2)

In action for fraud, court must determine from allegations whether delay in discovering fraud was excusable or was caused by lack of diligence of plaintiffs.

3. Limitation of actions ⇐179(2)

In action for fraud in exchange of land because of misrepresentation of quality of land, allegations that plaintiffs did not cultivate land during first year after exchange, and that parties who did failed to inform them of the condition, *held* insufficient to explain delay in discovering fraud so as to avoid bar of 3-year limitation statute (Code Civ. Proc. § 338).

4. Limitation of actions ⇐127(1)

Refusal to permit more than 10 amended complaints so as to avoid bar of 3-year limitation statute *held* proper (Code Civ. Proc. § 338).

In Bank.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Albert N. Johnson and another against Mabel De Witt Ehrgott and others. From a judgment for defendants, plaintiffs appeal.

Affirmed.

See, also, 218 Cal. 500, 24 P.(2d) 171.

T. L. Christianson, of Oakland, for appellants.

Robert B. Gaylord and Gaylord & Lovell, all of San Francisco, for respondents.

LANGDON, Justice.

This is an action for damages for fraud. Plaintiffs alleged that on January 18, 1927, they entered into an agreement with defendants to exchange an apartment house for a farm; that deeds were executed and delivered; that certain representations made by defendants as to the character and quality of the land and the trees growing thereon were false, and knowingly made; that they were relied upon by plaintiffs; and that plaintiffs were damaged. The action was filed November 28, 1930. In order to avoid the bar of the statute of limitations, plaintiffs alleged that they did not themselves work on the land during 1927, but had it cultivated by contract during that year, and did not discover the fraud until some time in 1928, within three years before the commencement of the action.

The complaint, as above described, is the tenth amended complaint. Each of plaintiffs' prior complaints was successfully attacked by general and special demurrers. The trial court in each case permitted plaintiffs to amend, until, at the time the ninth amended complaint was held insufficient, the court declared that it would permit but one more pleading. This, the tenth, was demurred to, and the demurrer sustained without leave to amend. Judgment thereupon was given for defendants, and plaintiffs appealed.

[1, 2] We may assume the sufficiency of the meager specifications of fraud, for the determinative point is the statute of limitations (Code Civ. Proc. § 338). The action for fraud and deceit must be commenced within three years after the discovery of the fraud, and if the plaintiff does not discover it when it is perpetrated, he must set forth the circumstances to excuse the late discovery. The court must determine from the allegations whether the delay was excusable or was caused by lack of diligence on the part of the plaintiffs. Lady Washington C. Co. v. Wood, 113 Cal. 482, 45 P. 809; Security Com., etc., Bank v. Seitz, 43 Cal. App. 353, 185 P. 188.

[3] The complaint wholly fails to meet this test. It declares that plaintiffs did not cultivate the land in 1927, and that the parties who did failed to inform them of the condition. This is certainly not a showing of diligence. It does not explain the failure of plaintiffs to inspect their own property, and indeed, the complaint is silent on the question whether the plaintiffs did inspect it, or whether they made any inquiry at all, and if not, why they did not.

[4] The trial court, after giving plaintiffs repeated opportunities to plead circumstances sufficient to avoid the bar of the statute, finally concluded that there were no such circumstances, and refused to permit further amendments. The court's action was prop-

er; there must be a limit to the number of amended complaints. See Davis v. Hibernia S. & L. Society, 21 Cal. App. 444, 132 P. 462.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SHENK, J.



1 Cal.(2d) 227

BUTTERFIELD v. BUTTERFIELD.

L. A. 14420.

Supreme Court of California.

July 2, 1934.

1. Courts ⇐78

Court rule inconsistent with statute is invalid, but mere fact that rule goes beyond statutory provision does not make it inconsistent therewith.

2. Venue ⇐34

Court rule, requiring defendant to file points and authorities in support of motion for change of venue, *held* valid as reasonable provision in furtherance of statutory purpose (Code Civ. Proc. § 396; Superior Court Rule 19).

In Bank.

Appeal from Superior Court, Inyo County; William D. Dehy, Judge.

Action by Sylvia A. Butterfield against William L. Butterfield. From an order denying defendant's motion for change of venue and overruling his demurrer to the complaint, he appeals.

Affirmed.

Prior opinion, 29 P.(2d) 231.

Lovett K. Fraser, of Lakeport, for appellant.

Jess G. Sutliff, of Escondido, for respondent.

PER CURIAM.

In this action for divorce defendant filed a demurrer and motion for change of venue, but failed to file points and authorities in support of either. At the instance of counsel for plaintiff, the trial court denied the motion, without prejudice, and overruled the demurrer, solely on this ground. Defendant appealed. The question presented by the appeal is whether there is a mandatory duty on the defendant seeking a change of venue to file points and authorities in support of the motion under rule XIX of the rules governing the business of the superior court. 213 Cal. lxxxviii.

[1] Defendant contends that in making his motion he complied with the provisions of section 396 of the Code of Civil Procedure, which section makes no requirement of filing points and authorities, and that the court rule invoked against him deprives him of a statutory right, and is therefore void. It is true that a rule inconsistent with a statute can have no validity; but the mere fact that the rule goes beyond the statutory provision does not make it inconsistent therewith. In Helbush v. Helbush, 209 Cal. 758, 290 P. 18, 21. the defendant applied for a final decree of divorce without filing the affidavit required by rule XXVI. This court gave full consideration to the extent of the rule-making power of the judicial council, and held the particular rule valid and not inconsistent with the statute. We said (page 764 of 209 Cal., 290 P. 18): "Neither party has the right to a final decree and the court has no right to enter the same, except upon the existence of certain facts. When those facts exist the right to have the final decree entered accrues. How shall those facts be made to appear? Without the required affidavit the court must depend upon the oral representation of the party applying for the final decree or upon its own knowledge with reference thereto obtained either upon an investigation on its own account or under its direction. The rule provides the method by which the facts may be disclosed and it would seem to be a reasonable regulation to that end. No unreasonable hardship is placed upon the applicant to require that he make a showing of the essential facts in this manner."

[2] This reasoning is completely applicable here. Appellant had a statutory right to a change of venue upon a proper showing of grounds therefor; and the rule requiring points and authorities is a reasonable provision in furtherance of the statutory purpose. No possible hardship can fall upon the party who must comply with the rule; and appellant makes no claim to that effect.

The order is affirmed.

1 Cal.(2d) 110

PEOPLE v. GAINES.

Cr. 3737.

Supreme Court of California.

June 19, 1934.

1. Criminal law ⇐649(2)

Refusing to grant recess until next morning, so that accused might have benefit of examination by handwriting expert of exhibits introduced by prosecution *held* not error, where evidence which accused sought to rebut was introduced October 13, 1932, and request for recess was made October 20, 1932, and court granted recess until 2 p. m.

2. Criminal law ⇐586, 1151

Application for continuance is addressed to discretion of trial court, whose ruling will not be reviewed except for abuse of discretion.

3. Criminal law ⇐469

Expert witness may testify to any facts within his knowledge as expert which might determine ultimate fact at issue, notwithstanding expert has not expressed opinion with reference to ultimate fact.

4. Criminal law ⇐1170(1)

In forgery prosecution, error in disallowing handwriting expert's testimony as to characteristics of handwriting of accused and alleged victim *held* not prejudicial, where expert reached no conclusion as to who wrote documents involved, predominating characteristics of handwriting of signatures were plainly visible and could have been compared by jury, and admission or rejection of testimony could not have affected final result (Code Civ. Proc. § 1944).

5. Criminal law ⇐829(1)

Refusal to give requested instructions *held* not error, where instructions given correctly covered same subjects.

In Bank.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Jack Gaines was convicted of forgery and grand theft, and, from an order denying motions for new trial, he appeals.

Affirmed.

Prior opinion, 27 P.(2d) 427.

C. Jack Gaines, Paul E. Gehres and R. C. Pardoe, both of Stockton, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

PER CURIAM.

After consideration of this appeal, we hereby adopt, as part of this decision, the following language taken from the opinion prepared by Mr. Justice York for the honorable District Court of Appeal for the Second Appellate District, Division One:

The appellant was tried upon an indictment containing ten counts charging him with the offense of forgery, and upon two informations containing ten counts charging him with the offense of grand theft. From judgment of convictions on all counts charged in said indictment and informations, and from the orders of the trial court denying his motions for a new trial, appellant prosecutes this appeal.

Defendant was charged with the theft of $9,500 in money, the personal property of Lola Carr Harman, real property of the value of $10,000 belonging to said Lola Carr Harman, and stock of the J. C. Penney Company of the value of $92,716.25, also the property of said Lola Carr Harman. In addition, he was charged with the theft of $350 in money, the property of C. M. and Ruth Bowler. The indictment charged the forging of the name of Lola Carr Harman to ten stock transfers and assurances and letters of attorneys, and the revocable power to receive and transfer certain stock certificates of the J. C. Penney Company.

As a defense, appellant claimed that he had formed a partnership with Mrs. Harman for the purpose of conducting and maintaining a general brokerage and real estate business, and that, in pursuance of that association and relationship, appellant was to continue his already established business as a real estate broker, but on a more expanded and extensive scale, due, in the main, to the fact that the said Lola Carr Harman had and did agree to furnish large sums of money to be used in the conduct of the business of making property loans, and that all profits—the result of said loans—were to be shared equally by appellant and said Lola Carr Harman. In her testimony, the said Mrs. Harman denied the existence of such relationship, and charged that appellant at various times had forged her name and signature to certain documents, instruments, and securities, and, by reason of such forgeries, appellant secured divers sums of money and converted the same to his own personal use.

It is contended by appellant that, since he "admitted the receipt of the money and property in question, as alleged in the counts for

grand theft and upon which he was being tried, and advanced no theory or defense other than his contention that he did so, not with a felonious intent, but by virtue of an agreement between himself and the said Lola Harman that the property should be used in their common business enterprise, then the paramount and vital issues of fact of the cause were: 1. Did such an agreement exist as between appellant and the said Lola Harman, and 2. Did the appellant forge the signatures to the several documents in question or did the said Lola Harman actually sign them as contended by appellant."

Predicated upon this theory, appellant contends that the trial court erred in refusing to grant defendant's handwriting witness sufficient time to complete his investigation of the handwriting in issue before offering his testimony—such testimony to be offered for the purpose of rebutting expert evidence which had been given by witnesses on behalf of the people in an effort to prove that forgery had been committed by appellant. Appellant also alleges error on the part of the trial court in sustaining the people's objection limiting scope of expert testimony; in refusing to give certain instructions requested by defendant; and in refusing to direct the jury to return a verdict in favor of defendant.

[1] The trial of this case was begun in the superior court on October 11, 1932; on October 13, three handwriting experts testified for the prosecution, at which time certain exhibits involving both the handwriting of the defendant and the handwriting of the complaining witness were introduced in evidence. On October 20, 1932, counsel for defendant asked the court for a recess until the following morning "so that we can have the benefit of the examination by a handwriting expert." The court refused this request, but did grant a recess until 2 o'clock of the same day, at which time the attorney for defendant called as his witness, Milton Carlson, handwriting expert, and by his testimony sought to rebut evidence given by handwriting experts, who had previously testified in favor of the prosecution. Since the testimony which appellant sought to rebut was given on October 13, 1932, we are of the opinion that sufficient time intervened between that date and October 20th, the date upon which Mr. Carlson was called, within which he could have made an examination of the exhibits referred to, and that no error was committed by the trial judge in refusing to grant a recess until the next day.

[2] " 'It is a settled rule of practice that an application for a continuance is addressed to the sound discretion of the trial court, and its ruling will not be reviewed except for the most cogent reasons. The trial court is apprised of all the circumstances of the case and the previous proceedings, and is therefore better able to decide upon the propriety of granting the application than an appellate court; and when it exercises a reasonable and not an arbitrary discretion, its action will not be disturbed.' 5 Cal. Jur. 968." People v. Collins, 195 Cal. 325, 332, 333, 233 P. 97, 100. There is nothing in the record that suggests the exercise of an arbitrary discretion of the trial court in refusing to grant the recess here referred to.

This brings us to the further contention that the trial court erred in limiting the scope of expert testimony. The said handwriting expert, when asked if he had come to any conclusion regarding the questioned documents, particularly as to whether or not they had been written by defendant or by Mrs. Harman, answered that, because of lack of sufficient time within which to make a proper examination of the several exemplars of handwriting, he could not express "a definite conclusion." A further question as to whether or not he had come to any conclusion with regard to the characteristics of the handwriting of either party was answered in the affirmative. Thereupon he was asked by counsel for the defendant to point out to the jury the various characteristics in the respective handwritings which would indicate, or would not indicate, that Mrs. Harman may have been the author thereof. This was objected to by the prosecution on the ground that the witness had already stated he had not come to any conclusion about any questioned documents in the case, which objection was sustained by the court. Thereafter the court persistently refused to permit the witness to answer similar questions along the same line of examination by counsel for defendant in an attempt to have him indicate some of the "various characteristics" in the handwriting of Mrs. Harman, thereby introducing evidence directed toward establishing a reasonable doubt as to defendant's guilt. The following is an illustration of the type of question referred to: "Q. By Mr. Bird: I will call your attention to the capital letter 'L' in the various questioned documents and more particularly to the little upstroke at the end of the 'L,' which I will illustrate on the blackboard, right there at the end (indicating), a kind of an upstroke at the end of the capital

letter 'L,' and ask you if in examining any of the exhibits offered here as exemplars of Mrs. Lola Harman's handwriting you found that she ever formed capital 'L's' in that form or with that characteristic?" In sustaining further objections to questions such as the one just quoted, the court said: "A witness is entitled, under the exception of the rule to express his opinion. It is not a proper function of an expert to come here and point out a lot of similarities, and dissimilarities, without expressing an opinion. Anyone can do that. Objection sustained."

[3] The trial court apparently based this ruling upon the theory that, unless an expert witness first expresses an opinion with reference to the ultimate fact at issue, he may not testify to any facts within his knowledge as an expert which might determine said ultimate fact. Such is not the law.

Section 1944 of the Code of Civil Procedure provides: "Evidence respecting the handwriting may also be given by a comparison, made by the witness or the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered, or proved to be genuine to the satisfaction of the judge." There is nothing in this statute to indicate that, before a "comparison" may be made, it is necessary that a witness express an opinion regarding the result of such comparison. An expert witness in some instances may state his final conclusion regarding a fact at issue; in others he may testify solely as to the several facts upon which a final conclusion could be predicated, or he may testify in both respects; often he expresses his opinion through the medium of the "hypothetical question." In other words, the foundational facts are distinct from the ultimate fact at issue, and they may be established by the testimony of either lay or expert witnesses. See 10 R. C. L. p. 994; 11 R. C. L. pp. 573, 590; 10 Cal. Jur. p. 960; Rogers on Expert Testimony, p. 303, citing Riordan v. Guggerty, 74 Iowa, 688, 39 N. W. 107.

[4] It follows that here the trial court erred in limiting the scope of examination of said expert witness in the manner aforesaid. The question is: Was the error prejudicial? We think not. The predominating characteristics of the handwriting of these signatures are plainly visible. Comparison of them could have been made as well by the jury as by the expert witness. Inasmuch as the latter had reached no definite conclusion in the matter, his testimony would probably have been largely cumulative and of no substantial value. Furthermore, there is no doubt of defendant's guilt. We have examined the entire record with care, and, indeed, the trial court was justified in declaring, when about to pronounce judgment: "I am constrained to say in your case that it was an exceedingly flagrant and aggravated one, and I am in entire accord with the verdict of the jury." Under the particular circumstances of this case, the admission or rejection of the testimony in question could not have affected the final result reached by the jury; hence our conclusion that said error affords no basis for reversal of the judgments, or any of them, and that defendant suffered no prejudice.

[5] We find no merit in appellant's contentions that the court erred in refusing to give to the jury certain instructions requested by him and in refusing to direct the jury to return a verdict in his favor. So far as appears, the instructions given by the court to the jury covered the same subjects and covered them correctly.

The judgments of conviction and the orders denying motion for new trial are affirmed.



1 Cal.(2d) 162

In re PUTNAM'S ESTATE.

PUTNAM v. WELLS FARGO BANK & UNION TRUST CO. et al.

Sac. 4751.

Supreme Court of California.

June 28, 1934.

Rehearing Denied July 26, 1934.

1. Wills ⇐55(6)

Evidence that testator who died at 82 used intoxicating liquors daily during latter 40 years of his life *held* insufficient to support claim of general insanity in absence of showing that because of liquors testator had become so weakened in physical and mental powers that he was incapable of testamentary act.

2. Wills ⇐55(3)

In will contest, evidence *held* insufficient to establish that testator had insane delusions with respect to incompetency of his children to handle money, which delusions directly affected testamentary act.

An "insane delusion" is the conception of a disordered mind which imagines facts

to exist of which there is no evidence and the belief in which is adhered to against all evidence and argument to the contrary, and which cannot be accounted for on any reasonable hypothesis.

[Ed. Note.—For other definitions of "Insane Delusion," see Words & Phrases.]

3. Wills ⇐38(1)

One is not acting under "insane delusion" if his condition of mind results from belief or inference, however irrational or unfounded, drawn from facts which are shown to exist.

In Bank.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

In the matter of the estate of Adam Putnam, also known as A. Putnam, deceased. Will contest by W. M. Putnam opposed by the Wells Fargo Bank & Union Trust Company and others, proponents. From a judgment for contestant entered on jury's verdict and from an order denying a motion for judgment notwithstanding the verdict, proponents appeal.

Judgment and order reversed.

Heller, Ehrman, White & McAuliffe and Martin Minney, Jr., all of San Francisco, for appellants.

H. C. Nelson and J. F. Quinn, both of Eureka, for respondent.

SHENK, Justice.

Adam Putnam died on June 24, 1930, at the age of about 82 years. He was a resident of Ferndale, Humboldt county, and left real and personal property of the value of nearly $300,000. Two children survive him, a daughter, Edna Putnam, and a son, the contestant, William Mason Putnam. The decedent made a will dated November 15, 1927, and a codicil thereto dated October 19, 1928. These instruments were filed for probate. The son, W. M. Putnam, filed an opposition to the probate thereof, alleging general insanity sufficient to deprive the decedent of testamentary capacity, and insane delusions directly affecting the testamentary acts. Answers to the opposition were filed by the contestant's son, W. M. Putnam, Jr., a legatee under the will; by the Wells Fargo Bank & Union Trust Company, named as executor and trustee therein; by Edna Putnam, the decedent's daughter; and by Mabel C. Putnam and Thomas M. Putnam, Jr., cousin and grandnephew, respectively, of the decedent, who also are legatees under the will. Testimony on both issues was received. A motion for a directed verdict was made on behalf of the proponents and denied. The jury found that the decedent was not of sound and disposing mind when the will and codicil were executed. The proponents moved for a judgment notwithstanding the verdict, which was denied. A motion for a new trial was denied. The persons answering said contest and opposition, who will be called the proponents, appealed from the judgment entered on the jury's verdict and from the order denying their motion for judgment notwithstanding the verdict.

Adam Putnam was born in Nova Scotia in 1847 and became an orphan at the age of 4 years. He came to Humboldt county, Cal., when he was about 17 years of age and pursued the business of ranching and cattle raising. He was industrious, thrifty, and energetic. In the course of years he acquired several ranches and dairy properties. In 1875 he married the daughter of "Dickey" Johnston and settled in Ferndale, where, in 1879, 1881, and 1882, two sons and a daughter were born. One son, Ed, predeceased the testator. In 1893 the decedent had accumulated a fortune and in that year participated in the organization of the Ferndale Bank, of which he was president until the time of his death.

By his will the decedent made the following disposition of his property: He devised and bequeathed the home in Ferndale with its furnishings and his automobile to his daughter, Edna. All of the rest of his property and estate he devised and bequeathed to Wells Fargo Bank & Union Trust Company, as trustee, to collect and pay the income thereof to the following persons: To Edna, his daughter, $500 per month during her lifetime; to his son, the contestant herein, $250 per month during his lifetime; to his grandson, W. M. Putnam, Jr., the sum of $25 per month during his life; to Bertha Johnstone, Mabel Putnam, Thomas M. Putnam, Jr., and Amelia Weir, each the sum of $25 per month during life; to the Ladies' Club of Ferndale, $25 a month for a period of five years; to a specified cemetery, $50 a year for the care of the graves of the testator's parents. He directed that in case the income became insufficient to make the foregoing payments, they should be made from principal. All the rest of the income and profit from the estate and the income payable to each beneficiary upon his death or otherwise were to be paid to "such societies and corporations in the state of California as are maintained mainly for

the benefit and relief or uplift of the orphans of the state of California as my said trustee may, in its discretion, from time to time select as being worthy of assistance, in such amounts and in such manner as said trustee may in its discretion determine." The instrument contains a provision that any amount so left for the benefit of orphan institutions which shall be in excess of legal limitations shall vest in the decedent's heirs at law in accordance with the laws of succession then in force. The testator forgave all unpaid loans stated to have been made to his son W. M. Putnam, and canceled promissory notes signed by his son evidencing such loans. There is a provision against the validity of any assignment or garnishment of the income in the hands of the trustee, and a provision for the payment of inheritance and other taxes out of the residue. By the codicil the bequest of a life income to W. M. Putnam, Jr., was increased to $50 a month.

[1] In presenting this appeal the proponents assert an absence of any evidence in the record to the effect that the testator was not capable of transacting his business affairs until shortly before his death and they rely on evidence which shows that despite the testator's daily use of intoxicating liquors during the latter forty years of his life, he continued as president of the Ferndale Bank and was capable of handling business affairs intelligently; that he was aware of the extent of his property and of the objects of his bounty and the relationship in which he stood toward those who had claims upon him, and was in fact an unusually intelligent, shrewd, and energetic man despite his advanced years; and that until his last illness, which commenced a few weeks before his death, he went every day to attend to his business affairs at the bank. On the issue of general insanity the contestant relies mainly upon the habitual use of intoxicating liquors by the decedent, and the effect which the use thereof is stated ordinarily to have upon the physical and mental powers of the user. It may be said at the outset that the evidence is insufficient to support the claim of general insanity. There was no showing that because of the use of intoxicating liquors the decedent had become so weakened in his physical and mental powers that he was incapable of the testamentary act. Although it was in evidence that he collapsed at the preliminary conference with the trust officer of the Wells Fargo Bank & Union Trust Company, whom he requested to assist him in the preparation of his will, no showing was made or attempted that he was under the influence of intoxicating liquor at that time or when he executed the will and codicil, or that his habitual use of intoxicating liquor had any bearing upon the testamentary act. Nor was there any showing that the testamentary act was influenced by the cause of death, stated to have been arteriosclerosis, accentuated by influenza which attacked him a few weeks before death. On this state of the record the presumption of general sanity has not been overcome. Estate of Fraser, 177 Cal. 266, 170 P. 601; Estate of Russell, 189 Cal. 759, 770, 210 P. 249; Estate of McDonough, 200 Cal. 57, 67, 251 P. 916.

If the verdict may stand, it must necessarily be supported by the evidence relating to the second ground of the contest, viz., that the testator was laboring under an insane delusion with respect to his children and directly affecting the testamentary act. There is no substantial conflict in the evidence introduced in support of and in opposition to this ground of contest. The question is whether the undisputed acts and conduct of the decedent evidence an insane or any delusion in fact. It may be conceded that the beliefs and opinions which the testator held respecting his children influenced the disposition of his property as to them. It is the proponents' contention that the record discloses more than sufficient evidence to serve as a foundation of fact for such beliefs and opinions which removes them from the realm of being insane or any delusion in fact.

The contestant insists that the testator was possessed of an insane delusion which he described as an unexplained, intense, and unwarranted hatred and hostility toward his wife and her blood relatives, particularly the contestant; an unfounded and fixed belief that his children were worthless and incompetent; that they had "too much Johnston" and that they had no Putnam blood in them; an unfounded and fixed belief that whoever might marry his children had designs only on the testator's property and were awaiting his death to get hold of it; an unwarranted, unfounded, and fixed belief that his children were spendthrifts and would dissipate and squander his estate within three years after his death and become public charges.

The following facts are claimed to support the foregoing statement: When Mason and Ed were boys, on one occasion the father beat them so severely with a cane that blood was drawn on Ed's leg. In 1916 or 1917 one witness saw Adam Putnam as he was walking from his home turn around and shake his clenched fist in the direction of his house and utter an opprobrious epithet. It was in evi-

dence that Putnam repeatedly stated that Edna had no business ability and showed a lack of judgment in handling business matters; that he spoke of his children as being all Johnston, and that there was no Putnam blood in them; that neither his wife nor any of the Johnstons was any good; that he had no use for Mason's present or his divorced wife; and that he cursed Allison, a friend of Edna's whom he accused of waiting for him to die so that he could get part of the Putnam estate; that he talked around town of Allison and his intentions, also cast reflections upon the relations between Allison and his daughter until he was admonished by one witness that he was killing his own daughter by his unfounded remarks. After he made his will, he wrote to the bank requesting that if it be in order a codicil to his will be prepared to provide against Allison's ever obtaining anything from the bequest to Edna.

On many occasions, beginning as early as 1905, Putnam, in the presence of others, made disparaging and profane remarks to his wife about her family which caused her to leave the room and weep. He accused his wife of being too much like her father "Dickey" Johnston, who was concededly honest but not much of a business man, and of spending all the money she could get her hands on. It was in evidence that the effect of liquor would make the decedent more cross and overbearing. He often stated that his children had no capacity for handling money; that Mason had no business ability; that there was too much "Dickey" in him; that he would not let any of them handle his money; and that his children would only squander his money. He often said that his children were "no good," were spendthrifts, had too much Johnston blood in them, and were a "barrel of expense" and worthless. He had been heard to state frequently that he was not going to leave the boys anything because they did not know how to spend money, and that to speak to him about the Johnston family was like waving a red flag in front of a bull; that on one occasion he became so angry he was livid and trembled when the witness disagreed with him on the subject; that on another occasion he turned red in the face and gritted his teeth when he stated that there was "too much damned Johnston"; that he often became profane in connection with the subject; that on another occasion he jumped on his hat; and that he jumped up and down and gritted his teeth; that on occasions he came home drunk.

He spoke unkindly to Edna about her friend Allison and his intentions and caused her to cry on several occasions. On other occasions he was heard talking and arguing on the subject in his room when no one else was present. Prior to the making of his will he had announced to witnesses that he was going to put his property in trust for the benefit of his children and inasmuch as he had been an orphan he would leave the rest to orphan asylums; that his own children would squander the money; that Allison was hanging around Edna only to get his money; that Edna was no longer of an age when a man would be likely to marry her for herself alone; that Mason's wife was an adventuress; that he did not care if the orphans squandered it, but he would fix it so his own children would not squander it.

The following further undisputed facts appear: Putnam placed Mason in Tamalpais Military Academy in San Rafael for two years before he reached his majority. Thereafter Mason attended business school in Eureka. In 1902 he started working for his uncle at the Bayside Lumber Company in Humboldt county at $40 a month as a bookkeeper. About this time he took out a $5,000 life insurance policy on which his father paid the initial and most of the subsequent premiums. During this time his father apparently objected to some associates of Mason's whom the latter appeared to be assisting financially. Mason in answer to such objections wrote to his father that he was not proud of such associations, but that he realized he had obtained all the advantages he could expect from his parents and would look for no further financial assistance from his father. During this period Mason continued to visit the family during week-ends.

In 1906 Mason went to Alaska and worked in copper mines, for a time underground and later as a bookkeeper and accountant, until 1911. During this period he sent between $3,000 and $4,000 to his father. Before he left Alaska he became interested in the fur business and with two others took a lease on Green island for the purpose of raising fur-bearing animals. In 1911 he returned to California and lived in the Putnam family home in Oakland. He began drawing on his credit with his father and by November of that year had used up his savings. In that year he married Nina Putnam and continued to live in the Putnam home in Oakland. In 1911 and 1912 he obtained sums of money from two of his uncles and from a third party on his promissory notes for $350, $125, and $250. In June, 1912, he borrowed $1,055 on the life insurance policy, $400 of which he turned over to his father to discharge a note execut-

ed to Prof. T. M. Putnam of Berkeley, and went back to Alaska with his wife. The fall of that year was spent on Green island. That venture, representing an investment of $700 to $1,000, was sold out for $1,200. Thereafter until 1915 he and his wife lived at Kachemak Bay without income, engaged in hunting and fishing expeditions. Mason and his father continued to correspond and Adam Putnam was advised of these activities. In fact, Mason continued to write to his father in affectionate terms during the latter's lifetime and kept him informed of his activities and the details of his domestic life.

Mason borrowed money in Juneau in the spring of 1915 and he and his wife returned to the family home in Oakland. Mason spent part of that year in an attempt to raise money for a fox propagating venture in Alaska and a corporation was organized for the purpose. Nothing came of it and Mason never returned to Alaska. From this time and while he was looking for work he incurred numerous debts, borrowed money, and gave his notes, many of which his father discharged. Prof. Putnam, to whom Mason went for assistance, often acted as a sort of intermediary between Mason and his father. At Adam Putnam's request he obtained information as to Mason's indebtednesses, including an amount which had been advanced to Mason to pay his transportation to Florida to take a position which had been offered him and which money he had spent. Prof. Putnam discharged these obligations with money sent to him by the decedent. All of the details of this period and all of the correspondence between Mason and his father and the decedent and T. M. Putnam need not be recounted. During the Christmas holidays of 1915 Mason worked at Hale's in San Francisco at $15 per week. About March, 1916, he was employed as a bookkeeper by the Pacific Gas & Electric Company in San Francisco at a salary of $75 a month. From this time Mason visited the home at Ferndale during summer vacations and Christmas holidays. A son, W. M. Putnam, Jr., was born to the Mason Putnams in 1918. Prior to the birth of the child, Nina Putnam worked for three months to obtain money to pay for the child's layette and clothes for herself. After the arrival of the baby, the family sent down from Ferndale boxes of food. Periodically as a birthday gift Adam Putnam purchased a suit of clothes for Mason.

In 1923 Nina Putnam divorced Mason on the ground of nonsupport. Nina discussed with Adam Putnam her difficulties with Mason and the regularity of week-end drinking parties at their apartment over a period of eight years. Adam Putnam paid the expenses of the divorce and paid also the expenses of three operations performed on the child. At this time Mason was receiving a salary of $165 a month. So far as the record shows he has continued in the employment of the Pacific Gas & Electric Company. In 1923 Adam Putnam investigated Mason's chances for advancement in the company and received a report from its then president that Mason could not be advanced inasmuch as he showed no executive ability. In 1926 Mason married Mrs. Strange.

The foregoing is but a portion of the testimony with which the record is replete and which the proponents contend supports any belief which Adam Putnam possessed that Mason had no business ability and was incapable of any wise handling of money. His lack of knowledge of simple business transactions, despite his bookkeeping and accounting experience, is indicated by his own testimony.

It was in evidence that Edna Putnam, who always lived at home and managed the household after her mother's death, had extravagant tastes, and although Adam Putnam often complained of them, he nevertheless was indulgent by giving her expensive automobiles, a $1,450 Steinway piano, and a $2,150 diamond ring. He took her on trips to the Orient and elsewhere, even when her mother was living, and gave her shares of stock and Liberty bonds, bought her a one-half interest in a gasoline service station, and allowed her to spend nearly $10,000 in remodeling and refurnishing the home at Ferndale.

It appears that as early as the year 1915 the decedent formed the intention of leaving his property in trust. In that year he wrote to Prof. Putnam asking him to act as a trustee under his will.

[2, 3] From the foregoing brief statement and other evidence in a voluminous record, it is obvious that there was abundant ground to support a normal parental belief that the children were incapable of the wise handling of large amounts of capital. It cannot be said that the will is unnatural in view of the evidentiary facts. No case is cited by the contestant which goes so far as to hold that when a foundation in fact for the testator's belief is disclosed, such belief constitutes an insane delusion, or any delusion at all. The cases are to the contrary. The only reasonable conclusion from the record before us is that the testator was possessed of a parental belief, not abnormal or unfounded under the

facts, relating to his son's ability to handle money, and that he took steps to protect him with an income adequate to his needs in addition to his own earnings for the balance of his life. Even though there may have been discord in the family during the decedent's lifetime or even injustice in the division of income between the children, that alone would not be sufficient to set aside a will executed by one in full possession of his mental faculties and otherwise competent to make a will. An insane delusion has been defined to be the conception of a disordered mind which imagines facts to exist of which there is no evidence and the belief in which is adhered to against all evidence and argument to the contrary, and which cannot be accounted for on any reasonable hypothesis. "One cannot be said to act under an insane delusion if his condition of mind results from a belief or inference, however irrational or unfounded, drawn from facts which are shown to exist." Estate of Scott, 128 Cal. 57, 62, 60 P. 527, 529; Estate of Shay, 196 Cal. 355, 237 P. 1079; Estate of Perkins, 195 Cal. 699, 235 P. 45; Estate of Powell, 113 Cal. App. 670, 299 P. 108. The facts in this case do not meet the tests prescribed by our law and are inadequate as a foundation for setting aside the testamentary acts in question.

The judgment is reversed. The order denying the motion for a judgment notwithstanding the verdict is reversed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; CURTIS, J.



1 Cal.(2d) 179

VOORHEES v. MORSE, City Treasurer.

S. F. 15114.

Supreme Court of California.

June 29, 1934.

1. Municipal corporations ⇐57

City of Long Beach in enacting laws and regulations respecting municipal affairs *held* subject only to charter and Constitution (Const. art. 11, §§ 6, 8).

2. Municipal corporations ⇐864(2)

Ordinance authorizing city treasurer to pay interest on unpaid registered warrants *held* not invalid as creating indebtedness exceeding year's revenues; interest as well as principal being payable from year's revenues (Const. art. 11, § 18).

3. Municipal corporations ⇐58

Section of charter authorizing city to borrow money at interest to pay warrants issued during specified months must be construed with other sections in determining city's power to register unpaid warrants and pay interest thereon.

4. Municipal corporations ⇐901

City's charter power to exercise all municipal and police powers necessary for efficient government *held* not limited by section of charter authorizing city to borrow money at interest to pay warrants issued during specified months, as regards city's power to register unpaid warrants and pay interest thereon.

5. Municipal corporations ⇐241

Ordinance authorizing interest on unpaid registered warrants *held* not violative of charter requiring contracts to be made by city manager with lowest responsible bidder.

This is true because, if agreement to pay interest may be treated as contract, it is contract that can be made only with holder of warrant, and in such transaction there can be no competitive bidder, and it would therefore be idle act to publish notice calling for bids.

6. Municipal corporations ⇐120

Ordinance duly passed as emergency measure under charter providing for emergency measures effective at time indicated therein *held* not void under section of charter requiring 30-day interval between passage and effective date of ordinance.

7. Municipal corporations ⇐901

Under ordinance authorizing city treasurer to register unpaid warrants and pay interest thereon, interest *held* payable without separate warrant therefor.

8. Municipal corporations ⇐901

Under ordinance, interest *held* payable from public welfare fund on unpaid registered warrant drawn thereon as against contention that neither budget nor appropriation ordinance specifically provided for interest, where it appeared that budget and appropriation ordinance showed unitemized appropriation for public welfare department; itemization not being required by charter.

9. Municipal corporations ⇐901

Under ordinance, interest *held* payable from public welfare fund on unpaid registered warrant drawn thereon as against contention that fund, if properly allocated, was insufficient, where, although auditor erroneously allocated excessive amount to fund aft-

er registration of such warrant, fund received only its proportionate share of public moneys during fiscal year.

10. Municipal corporations ⇐901

Ordinance authorizing registration of warrants drawn on any particular fund and not paid for want of moneys therein *held* not invalid because authorizing payment of interest from city fund, used chiefly for miscellaneous expenses.

11. Municipal corporations ⇐904(2)

City *held* empowered to provide for registration of unpaid warrants and payment thereof in order of registration.

In Bank.

Original proceeding by Marie Voorhees for a writ of mandate against H. C. Morse to compel respondent, as City Treasurer of the City of Long Beach, to pay with interest certain warrants drawn by the City Auditor against the public welfare fund of the city and registered by respondent.

Writ issued as to part of relief prayed for, and petition denied in part.

Nowland M. Reid, City Atty., Geo. W. Trammell, Jr., Asst. City Atty., and John O. Palstine, Deputy City Atty., all of Long Beach, for petitioner.

Denio, Hart, Taubman & Simpson and Matthew C. Simpson, all of Long Beach, for respondent.

CURTIS, Justice.

On January 17, 1934, the city council of the city of Long Beach passed and adopted Ordinance No. C–1244, entitled, "An Emergency Ordinance Providing for the Registration and Redemption of Warrants Drawn upon the City of Long Beach; Providing for the payment of Interest upon Such Registered Warrants and Providing for the Priority of the Payment of Such Registered Warrants." On February 17, 1934, said city council passed and adopted Ordinance No. C–1251, amending Ordinance No. C–1244, which later enacted ordinance was entitled, "An Emergency Ordinance Amending Section One of Ordinance No. C–1244 Providing for the Registration and Redemption of Warrants Drawn upon the Treasurer of the City of Long Beach; Providing for the Payment of such Registered Warrants, and Providing for the Priority of the Payment of such Registered Warrants."

Ordinance No. C–1244 provided that, whenever the city auditor of the city of Long Beach draws his warrant upon the city treasurer of said city payable out of any fund in the city treasury, and such warrant represents an amount in excess of the unapplied money in said fund, the city auditor shall, upon the date that such warrant is drawn, present such warrant to the city treasurer, who shall indorse upon the back thereof the date of presentation by the city auditor, and that the same is not paid for want of money in the fund upon which such warrant is drawn, and bears interest at the rate of 6 per cent. per annum from date of registration to and including the date upon which the city treasurer advertises that such warrant is payable upon presentation, after which indorsement the city treasurer shall return such warrant to the city auditor for distribution. Thereafter, whenever the city auditor deems that there are sufficient moneys in any fund in the city treasury upon which warrants have been drawn and registered to pay in the order of their priority, all or some of the registered warrants outstanding against said fund, together with interest thereon as provided, the city auditor shall notify the treasurer of such fact and of the number of warrants which can be redeemed. The city treasurer shall immediately publish notice that such warrants are redeemable by advertising one time in the official newspaper of said city. Warrants registered in accordance with the provisions just recited shall cease to bear interest on the date following said publication. Warrants registered as provided in said ordinance, together with interest thereon as provided in said ordinance, shall constitute a prior lien, in the order of registration of said warrants on any moneys thereafter received into the fund in the city treasury upon which such warrants are drawn, and such warrants and interest thereon as provided in said ordinance shall be paid in the order of their registration. It is further provided that such registered warrants shall not take priority over unregistered warrants drawn upon the same fund and outstanding at the time of such registration, and that the auditor shall furnish the treasurer a list of all unregistered warrants drawn and unpaid prior to the effective date of said ordinance. Upon the presentation of any registered warrant to the city treasurer for payment, after said city treasurer has published notice that such warrant is redeemable, the city treasurer shall pay to the payee of said warrant, or his assignee, the amount for which said warrant is drawn, together with interest thereon at the

rate of 6 per cent. per annum from date of registration of said warrant to and including the date upon which said city treasurer advertised that such warrant would be payable upon presentation, said interest to be paid from the city fund. It is further provided that "unapplied money" as used in said ordinance means money in any fund in the city treasury for which outstanding warrants have not been already drawn, and which would remain in such fund if all outstanding warrants drawn upon such fund were paid. Section 2 of said ordinance purports to set forth a statement showing that said ordinance was an emergency measure, and section 3 thereof provides that the city clerk should cause the same to be posted in three conspicuous places in said city, and that it should thereupon take effect.

Ordinance No. C–1244 was amended by Ordinance No. C–1251 in two respects. The provision in Ordinance No. C–1244 that "whenever the city auditor deems that there are sufficient moneys in any fund in the city treasury upon which warrants have been drawn and registered to pay in the order of their priority, all or some of the registered warrants outstanding against such fund, he shall notify the city treasurer which warrants are to be redeemed," was amended to read as follows: "Whenever from time to time, there are sufficient moneys in any fund in the treasury upon which warrants have been drawn and registered, to pay in the order of their priority, all or at least five or more of the registered warrants outstanding against such fund, together with interest thereon as herein provided, the city auditor shall notify the city treasurer of such fact and of the number of warrants which can be redeemed." The other change made in Ordinance No. C–1244 by the amendment thereof by Ordinance No. C–1251 related principally to the fund out of which the interest on registered warrants should be paid. By Ordinance No. C–1244 this interest is to be paid by the city treasurer from the city fund. By Ordinance No. C–1251 this provision was changed to read as follows: "* * * Said interest to be paid from the same fund out of which the principal of said warrant is paid, and the city treasurer shall be entitled to credit for the amount of the interest so paid." Section 2 of Ordinance No. C–1251 as to the emergency of said ordinance, and section 3 as to the effective date thereof are the same as those contained in Ordinance No. C–1244.

The petition herein set forth three distinct causes of action based upon three separate warrants drawn by the city auditor against the public welfare fund of said city and registered by said city treasurer. The warrant set forth in the first cause of action was issued and registered under Ordinance No. C–1244, and those set forth in the second and third causes of action were issued under Ordinance No. C–1251. By her first cause of action the petitioner seeks to compel the city treasurer to pay the amount of said warrant out of the public welfare fund, together with interest thereon out of the city fund. By her second and third causes of action the petitioner seeks to compel the payment of two of said warrants, together with interest on the first of said warrants from the respective dates of their presentation, out of the public welfare fund of said city. The facts under which the petitioner asks payment of the warrant upon which the third cause of action is based differs materially from those under which payment of the other two warrants is demanded. This difference in the facts involving these warrants will be considered in detail when we come to the discussion of the third cause of action. A return of the alternative writ issued by the court on the filing of the said petition makes no denial of any of the alleged facts. The questions therefore presented for decision are purely questions of law.

We will, for reasons which we think will later appear in the course of the opinion, devote our attention in the first instance to petitioner's second cause of action and the warrant upon which this cause of action is predicated. This warrant, as we have already intimated, was drawn, registered, and presented for payment under the provisions of Ordinance No. C–1251. The amount thereof was the sum of $66.25. It was issued by the city auditor upon the city treasurer in payment of the claim of the Long Beach Community Hospital against the city of Long Beach. It bears date February 17, 1934, and was drawn on the public welfare fund of said city. The amount stated in said warrant was at said time due, owing, and unpaid from said city of Long Beach out of the public welfare fund to the payee therein named. At the time it was drawn, it represented an amount in excess of the unapplied money in the publice welfare fund in the city treasury of said city; that is, at the time said warrant was drawn, there was not in said public welfare fund sufficient money to pay said warrant as well as all outstanding warrants drawn upon said fund. Thereupon, pursuant to said Ordinance No. C–1251, said city auditor, on said 17th day of February, 1934, and after the effective date of said ordinance, present-

ed said warrant to the said city treasurer, who thereupon, on said 17th day of February, 1934, indorsed upon the back thereof the date of such presentation by said city auditor, and that the same was not paid for want of money in said public welfare fund, and that said warrant bore interest at the rate of 6 per cent. per annum from the date of said indorsement to and including the date upon which the city treasurer should advertise that said warrant was payable upon presentation. Such indorsement, according to the terms of said Ordinance No. C–1251, constituted a registration of said warrant. Said warrant was the first warrant drawn upon said public welfare fund which was registered pursuant to said Ordinance No. C–1251 and was registered under registration No. A 13a. Prior to the registration of said warrant and prior to the effective date of said Ordinance No. C–1251, the city treasurer had registered against said public welfare fund pursuant to Ordinance No. C–1244 thirteen warrants which were numbered consecutively A 1 to A 13, both inclusive, all of which were outstanding and unpaid at the time of the registration of warrant No. A 13a. After the registration of warrant No. A 13a by the city treasurer, it was returned to the city auditor and by the city auditor delivered to the payee therein named, who for a valuable consideration assigned and delivered the same to the petitioner herein, who was the legal and lawful owner thereof at the institution of these proceedings. On February 19, 1934, there were sufficient moneys in said public welfare fund to pay said warrant No. A 13a, together with interest thereon as provided in said Ordinance No. C–1251, as well as sufficient moneys to pay said warrants Nos. A 1 to A 13, both inclusive, and also all unregistered warrants drawn upon said public welfare fund and outstanding at the time of the registration of any of the said above-mentioned registered warrants, and said moneys in said public welfare fund at said time had been properly apportioned to said fund. On said day the city auditor notified the city treasurer of the condition of the public welfare fund as stated above, and thereupon the city treasurer, on February 20, 1934, gave notice by publication, pursuant to said Ordinance No. C–1251, that all such warrants, including warrant No. A 13a, were payable upon presentation to the city treasurer of the city of Long Beach. On February 21, 1934, petitioner presented said warrant No. A 13a to the city treasurer, and demanded payment thereof, together with interest thereon from date of registration to the date upon which said city treasurer advertised that such warrant would be payable upon presentation, at which time there were sufficient moneys in said public welfare fund to pay said warrant and said interest, as well as sufficient moneys to pay all warrants registered against said fund prior to the registration of warrant No. A 13a and also all unregistered warrants drawn upon said fund and unpaid at the time petitioner demanded payment of warrant No. A 13a. The city treasurer then and there refused, and continues to refuse, to pay said warrant No. A 13a, or any part of the principal or the interest thereon.

In stating the grounds justifying the institution of this proceeding in the first instance to this court, petitioner alleges that the financial condition of the city treasury of the city of Long Beach is such and will so continue for some time that additional warrants totaling several hundred thousands of dollars will be drawn and must be registered awaiting the receipt of money in the city treasury sufficient to pay the same, and that the same condition prevails in many, if not all, other municipalities in the state. From this and other statements contained therein, and in the return of respondent, and the briefs of the respective parties hereto, it appears that grave doubts existed as to the validity of the registration of warrants as provided in the ordinances herein referred to and particularly as to those provisions thereof which create a liability against the city to pay interest on said warrants after their registration. It further appears from these same sources that, due to the economic conditions prevailing in the state it would be difficult, if not impossible, for many municipalities of the state to function as such unless the plan adopted by the city of Long Beach and set forth in said ordinances, or some plan similar thereto, can be devised and followed whereby such municipalities can meet the current expenses of maintaining and carrying on their governmental affairs. In fact, many of the municipalities of the state, including the city of Long Beach, have found themselves in the condition similar to that which prevailed in the state by reason of which the last Legislature found it necessary to enact legislation for the purpose of relieving the state's financial distress. This legislation is contained in chapter 605 of the Statutes of 1933 (Stats. 1933, p. 1547), and is entitled, "An act to add section 441 to the Political Code, relating to the registration of warrants and the payment of obligations of the State, to make an annual appropriation

therefor, to repeal an act entitled 'An act concerning the office of Treasurer of State,' approved March 16, 1855, and to declare that this act shall take effect immediately." By this act the Legislature provided a plan or scheme of registering warrants of the state when there were insufficient moneys in the state treasury in the several funds on which they were drawn to pay them at the respective date when they were drawn. A reading of this act will show that the plan or scheme provided by the state for the registration and payment of warrants and the payment of interest thereon when there were insufficient moneys in the state treasury to pay the same is in principle practically the same as that adopted by the city of Long Beach and set out in Ordinance No. C–1251 of said city. This act of the Legislature was before this court in the recent proceeding entitled Riley v. Johnson, reported in 27 P.(2d) 760, 763. It was held in the opinion in that proceeding that there was no provision in the Constitution prohibiting the registration of state warrants and the payment of interest on said unpaid warrants, and therefore the Legislature had full power to provide for the registration and indorsement of warrants unpaid for the lack of funds and for the payment of interest on such unpaid warrants. Petitioner relies upon our decision in that proceeding, and contends that a similar determination should be made in the present action.

[1] The city of Long Beach is governed by a freeholders' charter adopted and in effect long prior to the enactment of either of the ordinances involved herein. In said charter it availed itself of the provisions of the Constitution, sections 6 and 8 of article 11 thereof, "to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in" its charter. By the provisions of its charter the city of Long Beach has made itself independent of general laws in all matters of exclusively municipal concern, and its power to enact laws and regulations in respect to its municipal affairs is subject only to the limitations provided in its charter and in the Constitution. Bank v. Bell, 62 Cal. App. 320, 217 P. 538; Civic Center Ass'n v. Railroad Comm., 175 Cal. 441, 166 P. 351. It is conceded that regulations as to the registration of warrants for lack of funds and the payment of interest thereon is a matter of exclusively municipal concern. Any limitation upon the city of Long Beach to exercise this power, if any exists, must be found in the Constitution of the state or in the charter of said city.

[2] The only section of the Constitution which respondent contends renders void or illegal the provision in Ordinance No. C–1251, providing for the payment of interest on unpaid warrants, is section 18, article 11, which prohibits the incurring by a municipality of an indebtedness or liability exceeding the income and revenue for that year. Respondent argues that the obligation to pay the interest is unlimited, in that it cannot be escaped so long as there are insufficient funds to pay all of said warrants, and that the period for which the city obligates itself to pay interest on said warrants may, and in all probability will, extend beyond the fiscal year, the revenues of which must be resorted to exclusively for the payment of the expenses incurred during said year. We are unable to agree with respondent in this contention. The interest is payable when there is money in the treasury legally applicable to the payment of the warrant, and, if the warrant is to be paid out of the year's revenues, as it is conceded it must be, so must the interest. It was so held in Riley v. Johnson, supra. There we said: "The act contemplates but one payment by the treasurer with relation to any one warrant —one payment of an amount which represents principal and interest due." Therefore, if the warrant must be paid out of the year's revenue in which the liability, which the warrant represents, is incurred, so must the interest. In our opinion, the ordinance contemplates payment of the registered warrants and the interest thereon only from such funds as might lawfully be applied to the payment of both the principal and interest of such warrant. We see no violation of the constitutional section above cited in any of the terms of the ordinance.

[3, 4] Several sections of the city charter of Long Beach are cited by respondent in support of his contention that Ordinance No. C–1251 is invalid. The first of these cited sections is section 37a of the charter, which provides for the borrowing of money to pay warrants issued in the months of July, August, September, October, and November of each year and to pay interest on the amounts borrowed at the rate of 6 per cent. per annum. This section provides for an outright grant of power to said city to borrow money and pay interest thereon during certain months of the year. It limits the period of time during which interest may be paid to five months. It contains no express prohibition upon the city to borrow money at other times and pay interest thereon. The most that can be said is that there is an implied inhibition in the sec-

tion against the city borrowing money and paying interest at any other times than those specified in said section. It must be admitted that this section of the charter is susceptible of such construction. But this section of the charter must be construed with other sections of the charter bearing upon the powers of the city in order to arrive at the intent of the charter as a whole. Section 25 of said charter expressly confers upon said city the power "to exercise all municipal and police powers necessary to the complete and efficient management and control of municipal property, and for the efficient administration of the municipal government." The question very properly arises as to whether under these broad powers the city of Long Beach may not provide for the registration of its warrants and the payment of interest thereon when the money in the treasury is insufficient to pay said warrants at the time they were drawn. The crux of this whole proceeding is whether the city may bind itself to pay interest on these outstanding warrants. Without a provision for the payment of interest, it would be difficult to satisfactorily dispose of them. Bankers and other investors would be slow to accept them without exacting a substantial, if not an unreasonable, deduction from their face value. This would impose an undue hardship on the employees of said city and those furnishing needed supplies to the different departments of the municipality, and render it extremely difficult, and on occasions impossible, for the city to properly perform the duties imposed upon it by its charter and the Constitution of the state. As we have seen, the city by section 25 of its charter is given power to exercise all municipal and police powers necessary to the complete and efficient management and control of its municipal property, and for the efficient administration of the municipal government. In construing a charter provision no less comprehensive than section 25 of the charter of the city of Long Beach, the Supreme Court of the state of Washington upheld an ordinance enacted thereunder providing for the payment of interest on warrants registered and indorsed "not paid for want of funds." State ex rel. Strahorn v. Stout, 43 Wash. 501, 86 P. 848, 10 Ann. Cas. 208. In the face of the broad and comprehensive powers expressly conferred upon the city of Long Beach by the provisions of section 25 of its charter, taken in connection with the construction of a similar section by the Supreme Court of Washington, we feel justified in holding that such powers were not in any way limited by the provisions of section 37a of said charter.

[5] There is no merit in respondent's contention that said ordinance conflicts with sections 293 and 294 of the charter. Section 293 provides that said city of Long Beach shall not be bound by any contract except in certain cases not necessary to mention here, unless said contract is made in writing by order of the city council and signed by the city manager. Section 294 requires that all contracts with certain exceptions must be made by the city manager with the lowest responsible bidder. It further provides for the publication of notice calling for bids and the opening of said bids not more than thirty days after such publication. It is apparent, we think, that these sections of the charter have no application to a transaction involving the payment of interest on unpaid warrants of the city. If the agreement to pay interest may be treated as a contract, it is a contract that can only be made with one person, and that person is the holder of the warrant. In such a transaction there can be no competitive bidder, for no person other than the holder of the warrant has any interest, nor can he acquire any interest, in said warrant by competitive bidding, or otherwise, except by consent of the warrant holder. It would therefore be an idle act to publish notice calling for bids, and to follow such procedure would simply entail an additional expense to the city without any compensating results. The law never requires an idle act, and it is not to be presumed that the framers of the charter ever intended to make applicable these sections of the charter to transactions like those herein involved in which no benefit whatever would result to the city, or to anybody else, by a compliance with their requirements.

[6] It is next contended that said Ordinance No. C–1251 is void by reason of the fact that section 307 of the charter provides that no ordinance shall go into effect before the expiration of thirty days from the time of its passage. Section 45 of said charter provides for the passage of emergency measures to take effect at the time indicated therein. Ordinance No. C–1251 was passed as an emergency measure, and in its enactment the city council complied with all the provisions of said section 45 of said charter relative to the passage of measures of that nature. There is no merit, in our opinion, in this contention.

[7] Equally untenable is the point made by respondent that no interest can be paid on said warrant No. A 13a, for the reason that no separate warrant was ever drawn for said interest. Certain sections of the charter pro-

vide that all public moneys belonging to said city shall be disbursed upon warrants drawn on the city treasurer by the city auditor. There are certain exceptions to this requirement, but they are not pertinent to any question involved in this proceeding. The warrant drawn and registered covered the principal sum due the payee therein. The interest thereon was but a mere incident to the principal, and, in our opinion, no separate warrant was required to be drawn for its payments. The warrant, when indorsed by the city treasurer, fixed the date at which the interest should commence to run, and the ordinance fixed the date when the interest ceased. The city council at the time it directed the warrant to issue intended that it should bear interest as provided in said ordinance. We think that under this state of facts it can well be said that the warrant as issued covered the interest as well as the principal.

[8] Section 254 of the charter provides that: "On or before the fourth Monday of August in each year, the city council shall pass an annual appropriation ordinance which shall be based on the budget submitted by the city manager. The total amount of appropriations shall not exceed the estimated revenues of the city." It is contended that the appropriation ordinance for the year 1933–1934 made no specific provision for the payment of interest on warrants nor did the budget submitted by the city manager. There is nothing before us which would substantiate this contention. The return of the respondent purports to set forth a portion of the budget for that year submitted by the city manager and a copy of the appropriation ordinance enacted for that year. The appropriation ordinance for the fiscal year 1933–1934 set forth in respondent's return shows an appropriation for "Department of Public Welfare, $44,790." This item of $44,790 appropriated to the department of public welfare is not itemized either in said appropriation ordinance or in that portion of the budget set forth in said return. While it is true that the appropriation made no specific provision for the payment of interest on warrants, it also appears that it made no specific provision for the payment of any other item of expense which the public welfare department might incur. The same may be said regarding the budget submitted by the city manager as shown by the portion thereof before us. Evidently it was not the custom of said city to require the items of appropriation to be itemized either in the budget or appropriation ordinance, and no provision of the charter has been called to our attention requiring that the items be itemized. This contention of the respondent cannot, therefore, be sustained.

[9] Respondent's final contention is that warrant No. A 13a cannot be paid because there was not sufficient moneys in said fund upon which said warrant was drawn to pay the same if the moneys now on deposit in such fund had been properly allocated. In support of this contention, respondent in his return states that the city auditor, after the registration of said warrant A 13a, erroneously allocated to the public welfare fund a greater proportion of the public funds from the city treasury than by law should have been allocated to said fund, and that, had the city auditor not made said erroneous allocation, there would not have been sufficient moneys on deposit in said fund to pay said warrant when presented for payment. It appears, however, from said return that, prior to the allocation of funds complained of, the city auditor had not allocated to said fund the proportionate amount of public funds to which said public welfare fund was legally entitled. The return concludes with the frank statement "That the 'Public Welfare Fund' has not, however, received more than its proportionate share of all moneys allocated during this fiscal year, the earlier allocations having given the 'Public Welfare Fund' less than its proportionate share." In view of this statement in the return, we think the contention of respondent that there was not sufficient money in the public welfare fund to pay said warrant cannot be sustained. Sufficient money was in said fund at the time said warrant was drawn and presented, and the return of respondent shows that only its proportionate share of public moneys had been allocated to said fund during said fiscal year.

As a result of the foregoing discussion, we conclude that there is nothing either in the state Constitution or in the charter of the city of Long Beach inconsistent with the terms of said Ordinance No. C–1251, providing for the payment of interest on warrants registered for insufficient funds. While this question has not been directly passed upon by the appellate courts of this state in any previous decision, the same question has been before courts of other jurisdictions, with the result that it has invariably been held that in a chartered city, in the absence of constitutional or charter limitations, the city council has the power to provide for the payment of interest upon its registered warrants in the event the funds of the city are insufficient to pay warrants at the time they are drawn. 6 McQuillin, Mun. Corps. (2d Ed.) 85, § 2409; 2

Dillon, Mun. Corps. (5th Ed.) 1319; 44 Cor. Jur. 1170, § 4131; State ex rel. Strahorn v. Stout, supra; Alabama, etc., Ry. Co. v. City of Gadsden, 185 Ala. 263, 64 So. 91, Ann. Cas. 1916C, 573; Shipley v. Hacheney, 34 Or. 303, 55 P. 971; Merchants' Loan & Tr. Co. v. City of Chicago, 264 Ill. 76, 105 N. E. 726. These authorities are in accord with our own decision in Riley v. Johnson, supra, involving the right of the state to pay interest on registered warrants, and in our opinion they announce the correct rule to be applied in the present proceeding. Ordinance No. C-1251 is therefore valid, and warrant No. A 13a issued in pursuance thereof, together with the interest thereon as provided in said ordinance, is a legal claim and charge against the city of Long Beach, and it is the duty of respondent to pay said warrant together with said interest.

[10] Warrant No. A-3 involved in the first cause of action was issued and registered pursuant to Ordinance No. C-1244. The only difference between said ordinance and Ordinance No. C-1251, in so far as the present proceeding is involved, is that in Ordinance No. C-1244 the interest on registered warrants was made payable out of the city fund, while in the amended Ordinance No. C-1251 this interest was made payable out of the fund upon which the warrant itself was drawn. Warrant No. A-3 was one of thirteen warrants issued against the public welfare fund under Ordinance No. C-1244, and registered pursuant to said ordinance. Thereafter, and when there was sufficient money in the public welfare fund to pay said thirteen warrants, together with interest thereon as provided in said ordinance, and also to pay all unregistered warrants drawn against said fund, and the city treasurer had published notice that said warrants were redeemable, the city council ordered that a warrant be drawn in favor of the city treasurer on the city fund for the aggregate amount of interest on said thirteen warrants. Such a warrant was so drawn by the city auditor and delivered to the city treasurer for the purpose of providing him with sufficient funds with which to pay the interest on said thirteen warrants. Thereupon the petitioner herein, who was the owner of said warrant No. A-3, presented said warrant to said city treasurer and demanded payment thereof, together with interest thereon as provided in Ordinance No. C-1244, and the treasurer refused to pay either the principal or interest of said warrant. The only reason assigned for the nonpayment of said warrant No. A-3 and the interest thereon, in addition to those already considered in discussing the legality of warrant No. A 13a, was that the interest on warrants issued pursuant to Ordinance No. C-1244 is made payable out of the city fund rather than the fund against which the original warrant is drawn. This point is relatively unimportant, as Ordinance No. C-1244 has been amended so as to overcome this objection. It only affects the thirteen warrants drawn pursuant to said ordinance prior to its amendment; the interest on the whole number only amounting to $1.85. They were thus of comparatively small amounts. It is insisted by respondent that that part of said ordinance is invalid which directs interest on warrants to be paid out of the city fund rather than out of the fund upon which the original warrants were made payable. It is conceded that the city of Long Beach has provided a "City Fund," and that there was sufficient money in said fund to pay said interest warrant at the time it was drawn and presented to the treasurer for payment. This fund covers various items of expenditures, such as insurance and bond premiums, compensation insurance, and refunds. The largest item, however, included in this fund, as shown by the budget recommendation for the fiscal year 1933-1934, was shown as "miscellaneous," which then amounted to the sum of $100,000 or thereabouts. Evidently this fund was used largely, as the budget recommendation indicates, to meet miscellaneous items of expense not otherwise provided for by express appropriations. If this was its purpose, it would seem perfectly proper for the city council to draw on this fund to meet the interest on warrants, which could not be paid when issued on account of insufficient money in the funds on which they were drawn. There is no provision in the charter so far as we are able to ascertain that prohibits the use of said fund for that purpose. Ordinance No. C-1244 is not invalid for this reason. The other objections to its validity have already been considered and found untenable. We are therefore of the opinion that Ordinance No. C-1244 was a valid exercise of power by the city council of Long Beach, and that warrant No. A-3, together with interest thereon as in said ordinance provided, is a legal claim against said city and should be paid by the city treasurer.

[11] In the third cause of action petitioner asks that the respondent city treasurer of the city of Long Beach be required to pay warrant No. A-54, drawn in her favor by the city auditor against the city treasurer. This warrant was registered subsequently to the fourteen warrants involved in the other two causes of action herein. It was drawn against the

public welfare fund, and was registered for the reason that there was insufficient money in said fund to pay said warrant. At the time it was presented for payment, there was sufficient money in said fund to pay warrants A–1 to A–13a, being the warrants involved in the first two causes of action herein, together with interest due thereon, and also sufficient money in said fund to pay all unregistered warrants drawn on said fund prior to the registration of said warrant No. A–54. There was also at said time sufficient money in said fund to pay said warrant No. A–54, but there was not during any part of the day on which said warrant No. A–54 was presented for payment sufficient money in said fund to pay said warrant and also all of the warrants registered against said public welfare fund prior to the registration of said warrant No. A–54. At the time said warrant was presented for payment by petitioner, the owner and holder thereof, said petitioner waived all claim for interest on said warrant. It will readily be seen that the point involved in this proceeding is whether petitioner was entitled to payment of warrant No. A–54 when at the time she presented said warrant to the city treasurer and demanded payment thereof there was insufficient money in the public welfare fund, on which said warrant was drawn, to pay the same and also all of the warrants registered against said fund prior to the registration of said warrant No. A–54, notwithstanding the provisions of said Ordinance No. C–1251 pursuant to which said warrants were drawn requiring the payment of registered warrants in the order of their registration, rather than in the order of their presentation after such registration.

No provision of the city charter has been called to our attention which expressly places any restriction upon the power of the city of Long Beach through its city council to provide for the payment of city warrants in the order of their registration. The charter of said city does contain a complete provision for the fiscal management and control of the city, but it is entirely silent upon the power of the city to create priorities in the payment of warrants. In the case of Riley v. Johnson, supra, 27 P.(2d) 760, this court upheld the act adopted at the last Legislature providing for the payment of state warrants in the order of their registration. In the case of Pacific Gas & Electric Co. v. Cole, 32 Cal. App. 266, 274, 162 P. 435, the appellate court sustained an act of the Legislature providing for the order of payment of registered warrants of reclamation districts. In other jurisdictions the question has uniformly been decided in favor of the exercise of such power by a municipality. 44 Cor. Jur. 1174; First National Bank of Northampton v. Arthur, 10 Colo. App. 283, 50 P. 738; Eidemiller v. City of Tacoma, 14 Wash. 376, 44 P. 877; First National Bank of Buhl v. Village of Buhl, 151 Minn. 206, 186 N. W. 306; Phillips v. Reed, 109 Iowa, 188, 80 N. W. 347. We consider these authorities decisive of the question. It follows, therefore, that petitioner is not entitled to have warrant No. A–54 paid until all prior registered warrants and all of said unregistered warrants against said public welfare fund have been paid.

Our conclusion as to the relief to be granted petitioner upon her three causes of action is that she is entitled to immediate payment of warrant No. A–3, together with interest thereon pursuant to Ordinance No. C–1244, and also to immediate payment of warrant No. A 13a, together with interest thereon pursuant to Ordinance No. C–1251, but that she is not entitled to have warrant No. A–54 paid at this time. It is therefore ordered that a writ of mandate issue as prayed for under petitioner's first and second causes of action of her petition, but that said petition be denied as to the third cause of action, and that petitioner take nothing by said third cause of action.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; SHENK, J.



1 Cal.(2d) 199

VOORHEES v. GUNSUL, City Auditor.

S. F. 15113.

Supreme Court of California.

June 29, 1934.

Mandamus ⊂109

Mandamus lies to compel city auditor to perform duty under ordinance to notify treasurer that particular fund is sufficient to pay warrants (Code Civ. Proc. § 1085).

In Bank.

Original petition by Marie Voorhees for a writ of mandamus against Myrtelle L. Gunsul to compel respondent, as City Auditor of the City of Long Beach, to notify the City Treasurer of the presence on February 19, 1934, of

sufficient moneys in the city fund to pay all warrants outstanding against such fund on the date mentioned, and to notify the City Treasurer of the numbers of the warrants which could be redeemed.

Writ issued.

Nowland M. Reid, City Atty., Geo. W. Trammell, Jr., Asst. City Atty., and John O. Palstine, Deputy City Atty., all of Long Beach, for petitioner.

Denio, Hart, Taubman & Simpson and Matthew C. Simpson, all of Long Beach, for respondent.

PER CURIAM.

This is a companion case to action No. S. F. 15114, entitled Marie Voorhees v. H. C. Morse, as City Treasurer of the City of Long Beach (Cal. Sup.) 34 P.(2d) 153, this day filed. By her petition, the petitioner herein asks for a writ of mandamus directed to the respondent as city auditor of said city commanding her to notify the city treasurer of said city of the fact that there were on the 19th day of February, 1934, and at the commencement of this proceeding, sufficient moneys in the city fund in the city treasury to pay all of the warrants outstanding against said fund on said 19th day of February, 1934, including warrant No. D–71, and to notify said city treasurer of the numbers of the warrants which could be redeemed by the application of said moneys in said city fund.

Petitioner at all times mentioned herein was the owner of said warrant No. D–71. Said warrant was issued on the 17th day of February, 1934, in payment of a valid claim against said city pursuant to Ordinance No. C–1251 of said city, which ordinance and certain provisions thereof are referred to in detail in the opinion rendered in action No. S. F. 15114, above mentioned. At the time said warrant No. D–71 was issued there was not sufficient money in said city fund to pay the same and all other prior outstanding warrants against said fund. All necessary steps were taken as provided in said ordinance to register said warrant, and the same was on said 17th day of February, 1934, registered pursuant to the terms of said ordinance. Said warrant No. D–71 was at said time the only warrant drawn upon said city fund and registered pursuant to said ordinance No. C–1251, and at the time of the demand hereinafter set forth no interest had accrued thereon. Thereafter there were sufficient moneys in said city fund to pay said warrant, as well as all other outstanding warrants both registered and unregistered theretofore drawn upon said fund. Petitioner thereupon, and while there were sufficient moneys in said city fund to pay all outstanding warrants drawn on said fund, demanded of the city auditor that she notify the city treasurer that there were sufficient moneys in said city fund to pay all of the outstanding warrants drawn upon said fund, and that she notify said city treasurer of the numbers of the warrants which could be redeemed by the application of said funds thereto, and in particular that said city auditor notify said city treasurer that there were sufficient funds to redeem and that he should redeem said warrant No. D–71. The city auditor refused to comply with said demand of petitioner. This proceeding was the result of said refusal, and is brought to compel said city auditor to comply with said demand.

All questions raised by respondent in her defense to this proceeding were considered and decided by this court in the companion case of No. S. F. 15114, adversely to the contention of the respondent. Ordinance No. C–1251 of the city of Long Beach was held to be valid. A provision of said ordinance provides for the payment of registered warrants in the order of their registration. The validity of this provision of said ordinance was made a direct issue in said companion case, and determined adversely to the contention of the petitioner therein, who claimed that it was invalid and beyond the power of the city of Long Beach to enact. Nothing is to be gained by repeating here the discussion of the question found in said companion case. This provision of the ordinance makes it the duty of the respondent as city auditor to comply with petitioner's demand. Being a duty enjoined by law upon the respondent as a public officer, its performance may be enforced by mandamus. Section 1085, Code Civ. Proc.

It is therefore ordered that the writ issue as prayed for.

139 Cal.App. 249

HERRMANN v. RIESENBERG et ux.

Civ. 8363.

District Court of Appeal, Second District, Division 2, California.

June 13, 1934.

Judgment ⇐107

Default judgment which was entered after demurrer to one of two defenses was sustained where amendment was not made within time ordered, leaving the other defense still standing undisposed of, *held* required to be set aside.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb and Lester W. Roth, Judges.

Action by Arthur J. Herrmann against Henry Riesenberg and another. From a default judgment, defendants appeal.

Reversed, with directions.

Hubert W. Swender, of Los Angeles, for appellants.

Pease, Dolley & Elson, of Los Angeles, for respondent.

DESMOND, Justice.

Defendants appeal from a default judgment inadvertently entered prior to disposition of issues raised by their answer, which contained a first and second defense. A demurrer had been interposed to the second defense, and according to the minute order of the court the demurrer "to the complaint" was sustained and ten days given to amend. No amendment being made in ten days, a default was entered, as well as judgment thereon, although the first defense still stood and in itself constituted an answer, raising issues that could be determined only by a trial. A motion was then made by plaintiff under section 473 of the Code of Civil Procedure to set aside the default and judgment which had been entered in his favor, but this motion was denied by the trial judge for lack of jurisdiction, the defendants having already taken an appeal to this court. Later another judge of the superior court undertook to straighten out the record by entering certain nunc pro tunc orders sustaining the demurrer "as to the second defense" and allowing ten days for amendment.

Admitting, without deciding, that these nunc pro tunc orders may be considered as effectual for the purpose intended, "to make such minute entries speak the truth," we still are confronted with a judgment taken against defendants who have never had their day in court, at least as to matters of defense raised by the first portion of their answer. It is apparent then that the judgment must be reversed. Since this is so, we believe that the surest and most convenient way to see that justice is done to all parties and at the same time to eliminate the results of errors that may have occurred is to direct that in case a new trial is had, consideration first be given by the court to the motion to strike and to the demurrer which plaintiff has interposed. We are not making an order affirming or reversing the actions of the lower court on either of these matters because of confusion as to what the court did or intended to do in connection therewith.

Judgment reversed, with directions to the trial court to act in accordance with the foregoing instructions, if the case be retried.

We concur: STEPHENS, P. J.; SCOTT, Justice pro tem.



139 Cal.App. 414

NATIONAL AUTOMOBILE INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 9605.

District Court of Appeal, Second District, Division 2, California.

July 23, 1934.

1. Master and servant ⇐385(1)

Aggravation of pre-existing hernia into disabling condition because of injury is "aggravation of disease" within statute providing that, in case of aggravation of disease existing prior to the injury, compensation shall be allowed only for such proportion of disability due to aggravation of prior disease as may reasonably be attributed to the injury (St. 1917, p. 833, § 3, subd. 4, as amended by St. 1919, p. 910, § 1).

2. Master and servant ⇐385(1)

In determining propriety of award for injury aggravating pre-existing disease into disabling condition, that employee was injured before during his employment for which he received compensation is immaterial, where it is not claimed that he was not justly entitled thereto (St. 1917, p. 833, § 3, subd. 4, as amended by St. 1919, p. 910, § 1).

3. Master and servant ⇐417(6)

In certiorari proceeding to review compensation award, only question of law involved is whether there was any evidence supporting finding that award should be made.

4. Master and servant ⇐405(4), 417(7)

Where employee, in 1929, fell and sustained hernia for which he was awarded surgical, medical, and hospital treatment, but recovered without treatment and did not avail himself of award, and, in 1933, again fell and sustained larger hernia at same place, evidence *held* to sustain finding that employee had sustained aggravation of pre-existing disease into disabling condition for which he should be awarded surgical, medical, and hospital treatment, and finding could not be disturbed on review (St. 1917, p. 833, § 3, subd. 4, as amended by St. 1919, p. 910, § 1).

Industrial Accident Commission's determination that award should be limited to such proportion of disability as might have been reasonably attributable to the injury, that is, to treatment therefor, without indemnity for any period of disability, was an exercise by the commission of its quasi judicial discretion under St. 1917, p. 833, § 3, subd. 4, as amended by St. 1919, p. 910, § 1, and could not be disturbed when so supported by evidence.

Proceeding under the Workmen's Compensation Act by W. M. Ringer, employee, opposed by the National Automobile Insurance Company, insurer. To review an award of the Industrial Accident Commission awarding to the employee surgical, medical, and hospital treatment, insurer prosecutes a writ of review.

Award affirmed.

C. W. Bowers, of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco, for respondent commission.

CRAIG, Justice.

On August 1, 1933, the respondent employee received in the course of employment an injury diagnosed and found by respondent commission as a direct inguinal hernia, consisting of an aggravation of a pre-existing disease into a disabling condition, for which he was awarded surgical, medical, and hospital treatment. Petitioner seeks annulment of such award, contending that the commission acted in excess of its authority, in that the award was unreasonable, since there had been an award in 1929 for the same condition between the same parties.

[1-4] It is insisted that the applicant did not sustain in 1933 an injury contemplated by subsection 4, § 3, of the Workmen's Compensation Act (St. 1917, p. 833, as amended by St. 1919, p. 910, § 1). It is undenied that on the latter date the employee while walking downstairs fell and received injury as stated above. He testified also and consented to the introduction of a record which showed that in 1929 he had suffered an identical fall and injury accompanied by the same symptoms, for which the commission made an award of the same treatment. It further appeared that he had been given like treatment some years previously to 1929 and had been cured of a hernia, but that on the occasion of his second injury he recovered and "seemed to be all right" without treatment and did not avail himself of said award. The accident in 1933 resulted in a hernia at "about the same place, but about three times larger." The section of the statute invoked by petitioner provides that in case of aggravation of any disease existing prior to such injury compensation shall be allowed only for such proportion of the disability due to the aggravation of such prior disease as may reasonably be attributed to such injury. But "'even where a workman dies from a pre-existing disease, if the disease is aggravated or accelerated under certain circumstances which can be said to be accidental, his death results from injury by accident,' and is therefore compensable." Knock v. Industrial Accident Comm., 200 Cal. 456, 253 P. 712, 714. Aggravation into a disabling condition of a pre-existing hernia is the aggravation of a disease within the meaning of subsection 4 of section 3 of said act (Stats. 1917, p. 831, as amended), which provides that compensation shall be allowed only for such proportion of the disability due to the aggravation of the disease as may reasonably be attributed to the injury. Bige v. Industrial Accident Comm., 105 Cal. App. 210, 287 P. 577. That the employee was injured before and during his employment for which he received compensation is immaterial, where it is not claimed that he was not justly entitled thereto. Thoreau v. Industrial Accident Comm., 120 Cal. App. 67, 7 P.(2d) 767. In certiorari, the only question of law involved is whether there was any evidence supporting the finding that an award should be made. Roebling's Sons Co. v. Industrial Accident Comm., 36 Cal. App. 10, 171 P. 987; Newton v. Industrial Acc. Comm., 204 Cal. 185, 267 P. 542, 60

A. L. R. 1279. The evidence that the applicant did not receive treatment for the prior minor injury, but that he did suffer in the course of employment a hernia after he had been cured, and that he thereafter sustained injury in the course and arising out of his employment consisting of the aggravation into a disabling condition of a previous right hernia, as found by the commission, is not cast in doubt by conflicting evidence. Determining that the award should be limited to such proportion of disability as might have been reasonably attributable to the injury, i. e., to treatment therefor without indemnity for any period of disability, was an exercise by the respondent commission of its quasi judicial discretion under said section of the statute, and may not be disturbed when so supported by evidence.

The award is affirmed.

We concur: STEPHENS, P. J.; ARCHBALD, Justice pro tem.



INYO CHEMICAL CO. v. CITY OF LOS ANGELES et al.*

Civ. 765.

District Court of Appeal, Fourth District, California.

June 13, 1934.

Rehearing Denied July 5, 1934.

Hearing Granted by Supreme Court Aug. 9, 1934.

1. Waters and water courses ⇐179(4)

Evidence sustained findings of negligence in constructing and operating municipal aqueduct traversing alluvial cone at mouth of canyon, where heavy, prolonged rainfall enlarged gully across cone and filled aqueduct with débris causing it to break and precipitate waters onto adjacent leasehold.

2. Evidence ⇐66

City and its agents having studied available rainfall records *held* charged with knowledge that unusual rains of varying intensity occurred in vicinity of break in municipal aqueduct, caused when heavy, prolonged rainfall filled aqueduct with débris, thereby precipitating waters onto adjacent leasehold, as regards contention that rainfall was so unusual that it could not have been anticipated.

3. Waters and water courses ⇐179(3)

In action against city for damage to leasehold from breaking of municipal aqueduct when filled with débris by heavy, prolonged rainfall, evidence of fills at other times and places *held* of probative value.

Evidence was admitted to show that about 1913, near the time that aqueduct was completed, it was completely filled in for more than half a mile a short distance below point where break in question occurred in 1926, and that near same point it was again filled in 1914, that it was completely filled with sand and débris from flood waters in 1921, and that at various times between 1912 and 1926, it was partially filled by rocks, gravel, and sand falling from side of mountains on which aqueduct was constructed.

4. Waters and water courses ⇐179(4)

Question of negligence in constructing and operating municipal aqueduct across alluvial cone at mouth of canyon without constructing spillways or adopting other means to exclude débris, which filled aqueduct during heavy rain, causing collapse and precipitating waters onto adjacent leasehold, *held* not dependent on expert testimony alone; question not being whether aqueduct in itself was safe.

5. Appeal and error ⇐1048(3)

In action against city for flooding of leasehold when municipal aqueduct broke because filled with débris by heavy rain, error, if any, in admitting answers to defective hypothetical questions asking engineers whether construction of aqueduct was safe and prudent, instead of in accordance with good engineering practice, *held* harmless, where engineers had given detailed testimony regarding conditions observed on ground, and evidence apart from expert testimony sustained findings.

6. Damages ⇐108

Generally, measure of damages in action for injury to land is difference in market value before and after injury.

7. Waters and water courses ⇐178(2)

In action for breaking of municipal aqueduct, precipitating waters onto plaintiff's leasehold and thereby contaminating, dissolving, or washing away trona deposits thereon, measure of damages *held* difference in value of leasehold before and after injury, as against contention that proper measure was value of destroyed trona less cost of its removal.

8. Waters and water courses ⇐179(4)

In action for breaking of municipal aqueduct during heavy rain, precipitating waters onto adjacent leasehold, evidence *held*

insufficient to sustain damages awarded, especially in absence of attempt to exclude damage caused by flood waters from natural creeks.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by the Inyo Chemical Company against the City of Los Angeles and others. Judgment for plaintiff, and defendants appeal.

Reversed and remanded, with directions.

Erwin P. Werner, City Atty., Mark L. Herron, Asst. City Atty., A. A. Scott, Harold L. Green and Russell B. Jarvis, Deputy City Attys., Jess E. Stephens, Sp. Counsel, Ray L. Chesebro, City Atty., J. M. Stevens, Asst. City Atty., and Kenneth K. Scott, Deputy City Atty., all of Los Angeles, for appellants.

E. R. Young, E. L. Searle, and Young, Lillick, Olson, Graham & Kelly, all of Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an action for damages alleged to have been sustained by the plaintiff through and because of the breaking of an aqueduct maintained and operated by the defendants.

This break occurred in what is known as the Los Angeles aqueduct, which was completed about the year 1913 and which is operated by the defendants for the purpose of conveying waters from the Owens river, together with other waters, to the city of Los Angeles. In what is known as the Olancha division, in which this break occurred, the aqueduct is an open cement-lined canal approximately 35 feet wide at the top, 12 feet deep, and 11 feet wide at the bottom. This section of the aqueduct is constructed along and upon the easterly slope of the Sierra Nevada Mountains which, immediately west of this portion of the aqueduct, rise to an elevation of from 8,000 to 13,000 feet. The aqueduct was designed to carry waters from the Owens river and also such waters flowing down the easterly slope of these mountains as might be intercepted and caught thereby, various openings being constructed in the upper or westerly bank of the aqueduct to facilitate the inflow of such waters. The flood and surface waters flowing down the easterly slope of these mountains, thus intercepted by the aqueduct, carry certain amounts of sand, silt, and débris during times of heavy rainfall which are deposited in the bottom of the canal, reducing its capacity to some extent. No provision was made for keeping such deposits out of the canal, but at appropriate intervals the water was shut off and the accumulated débris removed. At some of the larger creeks spillways were constructed to carry flood waters over the aqueduct, one of these being at Cottonwood creek, about three and one-half miles north of where the break occurred. Gates were provided at the intake on Owens river by which all water could be shut off from the aqueduct, and provision was also made at certain points for spilling all water in the aqueduct into natural creek beds, one of these being at Cottonwood creek. The aqueduct was designed to have a capacity of 900 second feet at hydraulic grade line, which is 15 inches below the top of the aqueduct, and 1,115 second feet at the top of the concrete lining. The intervening space of 15 inches was intended to provide a safety factor to take care of any water coming down the slope of the mountain which might be intercepted. However, the defendants' rating tables disclose that the actual working capacity of the aqueduct near Cottonwood creek was 654 second feet at hydraulic grade and 875 second feet at the top of the concrete lining. There is evidence that this actual lower capacity was caused by the fact that there are 1,800 degrees of curvature in the aqueduct in the three and one-half miles next above where the break occurred, and that this resulted in such a slow movement of the water at this point that its velocity was not sufficient to move any sand or gravel which came in from above.

Immediately to the west of this section of the aqueduct there are a number of so-called canyons extending down the face of the steep easterly slope of these mountains. Below each of these canyons there is what is called a "cone," consisting of a large mass of sand, gravel, and rocks which in times past has been washed out of the canyon above it. Each cone has its apex at or near the mouth of its respective canyon and spreads out in a fan-shaped manner on down the slope. These cones vary in size and area, and the canyons above them also vary in steepness and in drainage area. In its route along and upon the easterly slope of these mountains this aqueduct crosses many of these cones, including the one involved in this action, which is called "Cone A," being immediately below what is termed "Canyon A." The aqueduct was built over Cone A at a point several hundred feet below its apex and is somewhat in the form of a semicircle as it passes around the sloping sides of the cone.

The plaintiff operated a manufacturing plant at Cartago, near the southerly end of

Owens Lake and a short distance easterly from and below the point where the break in the aqueduct occurred, in which it produced calcined trona and a refined soda ash. Owens Lake has no outlet and the waters thereof are saturated with certain mineral substances. As the waters in the lake had lowered, sodium bicarbonate or sodium hydrate, in a form called "trona," was deposited on certain portions of the lake bed from which the water had receded. The plaintiff had leased from the state of California some 1,300 acres of land along the shore of Owens Lake, apparently part of the tract being covered by waters of the lake. Under this lease it was required to pay to the state an annual rental of $2.50 per acre and, in addition, to pay a royalty of 50 cents for each ton of trona removed and a royalty of 25 cents for each ton of any other product removed or taken from the water or land. In conducting its business the plaintiff gathered dry trona from certain portions of the land which were not covered with water, hauled this trona to its plant on roads which it had constructed, and, after processing the same, sold the same as refined trona. It also pumped brine from the highly concentrated waters of the lake itself through a pipe line to its plant, using the material to manufacture soda ash. The brine thus pumped to the plant was also strengthened by adding thereto quantities of the dry trona which was taken from the banks of the lake. The deposit of dry trona varied in thickness and in purity and in some places was covered by or mixed with sand, but at one place on the lease there was an area of about 130 acres containing an especially thick deposit of high-grade trona.

A heavy rainfall began in the Owens Valley on November 24, 1926, and continued at intervals until the morning of the 27th, being slightly heavier at a point three and one-half miles north of Cone A than at Independence, which is thirty miles north of this cone, and being particularly heavy during the last twenty-four hours of the storm. Some time during the night of the 26th-27th the water coming out of Canyon A and flowing down Cone A extended and deepened a gully which had existed on the face of the cone and washed some 7,000 cubic yards of sand, gravel, and débris into that part of the aqueduct traversing this cone, with the result that the water in the aqueduct backed up and overflowed, washing out the foundations of the aqueduct and causing it to collapse and break. About 500 feet of the aqueduct was washed out and the combined waters flowed on down the slope of the cone scouring out a channel some 300 or 400 feet in width, and passing over a portion of plaintiff's lease and on into Owens Lake. Large quantities of dry trona were washed out and destroyed, and other portions of the trona deposit were covered with sand and débris, in some places to a depth of several feet. The plaintiff brought this action to recover damages for the injury done to its trona beds and to certain of its roads, pipe lines, and power lines, and for its increased cost of operation during the time certain repairs were made. After a trial before the court without a jury, judgment was entered in favor of the plaintiff for $236,251.96, from which judgment the defendants have taken this appeal.

While the transcripts contain about 2,300 pages, printed briefs totaling about 3,200 pages have been filed, supposedly for the assistance of the court, and it is neither practicable nor necessary to treat and comment upon, in detail, all of the matters thus presented.

[1-3] With respect to their liability in general, the appellants contend that the court's findings of negligence on their part in constructing, maintaining, and operating the aqueduct are without support in the evidence. The court made a number of findings in this regard, including the following, which are particularly attacked:

"The court finds that the defendants were negligent in the construction of the aqueduct or canal owned and operated by them, as hereinbefore described, in that they failed to construct necessary or proper spillways to carry storm or surface waters, which might reasonably be expected to fall upon the mountain slopes westerly of said canal or aqueduct, over and across or under said aqueduct or canal, and particularly that they were negligent and careless, and failed to exercise due care in the construction of said aqueduct in that they failed to make any provision, either by overhead or underground spillways or conduits in that certain canyon referred to and described in the evidence and testimony introduced in this case as Canyon 'A,' to carry storm or surface waters which might reasonably be expected to fall on the watershed above said Canyon 'A', over or under said canal or aqueduct, or to make provision so that such storm or surface waters carrying sand, gravel, silt and rocks would not be emptied into said canal."

"* * * the court further finds that defendants were negligent in the maintenance, care and operation of said canal or aqueduct in that defendants knew, or should have

known from experience gained by the operation of said canal from the period extending from about the year 1913 to November 26, 1926, that heavy rains falling upon said mountain slopes westerly of said canal or aqueduct would cause storm or surface waters to flow down said slopes and into said canal or aqueduct, and would carry with them sand, silt, rocks and débris, and empty the same into said canal or aqueduct unless spillways or conduits were constructed to carry said surface waters and said sand, silt and rocks over or under said aqueduct or canal, and that defendants knew, or should have known if such storm or surface waters flowed into or were emptied into said canal or aqueduct and carried with them sand, silt, rocks or débris, they were likely to fill, or partially fill, said aqueduct or canal and cause the flow of water being maintained in said canal or aqueduct by said defendants, to be dammed up and to back up and overflow the easterly bank of said canal or aqueduct, and to wash away the fill or embankment upon which said canal or aqueduct was constructed, and to undermine the same, and the court finds that said defendants were particularly negligent in the maintenance, care and operation of said canal or aqueduct in that they failed to construct any spillway or conduit over or under said canal or aqueduct opposite or below that certain canyon referred to, described and testified to as Canyon 'A' in the testimony and evidence introduced in this case and that defendants were negligent in that they knew, or should have known, if said canal or aqueduct became undermined and collapsed that the waters flowing therein would flow down and upon, and be precipitated upon the bed of Owens Lake, and would deposit soil, silt, sand and débris upon the leasehold owned, operated and controlled by plaintiff; that defendants were negligent and careless, and failed to exercise due or proper care in the maintenance and operation of said canal or acqueduct in that they did not maintain a proper or sufficient patrol or guard, and did not maintain adequate or sufficient inspection of said canal or aqueduct during the period of heavy rainfall that continued from November 24th to the morning of November 27th, 1926 * * *."

It is argued that the only evidence appearing in the record which could possibly be taken as supporting a finding of negligence on the part of the appellants consists in the answers given by two expert witnesses to hypothetical questions asked of them, which evidence was improperly admitted since the form of the questions was improper and, further, that it conclusively appears from the evidence that the break in the aqueduct which resulted in this action was caused by such an unusual flow of water out of Canyon A and down Cone A that the same must have come from such a cloud-burst or unusual rain as could not have been anticipated by the appellants and which must be held, as a matter of law, to have constituted an act of God and one for which the appellants cannot be held responsible. We are unable to agree with either of the contentions thus made.

While it appears from the evidence that the ordinary rainfall in the Owens Valley is light, it also appears that this area, including the easterly slope of the mountains along which this aqueduct runs, is subject to torrential rains at times; that such rains are especially heavy in spots; and that the places or spots where the rain is unusually heavy vary with the different storms.

According to the government records kept at Independence, thirty miles north of where the break occurred, it rained 1.12 inches on November 24, 1926, 2.51 inches on the 26th, and 1.06 inches on the 27th. According to records kept by the appellants at their Cottonwood creek gate, about three and one-half miles north of this break, their gauge showed .18 of an inch of rainfall on the morning of November 24, 1926, 1.79 inches on the morning of the 25th, .35 on the morning of the 26th, and 2.78 inches on the morning of November 27th. It should be noted that these last figures are from morning to morning of the respective days, while the preceding government figures are from midnight to midnight. With this in mind, while the rainfall during this storm may have been somewhat higher at the point where the break occurred than at Independence, it does not necessarily appear that the difference was very great. The total for the storm at Independence was 4.68 inches, while the total at the Cottonwood gate was 5.01 inches. A number of witnesses testified that the heaviest rainfall during this storm occurred during the afternoon and evening of the 26th and the early morning hours of the 27th, and that while it was a very heavy rain, it was no heavier than they had seen at that place several times in the past. It appears from the government records of rainfall at Independence that in December, 1867, it rained 3.90 inches on the 21st and 22d, 1.60 inches on the 23d, and 5.59 inches within a period of twenty-nine hours on the 25th and 26th, and there was a total rainfall of 12.19 inches during that month. During January, 1868, it rained 3.05 inches on the first and 1.04 inches on the 10th. During

January, 1914, it rained 1.33 inches on the 24th and 3.51 inches on the 25th. The government records thus disclose that the rainfall at Independence on November 26, 1926, had been exceeded on four days since the government records were kept. The appellants argue, however, that it conclusively appears that a rainfall occurred on the night of the 26th-27th at Canyon A very greatly in excess of any that had ever occurred there before, since on this occasion the water coming from Canyon A washed great quantities of sand and gravel from Cone A into the aqueduct for the first time since it was constructed. It neither appears that the rain in question was heavier at this point on this occasion than had occurred there before the aqueduct was constructed, nor, necessarily, that it was heavier than the one in January, 1914. The manner in which rain fell, the condition of the cone at the time, the form of the gully already on the face of the cone, the manner in which the material had settled through the years, and many other things may have led to the concentrated washing and caving which occurred on this occasion.

It is also argued that this rainfall in Canyon A must have been greater than in the surrounding area since the drainage area in Canyon A is smaller than that in adjoining canyons, since Cone A is smaller in area than some of the cones near by, and since no such a slide or fill then occurred at the other cones crossed by the aqueduct. Not only is there testimony from witnesses justifying the inference that the rainfall at the point in question was not noticeably greater than in the surrounding country, but the fact that such a wash then occurred here for the first time, and here only, does not conclusively show that a very unusual amount of rain fell at that time in Canyon A only. While it appears that the drainage area of Canyon A and the area of Cone A are smaller than some other similar canyons and cones below and over which the aqueduct passes, it also appears that Canyon A is steeper than the others, that its walls and sides and practically all of its drainage area consists, to a large extent, of light loose material, and that Cone A stands apart from other cones in the vicinity as being composed of lighter material, light sand and gravel and fewer and smaller rocks. Not only is it possible that such lighter material would wash more easily than cones composed of heavier material but the fact that this cone had been thoroughly soaked during the preceding two days, with the added steepness and narrowness of its canyon, and the fact that there was already a channel on the face of the cone, at least near the mouth of the canyon, may have concentrated the water and started the loose sand to slipping while larger cones near by may have absorbed and spread a larger amount of water without starting a concentrated erosion. When water once starts to cut a soft material the cutting is often rapid. There is some evidence that the condition and position of this cone and canyon were different from its neighbors, and it cannot be said that the only possible inference to be drawn from the thing that happened is that the rainfall in that particular spot was enormously greater than that on either side. It further appears that the appellants had knowledge of and had studied the available rainfall records and they are to be charged with knowledge that unusual rains occurred in this vicinity and that they vary in intensity at different places. If it may be assumed that the trial court could have found to the contrary, it cannot be said that there is no evidence to sustain the court's finding that this storm was not so unusual as not to have been anticipated by the appellants and that it was not of such proportions as to constitute what may be termed "an act of God" in the legal sense.

The question of the appellants' negligence in constructing and maintaining this aqueduct should be considered in connection with the fact that such a storm as the one here in question should have been anticipated by them. Under such circumstances this aqueduct was constructed for a distance of several thousand feet across this cone of unusually light material, and there is evidence that it was constructed by cutting down to grade on the slope of this cone through this light material and leaving on the uphill side of the aqueduct a perpendicular wall of sand and gravel standing four feet above the top of the west side of the aqueduct, from which point the cone sloped on up to its apex at a grade of between 20 per cent. and 25 per cent. In other words, this mass of sand, gravel, and light material stood immediately above the aqueduct, with its lower edge standing 4 feet directly above the side of the same, and with nothing to take care of any water or material that might come down. Not only would any water that got started down this cone in a definite channel have a colossal carrying capacity, as testified by one of the engineers, but the very condition in which this cone was left, in itself, justifies a finding of negligence. A number of photographs showing the actual conditions at this point appear in the record and these, in themselves, furnish sufficient evidence to support the findings attacked. There was also evidence that about the time

the aqueduct was completed it was completely filled in for more than half a mile a short distance below the point where this break occurred, that near the same point it was again filled in 1914, that it was completely filled with sand and débris from flood waters in 1921, and that at various times between 1912 and 1926 it was partially filled by rock, gravel, and sand falling in from these slopes. The appellants argued that evidence of such fills at other times and places is of no value because a fill had not before occurred at the identical spot involved here. This contention is without merit and this evidence tends to support the finding made.

[4, 5] The appellants contend that the question of negligence with respect to the manner in which this aqueduct was constructed and maintained was entirely a question to be decided upon the testimony of expert witnesses and that the only material evidence upon this point which is properly in the record, consisting in the answers to hypothetical questions given by several expert witnesses put on by the appellants, is directly contrary to the court's findings. It is contended that none of the respondent's evidence on the question of negligence is material except for two hypothetical questions asked of engineers placed on the stand by the respondent. It is then argued that the evidence of these two engineers was inadmissible because of the form of the question asked of each and that there is, therefore, no evidence in the record to sustain the finding of negligence. The hypothetical question asked of respondent's two engineers, after stating the general facts and circumstances disclosed by other evidence, concluded as follows: "* * * state whether in your opinion it was safe and prudent to construct said aqueduct of the dimensions and character and at the location mentioned, without providing means for carrying the drainage water (and) débris which might be expected to flow from said canyon west of the point where the fill occurred, so that such drainage water and débris would not be deposited in said aqueduct, state whether or not in your opinion it was safe?"

To this question one of the witnesses answered no, and the other witness answered as follows: "In my opinion it was imprudent and not good engineering. If the locating engineer was forced by some unknown reasons to me, to locate an open aqueduct across all these débris cones you have mentioned, and at the mouth of all the canyons you have mentioned, he should have provided for not only to protect the aqueduct by frequent overhead crossings, but in some places to protect the aqueduct by covering the same. That is based on my knowledge also of the country alongside and through which the aqueduct runs from Alabama Hills to below Little Lake."

It is appellants' contention not only that the question of negligence depended entirely upon expert evidence, but that the form of the question asked of these witnesses took away from the trier of fact the ultimate fact to be decided, and that the court, therefore, erred in permitting the questions to be answered. It is argued that the witnesses should have been asked whether the manner of construction indicated was in accordance with good engineering practice, and not whether it was safe and prudent under the circumstances. In support of this contention the appellants rely upon the following cases: Sappenfield v. Main Street R. Co., 91 Cal. 48, 27 P. 590; Giraudi v. Electric Imp. Co., 107 Cal. 120, 40 P. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114; Luman v. Golden Ancient Channel Min. Co., 140 Cal. 700, 74 P. 307; Parkin v. Grayson-Owen Co., 157 Cal. 41, 106 P. 210; Mulholland v. Western Gas Const. Co., 21 Cal. App. 44, 131 P. 110, 113.

It may first be observed that no objection was made to the form of the question when it was asked of the second expert witness put on by the respondent and that this witness replied that in his opinion the manner of construction, under the circumstances named, did not constitute good engineering. The respondent's expert witnesses had testified in great detail as to the existing conditions as they had seen them on the ground and as to the surrounding circumstances. One of the witnesses explained his answer by stating what, in his opinion, could have been done to meet the situation shown to exist. As pointed out in Giraudi v. Electric Imp. Co., 107 Cal. 120, 40 P. 108, 110, 28 L. R. A. 596, 48 Am. St. Rep. 114: "The cases do undoubtedly hold that an expert cannot be asked whether a structure is a safe one, or whether certain methods are prudent, but all hold that facts may be elicited from the witness from which the conclusion inevitably follows." In that case, the court further said: "The difference is largely one as to the form of the question, and, while I do not mean to say that it is immaterial, or that such an error may never be cause for reversal, I do not think it should be so held here. The answer of the witness gave the facts in full, and explained what methods would have been safe. All this information might have been obtained by prop-

er questions. And then it was not very material here. The negligence of defendant was fully proven by other evidence." In the instant case, no such technical question was involved as whether or not the aqueduct, in itself, was safe. If it be conceded that no layman is capable of passing upon the form of construction of such an aqueduct in order to give it the requisite strength to meet the strain to be placed upon it under the conditions under which it is to be operated, it does not follow that the other question as to the surroundings in which it was built and maintained and as to the danger that might lie in the great mass of light material immediately above it and under the canyon, is a question for experts alone. In our opinion the question presented was not one for experts alone, and there was ample evidence, aside from the expert testimony, to sustain the court's findings. We take it that the expert evidence upon this subject was admitted not as the only evidence which was material in that connection and not as passing upon the ultimate fact to be decided, but for the purpose of giving the court the assistance of the opinion of these experts, not as to whether the aqueduct was safe in itself but as to whether recognized principles of engineering had been followed with respect to where it was placed and with respect to what other measures had been taken to safeguard its operation. This was recognized by one of the witnesses for the respondent who referred to good engineering in his answer and, as a practical matter, we think it is recognized by the appellants, who also asked their witnesses whether the manner of construction under the circumstances was safe and prudent, although they added thereto the phrase "and in accordance with good engineering practice." This added reference to good engineering practice technically improved their question, but it may well be doubted whether it made any practical difference in the evidence thus brought out. It affirmatively appears that the trial court took all of the evidence, expert and otherwise, into account in arriving at its decision and, we think, properly so. After a careful examination of the record, we are of the opinion that the defect in the form of these hypothetical questions was not fatal to the respondent's case and that the error, if any, in permitting these questions to be answered was neither prejudicial nor reversible. Mulholland v. Western Gas Const. Co., 21 Cal. App. 44, 131 P. 110, 113; Lemley v. Doak Gas Engine Co., 40 Cal. App. 146, 180 P. 671; Bowen v. Sierra Lbr. Co., 3 Cal. App. 312, 84 P. 1010.

The court's findings with reference to negligence in connection with the manner in which the aqueduct was operated on the night on which the break occurred also finds some support in the evidence. While there is some testimony that the appellants doubled their force of men that night by sending extra men to certain points at which men were regularly stationed and kept, the only evidence in the record is to the effect that the aqueduct was not patrolled and there is no evidence of anything material being done by these extra men except in one case where aid was given in repairing a floodgate which would not open. While this gate was repaired it was not opened until long after the damage was done. Although the rain had been particularly heavy during the preceding three days and was particularly heavy on the night in question, the aqueduct was kept running nearly full and there is evidence that nothing was done to discover what amount of débris had been washed into the aqueduct. There is some evidence that the break here in question occurred about 8:30 o'clock on the night of the 26th. The aqueduct was completely filled just below the break, the entire stream of water carried by the aqueduct was diverted down the hill across the respondent's property, and the break was not discovered until some time early the next morning, although one of the appellants' men was stationed at a point two and one-half miles below the break and he testified that in the performance of his duty he made an examination of the aqueduct to see how much water it was carrying every hour during the night. The matter of negligence in connection with the operation of the aqueduct on the night in question is of minor importance as compared with the question of negligence in its construction and maintenance in general, but there is sufficient evidence in the record to support the findings as to each phase of negligence charged.

[6-8] We will next consider the matter of damages. The court found that at the time of the break in the aqueduct there were on the lease owned and controlled by the respondent approximately 200 acres which were covered with deposits of trona varying in depth from 12 inches to 4 feet; that 130 acres of this was covered with high-grade trona; that the water flowing through the break in the aqueduct over and across the respondent's premises and the sand, soil, silt, and débris deposited thereon by said flow of water destroyed and rendered worthless 75 acres of high-grade and 80 acres of low-grade trona deposits; that said flooding

washed away and destroyed approximately 90,000 tons of the highest grade of trona; that in addition to the destruction of such trona deposits the fresh water thus flowing and the soil, silt, and gravel carried therewith reduced the purity and strength of the brine which had existed on respondent's leasehold so that it became necessary for the respondent to add large quantities of trona to such brine to bring the same up to a required gravity; that about two miles of a roadway which had been five and one-half miles long was washed out, rendering the whole roadway useless and valueless; that several hundred feet of pipe line and certain power lines were washed out; and that respondent was compelled to make certain repairs to its pipe lines, power lines, and pumping plants, to build a longer road to its remaining trona deposit, to construct an extension to its pipe lines and to put in a new pumping plant. The court then found that by reason of the negligence of the appellants the respondent had been damaged in the sum of $236,251.96.

The appellants attack this last finding, as to the amount of the damages, as being without support in the evidence. The only support for the amount of the damages as found by the trial court is to be found in the testimony of one of the respondent's officers. This witness testified that the respondent's books disclosed that $710.64 was spent in repairing pipe lines; that the entire road, a part of which was washed out by the flood, had cost $6,767.50 when originally constructed about two years prior to November, 1926; that after the flood $9,912.80 was spent in building a new road to the remaining trona deposit, in building a new pipe line for the brine supply, and in building a new pumping plant at the end of this pipe line; that while the repairs were being made it cost the respondent $36,161.02 in increased operating expenses; and that for about three months prior to the break in the aqueduct the respondent had been making a profit of $2.53 per ton on all trona sold. Applying this profit to the 90,000 tons of trona said to be destroyed, this witness stated that the damage to the trona was $227,700. The court reduced this last figure by $45,000, deducting the royalty of 50 cents per ton which the respondent would have had to pay to the state in the event the 90,000 tons of trona destroyed had been removed by the respondent. Otherwise the court adopted the figures given by this witness, resulting in the judgment of $236,251.96.

The largest item of damage was the injury done to the trona deposits on this land, and the most important legal question presented on this phase of the case is as to the measure of damage properly to be applied in that connection. The appellants maintain that any injury done by them to the trona deposit was an injury to real estate and that the usual rule for measuring such damage applies, that is, the difference between the value of the land before and after the injury. On the other hand, the respondent contends that trona is a mineral, that a different rule applies where mineral land is injured or destroyed, and that the proper measure of damage here is the value of the destroyed trona less the cost of taking the same from the ground.

The respondent relies on the following cases: Empire Gold Min. Co. v. Bonanza Gold Min. Co., 67 Cal. 406, 7 P. 810; Lightner Min. Co. v. Lane, 161 Cal. 689, 120 P. 771, Ann. Cas. 1913C, 1093; Maye v. Yappen, 23 Cal. 306; Silver Springs, etc., R. Co. v. Van Ness, 45 Fla. 559, 34 So. 884; Kingston v. Lehigh Valley Coal Co., 241 Pa. 469, 88 A. 763, 49 L. R. A. (N. S.) 557; Bolles Wooden-Ware Co. v. United States, 106 U. S. 432, 1 S. Ct. 398, 27 L. Ed. 230; United States v. Homestake Min. Co. (C. C. A.) 117 F. 481; Resurrection Gold Min. Co. v. Fortune Gold Min. Co. (C. C. A.) 129 F. 668; Durant Min. Co. v. Percy Consol. Min. Co. (C. C. A.) 93 F. 166; Colorado, etc., Min. Co. v. Turck (C. C. A.) 70 F. 294; Aurora Hill Con. Min. Co. v. 85 Min. Co. (C. C.) 34 F. 515. With one exception all of these were cases of conversion where either ore or lumber had been taken by another and converted to his own use. In one case, Silver Springs, etc., R. Co. v. Van Ness, supra, the measure of damages applied was the value of certain rock in place, but the action was for breach of a contract and the case was decided on the theory that the defendant was keeping possession of the rock in question. While these cases recognize the rule that where suit is brought for damage done to real property the correct measure of damage is the depreciation in the value of the property caused by the injury, they were brought not to recover for injuries done to real property, but to recover the value of materials which had been reduced to the form of personal property and taken and converted by another. Under such circumstances the measure of damage applied was the value of the thing taken, and in these and other cases this rule is not only applied to minerals but to lumber and various crops, when the article in question has been severed and has become

personal property. The respondent also argues that the cases of Hendricks v. S. V. M. & I. Co., 58 Cal. 190, 41 Am. Rep. 257, and Goller v. Fett, 30 Cal. 481, have established the rule in this state that the measure of damages for injuries done to mineral land by washing or flooding is the value of the minerals destroyed. The first of these cases merely held that the doctrine of lateral support did not apply under the facts there presented and it was incidentally remarked that the defendant would have been liable for the value of the gold actually taken except for the fact that it had no net value. The second of these cases involved the question of the validity of a verbal sale of an interest in a mine and, incidentally, the court held that the cost of digging gold-bearing earth was to be considered in an action to recover for what had been taken. Neither of these cases establishes any rule as to the measure of damages in an action for injury to mineral lands as such.

The respondent concedes the general rule, which is well established, that the measure of damages in an action for injury done to land is the difference in the market value of the land before and after the injury. It is strenuously insisted, however, that a different rule has been applied in the case of mineral lands than in the case of lands in general. No such distinction is made in the cases relied on by the respondent and the distinction which plainly appears in those cases is that they involved materials which had been already reduced to personal property and taken and converted to the use of another. Not only is there good reason for a different rule in such cases, in that they involve personal property taken, but the value thereof at the time of conversion may be readily ascertained without involving future uncertainties and speculative elements. Our attention has been called to no cases where it has been held that an exception to the usual rule, with respect to the measure of damages, applies in cases of injury to mineral lands.

The appellants cite certain cases which will next be considered. In LeBrun v. Richards, 210 Cal. 308, 291 P. 825, 829, 72 A. L. R. 336, a case involving damage caused by the flooding of certain lands, the general rule was applied and the court said: "The correct rule is that the measure of damages for injuries to real property is the difference, if any, in its market value before and immediately after the injury." In Perkins v. Blauth, 163 Cal. 782, 127 P. 50, Ann. Cas. 1913E, 1267, the same rule was applied in a case where the defendants had cut the banks of the Sacramento river and permitted the waters thereof to come through and inundate the plaintiff's land, washing out the soil and covering portions thereof with deposits of sand. In Salstrom v. Orleans Min. Co., 153 Cal. 551, 96 P. 292, the defendant deposited débris in a stream causing water therefrom to run over the land of the plaintiff, washing out certain soil fit for farming purposes and piling débris on certain mining land. With reference to the part of the property which was fit only for mining purposes, the court held that the proper measure of damage was the cost of removing the débris if the same was removable at a cost less than the value of the property, but if the cost of removing the same should exceed the value of the property then the measure thereof was the value of the property itself. In other words, the court held that if the value of this mineral property was destroyed, the measure of damage was the value of the land, and the usual rule was thus applied. In Green v. General Petroleum Corporation, 205 Cal. 328, 270 P. 952, 60 A. L. R. 475, a blow-out of an oil well resulted in depositing a mixture of oil, mud, and rocks on adjoining property. The proper measure of damages was held to be the cost of restoring the injured property to its former state or, if this exceeded its prior value, the value of the property destroyed. We take it that these last two cases are not inconsistent with the two cases last before cited. In other words, in cases of injury to land, if repairs can reasonably be made in restoring the property to its former state, the cost thereof furnishes a proper measure of the damage done. Where this is not practicable and the injury to the land may be considered permanent, the general rule prevails. The case now before us was tried on the accepted theory that it was impracticable or impossible to restore the land to its former state and it is impossible to consider the damage done as other than a permanent injury to the land. The depreciation in the value of land has been applied as a measure of damages in flooding cases in other jurisdictions. Young v. Extension Ditch Co., 13 Idaho, 174, 89 P. 296; McHenry v. Parkersburg, 66 W. Va. 533, 66 S. E. 750, 29 L. R. A. (N. S.) 860; Ewing v. Louisville, 140 Ky. 726, 131 S. W. 1016, 31 L. R. A. (N. S.) 612; Hanover Water Co. v. Ashland Iron Co., 84 Pa. 279.

In the case before us, the land in question was permanently injured. A part of the trona deposits was so covered up and mixed with other material as to be valueless, a part

was washed away and taken to other land, and still another part, presumably, remains in solution on the lease in question. While the usefulness of this land was largely destroyed, no portion of it was reduced to personal property or taken by the appellants, and to attempt to measure the damage done by estimating the profits that might have accrued from its use at some time in the future involves untold speculation and uncertainty, a result which, as clearly appears, actually occurred in this case.

Even under the rule contended for by the respondent, the evidence is not sufficient to show the value of this trona in place. In an effort to show this value the respondent not only went into the highly speculative field of profits, but produced evidence only as to its profit on one part of its business, in which a part only of the trona was used, that is its profit on one of its manufactured products, which may be termed "refined trona." Such evidence as there is is not as to the value of the trona when removed from the ground and there is nothing to show the cost of removing the same from the ground. The figures given relate to the profits the respondent made on that portion of the trona which it sold after processing the same. Even the books were not introduced in evidence, but one of the officers of the respondent was permitted to testify that he had examined the books and to give his conclusion that the company was then making a profit of $2.53 (or $2.03 net after paying the state's royalty) on each ton of refined trona sold. There is nothing to show the value of the trona in its raw state nor what part of the profit resulted from the manufacturing process. It further appears that in arriving at his conclusion as to the average profit per ton this witness considered the average expense of operation over a period of three months prior to the break in the aqueduct but took the average selling price over the preceding two years, although in making the estimate he omitted a part of the refined trona which had been sold during that time. It also appears that in thus getting at the supposed value of the trona this witness disregarded entirely the value of the trona used by the respondent for strengthening brine in the manufacture of its other products. The uncertainties involved are made more apparent by the fact that at the rate at which the respondent had been selling the trona in the past it would have taken thirty-six years to have processed and sold the trona destroyed, and are further emphasized by the fact that the respondent stopped selling refined trona on July 1, 1927, because, as one of its witnesses testified, an increase of 50 cents a ton in the hauling cost had then made the sale of this product unprofitable. While the respondent argues that future profits were in no way used in measuring this damage and that what appears to be future profit is in fact the present value of the trona in place, the distinction is more nice than real and the conjectural nature of the proof remains apparent.

In our opinion, the usual rule as to the measure of damages for permanent injuries to real estate should have been here applied and, in so far as the destruction of the trona deposit is concerned, there is no evidence to sustain the findings as to the amount of the damage.

It appears, beyond question, that in fixing the amount of the damages the trial court took the figures as testified to by the respondent's auditor. These figures, as given above, include three items covering pipe lines, roads, and pumping plants totaling $17,390.94. The complaint segregated the claims for damages and asked for specific amounts for the different items of damage. In this segregation the amount asked for injuries to pumping plants, pipe lines, power lines, and roadways was $9,688. It thus appears that the amount allowed by the court for this item of damage exceeded the amount asked for in the complaint by $8,702.94. There would also appear to be a duplication in that the entire original cost of the old road was allowed as well as the entire cost of a new road.

An allowance of $36,161.02 for increased operating expenses during the period following the break was included in the judgment. The evidence relied upon as supporting this part of the judgment is unsatisfactory and, in our opinion, insufficient. The respondent's auditor testified that the increased operating cost of the plant during this period was the sum named, that he arrived at this figure by taking the total amount expended during that period and subtracting therefrom what would have been the normal cost of operating the plant in order to secure the same amount of production, and that he used the cost of production during the two months preceding the break as being the normal cost of production for the period in question. Complete figures were not given, and it appears that the amount named as the excess cost of operation was a conclusion of the witness and such figures as are given do not support that conclusion. It further appears that there is a duplication in that this witness testified that in arriving at the cost of

operation during that period he included the cost of repairs made, whereas the cost of these repairs was also allowed in connection with the damage to the equipment above referred to.

It would further appear that not all of the damage suffered by the respondent was caused by the break in the aqueduct, although the court found that all of the damage was thus caused. It appears from the testimony of respondent's witnesses that although only a portion of the roadway across the lake bed was destroyed on this occasion it was not practicable to repair the break because the whole roadway was rendered useless by the rise of water in the lake, which prevented the use of the road in that position. These same witnesses also testified that extensions of the pipe lines and power lines and the construction of a new pumping plant were necessary because the highly concentrated brine of the lake, near the shore line, was weakened by water and mixed with sand and débris, necessitating their building a pipe line farther out into the lake where clean brine could be obtained. There is evidence that this rise in the water in the lake was caused not only by the break in the aqueduct but by flood waters coming down many natural creeks, there being two of these creeks which emptied their waters over the respondent's lease. The high-grade trona deposit on this lease, a part of which was destroyed, lay on a delta between these two creeks. There is evidence to indicate that a part of the damage to this trona deposit may have been caused by waters of these creeks rather than by the break in the aqueduct. In any event, it seems certain that a part of the damage claimed and allowed in connection with the new roads, pipe lines, and pumping plant was caused by other waters than those for which the appellants are responsible, and that this same situation was a not inconsiderable element in the added cost of operation included as one of the items of damage. On a retrial of the case this matter should receive consideration and, in spite of the obvious difficulties, some attempt should be made to exclude such portion of the damages as were not caused by the negligence of the appellants.

The respondent's leasehold interest was an interest in real property, and the injury caused by the appellants was an injury to this interest in real property. The proper measure of damage to the leasehold interest would be the difference in the value of that interest before and after the injury, and on a retrial of the action this value should be determined and used as a basis for any recovery allowed in this connection.

The judgment is therefore reversed, and the cause is remanded for a new trial solely upon the issue of the amount of damages, with directions to the trial court to render judgment in favor of the respondent for the amount of damages so found upon a determination of that issue.

I concur: MARKS, J.

JENNINGS, J., being absent, does not participate in this opinion.



139 Cal.App. 334

PEOPLE v. WEBB BROS.

Civ. 5160.

District Court of Appeal, Third District, California.

June 19, 1934.

Rehearing Denied July 19, 1934.

Hearing Denied by Supreme Court Aug. 16, 1934.

1. Constitutional law ⇐23

Although amendment becomes part of Constitution when adopted, operative effect may begin thereafter.

2. Automobiles ⇐97

Constitutional amendment adopted in November, 1926, imposing motor vehicle license taxes, *held* not immediately operative; hence did not prevent collection of license taxes assessed under 1925 statute for last quarter of 1926 (St. 1925, p. 833; Const. art. 13, § 15, as amended in 1926).

Const. art. 13, § 15, subd. (b), as amended in 1926, provides that taxes therein imposed shall become lien on first Monday in March of each year after adoption of amendment, and shall become due on first Monday in July thereafter.

3. Automobiles ⇐97

Words "levied" and "assessed" within constitutional amendment imposing motor vehicle license taxes must be construed according to context and refer to report of gross proceeds and calculation of taxes (Const. art. 13, § 15, as amended in 1926).

[Ed. Note.—For other definitions of "Assessed" and "Levy (of Taxes)," see Words & Phrases.]

Appeal from Sacramento County; Peter J. Shields, Judge.

Action by the People against Webb Bros. Judgment for plaintiff, and defendants appeal.

Affirmed.

H. J. Bischoff, of San Diego, for appellants.

U. S. Webb, Atty. Gen., and R. L. Chamberlain, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

This is an appeal by the defendants from a judgment awarding the plaintiff the sum of $971.52 license fees assessed against the defendants for the quarter ending 1926, under and in accordance with the provisions of chapter 412, Statutes of 1925 (page 833), imposing a tax of 4 per cent. upon the gross proceeds for the operation of motor vehicles upon the public highway.

On November 2, 1926, the people of the state of California amended article 13 of the Constitution by adding thereto section 15. This section imposes a license tax upon persons operating motor vehicles of the kind therein described, upon the public highways of the state. This section also contains a provision that nothing therein shall affect any taxes levied or assessed prior to the adoption of the section.

Notwithstanding the decision of the Supreme Court in the case of People v. Borderland Express et al., 218 Cal. 680, 24 P.(2d) 823, holding in a case the exact parallel of the one under consideration that the contention of the appellants is untenable, the argument is presented that under the holding had in the case of City and County of San Francisco v. Pacific Telephone & Telegraph Company, 166 Cal. 244, 135 P. 971, judgment should have been entered in favor of the appellants, the contention being that the holding in the Borderland Express Case is incorrect and not in consonance with the reasoning of the Supreme Court in the case of Pacific Telephone & Telegraph Company. A careful review of the two cases leads us to the conclusion that there is no conflict in the rules of law therein set forth.

In the case of Pacific Telephone & Telegraph Company, supra, the action involved a license tax for the first two quarters of the year 1911. Section 14 of article 13 of the Constitution involved in that action was adopted on November 8, 1910, and became effective as a part of the Constitution immediately upon its adoption, but its operative effect upon the license taxes involved began with the 1st day of January of the year 1911.

[1, 2] The second paragraph of subdivision (b) of section 15 of article 13 reads: "The taxes herein provided for shall become a lien on the first Monday in March of each year after the adoption of this section and shall become due and payable on the first Monday in July thereafter." Thus, while it is a settled law that an amendment to the Constitution becomes effective as a part of the Constitution upon its adoption by the voters of the state, its operative effect upon the subject-matter therein contained may begin at a later date. This we think clearly appears to be the true consideration that should be given to the operation of section 15 of article 13 of the Constitution quoted above.

[3] A considerable portion of the appellants' brief has been given to a discussion of the words "levied" and "assessed." However, these words we think must be construed according to the meaning contained in the context of the constitutional amendment. As so used, they really refer to the report of the gross proceeds made by the owners or the operators of the vehicles, subject to the provisions of the section, and then a mathematical calculation of the sum of money which the operators or owners are under obligations to pay. It is apparent that the words "levied" and "assessed" relate simply to the method of ascertaining the extent of the obligation and not to the meaning of the words when used in connection with other transactions, such as the levying of an attachment or the assessing of real estate by assessors and the levying of a tax by boards of supervisors.

As we read the opinion in the case of San Francisco v. Pacific Telephone & Telegraph Company, supra, had the license tax been due for the two quarters ending with December 31, 1910, instead of for the two quarters beginning with January 1, 1911, the decision would have been exactly the same as that in the case of People v. Borderland Express, supra. Under such circumstances this court, we think, is bound by the two decisions, and must hold that the judgment of the trial court should be affirmed. And it is so ordered.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

139 Cal.App. 337

PEOPLE v. FELLOWS.

Cr. 98.

District Court of Appeal, Fourth District, California.

June 19, 1934.

1. Automobiles ⇐355(6)

Evidence in trial for driving automobile while intoxicated *held* to show that defendant was intoxicated and driving automobile at time and place alleged (St. 1929, p. 537, § 112).

2. Automobiles ⇐354

Evidence that defendant's automobile was being driven in cautious, prudent, and orderly manner before it was stopped *held* admissible in trial for driving it while intoxicated (St. 1929, p. 537, § 112).

3. Criminal law ⇐1036(1)

Exclusion of testimony in trial for driving automobile while intoxicated as to whether it was being driven cautiously before it was stopped *held* not prejudicial to defendant, who made no proffer of what he expected to prove when objections were sustained (St. 1929, p. 537, § 112).

4. Criminal law ⇐1163(1)

Appellate court cannot presume prejudice, where not shown by record.

5. Criminal law ⇐1163(3)

Appellate court cannot presume error in excluding from evidence pictures of which no copies were in record, though marked for identification, nor conclude, in absence of evidence, that their rejection prejudiced appellant.

6. Criminal law ⇐1170(1)

Exclusion of testimony in trial for driving automobile while intoxicated as to whether car was being driven cautiously before it was stopped *held* not prejudicial to defendant, who maintained that his wife was driving car at time (St. 1929, p. 537, § 112).

7. Criminal law ⇐1170(2)

Exclusion of evidence in trial for driving automobile while intoxicated that it was being driven cautiously before it was stopped *held* not prejudicial to defendant, where evidence of his guilt was so complete and convincing as to preclude presumption that jury could have acquitted him had such evidence been admitted (St. 1929, p. 537, § 112; Const. art. 6, § 4½).

8. Automobiles ⇐332
Constitutional law ⇐24

Repeal of Eighteenth Amendment and state prohibition act *held* not to require adoption of more liberal view of crime of driving automobile while intoxicated, act defining such crime not being changed by such repeals (St. 1929, p. 537, § 112; St. 1921, p. 79; Const. U. S. Amend. 18).

9. Criminal law ⇐1172(1)

Instruction that person must be presumed to intend what he voluntarily and willfully does and all natural, probable, and usual consequences of his own acts *held* not prejudicial to defendant in trial for driving automobile while intoxicated (St. 1929, p. 537, § 112).

10. Criminal law ⇐785(7)

Court erred in refusing statutory instruction concerning expert witness' opinion, where physician who examined defendant in trial for driving automobile while intoxicated testified, at least partly, as expert (St. 1929, p. 537, § 112; Pen. Code, § 1127b).

11. Criminal law ⇐1173(2)

Refusal of statutory instruction concerning expert witness' testimony *held* not prejudicial to defendant in view of convincing evidence of his guilt (Pen. Code, § 1127b; Const. art. 6, § 4½).

12. Criminal law ⇐656(3)

Court's remarks in jury's presence during trial for driving automobile while intoxicated that he would confine case to question whether defendant was intoxicated when he drove car *held* not to authorize reversal of conviction as assuming that defendant was driving car.

The remarks were made before defense that defendant's wife was driving car was developed and defendant did not call court's attention to such defense at time of remarks nor assign them as error.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

George Fellows was convicted of driving an automobile while under the influence of intoxicating liquor, and he appeals.

Affirmed.

E. John Eriksson, Homer M. Bail, and John A. Hadaller, all of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

MARKS, Justice.

By an information filed by the district attorney of San Bernardino county, appellant was charged with the crime of driving an automobile while under the influence of intoxicating liquor on Colton avenue, a public high-

way of San Bernardino county, on the evening of October 18, 1933. He has appealed from the judgment pronounced upon him requiring him to serve six months in the county jail, and from the orders denying his motions for new trial and for arrest of judgment.

[1] The defense presented was that appellant was not intoxicated and that at the time and place in question he was not driving the automobile, but that it was being driven by Mae Fellows, his wife. We have studied the record and are convinced beyond any reasonable or possible doubt that Fellows was badly intoxicated and was driving the automobile while in that condition. The evidence of intoxication is furnished by several witnesses who testified as to a very noticeable alcoholic odor on appellant's breath; that from the time he alighted from his car to his incarceration, a period of more than two hours, he could not stand or walk without staggering; that his speech was thickened to such a degree that he could not articulate clearly. A physician who examined him and applied recognized tests pronounced him drunk. The evidence that he was the driver of the automobile is equally conclusive. One witness saw him driving the car. Several other witnesses saw him sitting behind the steering wheel immediately after the automobile was stopped on the highway. Another witness saw appellant and his wife change places in the automobile after it was stopped so that she then occupied the driver's seat behind the steering wheel with appellant sitting in the place formerly occupied by her.

[2] Appellant complains of rulings of the trial court in sustaining objections to questions propounded by his counsel in cross-examining the people's witnesses whereby they evidently sought to elicit evidence that his automobile was being driven in a cautious, prudent, and orderly manner before it was stopped on the highway.

In People v. Ekstromer, 71 Cal. App. 239, 235 P. 69, 71 (quoting from People v. Dingle, 56 Cal. App. 445, 205 P. 705), it is said: " 'With respect to the meaning of the phrase "under the influence of intoxicating liquor," as used in this statute, we think we are well within the bounds of accuracy in saying that if intoxicating liquor has so far affected the nervous system, brain, or muscles of the driver of an automobile as to impair, to an appreciable degree, his ability to operate his car in the manner that an ordinarily prudent and cautious man, in the full possession of his faculties, using reasonable care, would operate or drive a similar vehicle under like conditions, then such driver is "under the influence of intoxicating liquor" within the meaning of the statute.' * * * Section 112 of the California Vehicle Act was designed to protect the public from the menace of automobiles operated upon the public highway with inadequate or no efficient control, in a world of traffic difficult of management under normal conditions, and should be liberally construed to effect its purpose."

From the foregoing it would seem clear that some evidence of that degree of intoxication which would make it unlawful for a driver to operate his car on a public highway is to be found in the manner of his operation of his automobile, because the impairment of "his ability to operate his car in the manner that an ordinarily prudent and cautious man, in the full possession of his faculties, using reasonable care, would operate or drive a similar vehicle under like conditions" is made one of the tests to be applied. Certainly, testimony tending to show that a driver operated his car in an unusually reckless manner, driving it from side to side of the road, would be admissible as evidence of an intoxication which affected his nervous system, brain, or muscles. People v. McGrath, 94 Cal. App. 520, 271 P. 549. It would also be some evidence of sobriety, and that such an effect had not been produced, if the car had been driven normally and carefully. We believe these matters proper subjects of inquiry in cases of this kind.

[3-7] In the instant case we cannot regard this error as prejudicial for the following reasons: (1) Upon the sustaining of the objections, appellant made no proffer of what he expected to prove. The answers given, if the court had permitted the witnesses to answer, might have been damaging to his cause. We cannot assume prejudice in the absence of anything in the record showing it. Certain pictures were offered in evidence and rejected. Although they were marked for identification, copies are not in the record. We cannot presume error and, in the absence of the evidence, cannot conclude that their rejection from the evidence prejudiced appellant. (2) Appellant stoutly maintained that his wife, and not himself, was driving the car. From the point of view of this defense the manner of the operation of the car became immaterial. (3) The evidence of appellant's guilt was so complete and convincing that it is beyond belief to presume that the jury could have found him not guilty had it been proven that the automobile was carefully driven by him. Section 4½, art. 6, Const.

[8] Appellant complains of three instructions given by the trial court which defined the offense with which he was charged. He urges that since the repeal of the Eighteenth Amendment to the Federal Constitution, and the Wright Act (St. 1921, p. 79), the courts should adopt a more liberal view of the crime denounced by section 112 of the California Vehicle Act (St. 1923, p. 553, as amended by St. 1929, p. 537) than while those enactments were in force. The repeal of these laws made no change in the provisions of the act making it unlawful to operate a motor vehicle on the public highways of California while under the influence of intoxicating liquor. Appellant's argument should be addressed to the Legislature and not to the courts. The three instructions were carefully drawn and properly stated the law of this state.

[9] Appellant complains because the trial court gave the familiar stock instruction that "a person must be presumed to intend to do that which he voluntarily and wilfully does in fact do, and must also be presumed to intend all the natural, probable and usual consequences of his own acts." We cannot see how the giving of this instruction could possibly prejudice the case of appellant if it be assumed that it was error to give it.

[10-11] Appellant proposed, and the court refused, to give the instruction concerning the opinion of an expert witness as provided in section 1127b of the Penal Code. This instruction should have been given as the physician who examined appellant testified, at least in part, as an expert. We cannot regard the failure to give this instruction as prejudicial error (section 4½, art. 6, Const.), under the rule announced in People v. Williamson (Cal. App.) 26 P.(2d) 681.

Appellant assigned as misconduct certain remarks of the district attorney during his argument to the jury. We have examined the record and find no error in them under the rules announced in People v. Burke, 18 Cal. App. 72, 122 P. 435, People v. Lee Yick, 189 Cal. 599, 209 P. 538, People v. Molina, 126 Cal. 505, 59 P. 34, and People v. Gingell, 211 Cal. 532, 296 P. 70.

[12] During the early part of the trial, the court, in passing upon objections to questions asked of witnesses, made several remarks in the presence of the jury, of which the following is an example: "I am going to exclude that line of testimony and confine this case to the question of whether this defendant was intoxicated at the time he drove the car." Appellant urges that in those remarks the trial judge assumed, and told the jury, that he was driving the automobile, when one of his defenses was that his wife was driving it. It should be observed that these remarks were made before this defense was developed and before it appeared that appellant maintained that his wife was the driver. He did not call the trial court's attention to this defense at the time and did not assign the remarks as error. Had this been done, the remarks should, and undoubtedly would, have been withdrawn and the jury instructed to disregard them. Under this state of the record the remarks cannot be urged as reversible error here for the first time.

We have examined the other specifications of error and can find no merit in any of them. No good can be done in discussing them in detail.

The judgment and orders appealed from are affirmed.

I concur: BARNARD, P. J.

JENNINGS, J., being absent, does not participate herein.



139 Cal.App. 454

In re RINDGE'S ESTATE.

MERRILL et al. v. CAVAGNARO.

Civ. 9136.

District Court of Appeal, First District, Division 1, California.

June 29, 1934.

Costs ⇐239

Since order settling executor's first account was not intended to be reversed or modified by appellate court, whose judgment merely contained direction that on final distribution inheritance taxes paid by executor should be charged against legatees' shares, executor, not appealing objectors, was entitled to costs on appeal.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Accounting by Adrian Cavagnaro, executor of the last will of Elyse C. Rindge, deceased, wherein objections were filed by Carrie M. Merrill and others. From an order overrul-

ing objections and approving and settling account, the objectors appealed. Motion made after judgment [28 P.(2d) 705] for an order recalling and correcting the remittitur so as to include costs on appeal.

Motion denied.

Treadwell, Van Fleet & Laughlin, of San Francisco, for appellants.

Sullivan, Roche, Johnson & Barry, of San Francisco, for respondent.

TYLER, Presiding Justice.

Motion for order recalling and correcting remittitur so as to include costs on appeal. The motion is based upon the contention that the judgment entered herein modified the judgment appealed from but contained no directions as to costs on appeal, and the clerk omitted to enter upon the record and insert in the remittitur a judgment that appellant recover costs.

The judgment appealed from was not reversed or modified but simply contained a direction that upon final distribution the amount paid by the executor on account of inheritance taxes should be charged against the shares of the legatees on which the taxes were based. The direction is in no sense a reversal or modification and was not intended to be so understood. Respondent therefore is entitled to costs.

The motion is denied.

We concur: KNIGHT, J.; CASHIN, J.

139 Cal.App. 535

SUTHERLAND v. SAN DIEGO ELECTRIC RY. CO.

Civ. 1072.

District Court of Appeal, Fourth District, California.

July 3, 1934.

Rehearing Denied Aug. 1, 1934.

1. Contracts ⇐153

Contract should be interpreted, if possible, to give effect to all parts thereof.

2. Taxation ⇐1

Tax against automobile bus line *held* in nature of property tax on operating properties in such business, including franchise to use highways, and not income tax, though gross receipts of preceding year are taken as means of measuring valuation of property (Pol. Code, § 3664aa; Const. art. 13, § 15).

3. Taxation ⇐508

Property tax against bus line becoming lien on first Monday of March in given year is tax on property for ensuing year after tax becomes lien, rather than tax for preceding calendar year (Pol. Code, § 3664aa; Const. art. 13, § 15).

4. Sales ⇐77(1)

Contract for sale of bus line providing seller should pay gross revenue tax as to operations until buyer took over line, and for recovery by parties of gross revenue tax paid in respect to revenue received by the other, referred to property tax, and proportion of tax becoming lien in March, 1929, covering period from date buyer took possession until end of assessment year, was payable by buyer taking over bus line January 10, 1930, while entire tax becoming lien in March, 1930, was payable by buyer (Pol. Code, § 3664aa; Const. art. 13, § 15).

5. Sales ⇐77(1)

Difference in value of equipment of buyer and seller of bus line could not affect proration of tax between them, where such difference could not affect amount of tax under measure of valuation fixed by Constitution, particularly where parties by contract provided what might be recovered between them.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Action by Fred A. Sutherland against San Diego Electric Railway Company, in which Martha Sutherland, as administratrix of the estate of Fred A. Sutherland, deceased, was substituted as plaintiff. Judgment for plaintiff, and defendant appeals.

Affirmed.

Morrison, Hohfeld, Foerster, Schuman & Clark, of San Francisco, for appellant.

A. Haines, Arthur F. H. Wright and Gray, Cary, Ames & Driscoll, all of San Diego, for respondent.

BARNARD, Presiding Justice.

Fred A. Sutherland operated seven automobile bus lines, having his headquarters at San Diego. On September 20, 1929, he entered into a written contract with the San Diego Electric Railway Company, a corporation under which he agreed to sell and the railway company agreed to buy the operative rights to three of these automobile bus lines, together with all franchises, permits, licenses, ease-

ments, and good will pertaining thereto, with a few benches and stop signs. Sutherland retained the other lines theretofore operated by him, and no automobile bus equipment or other physical property was to be transferred. A part of the purchase price was to be paid upon approval of the transfer by the railroad commission and the balance upon the taking over of the operation of the three lines by the buyer. The agreement provided that the buyer should have a reasonable time after approval of the transfer by the railroad commission in which to secure new operating equipment with which to conduct the operations of the lines to be taken over. It was also provided that during the interim between the approval of the project by the railroad commission and the taking over of operations by the buyer, the seller was to continue to operate the three lines, retaining all receipts and paying all expenses and cost of operations, including taxes and license fees. The contract then contains a paragraph, a dispute as to the meaning of which has given rise to this controversy, which reads as follows: "Seller shall pay the gross revenue tax in respect to the operations herein agreed to be sold up to the time when Buyer actually takes over said operations by its own equipment and employees; if Buyer should ever be required to pay any gross revenue tax in respect to any revenue received by Seller and not received by Buyer, Seller agrees to reimburse Buyer the amount of such gross revenue tax; and if Seller should ever be required to pay any gross revenue tax in respect to any revenue received by Buyer and not received by Seller, Buyer agrees to reimburse Seller the amount of such gross revenue tax so paid by Seller."

The buyer took over the operation of the three lines in question on January 10, 1930, and after the first installment of the tax imposed by the provisions of article 13, section 15, of the Constitution, and section 3664aa of the Political Code, which had become a lien on the first Monday in March, 1929, had been paid. The second installment of this tax was paid by Sutherland in February, 1930. In February, 1930, Sutherland reported to the state his gross receipts from the operation of all seven lines during the calendar year 1929. On the first Monday in March, 1930, the tax for another year became a lien under the constitutional and statutory provisions referred to. Before the first installment thereof was paid, Sutherland requested the railway company to pay the proportion thereof attributable to the three lines which had been taken over by the company. Payment was refused and Sutherland subsequently paid both installments of that tax. He then brought this action to recover a proportion of the tax paid, in connection with the three lines sold, under the assessment which became a lien on the first Monday in March, 1929, covering the period from the date when the buyer took possession to the end of that assessment year, and also to recover the entire tax paid in connection with these lines under the assessment which became a lien on the first Monday in March, 1930. While the action was pending the plaintiff died and his personal representative was substituted as plaintiff. From a judgment in favor of the plaintiff the defendant has taken this appeal and, for convenience, the original plaintiff will be referred to as the respondent.

The facts are not in dispute and the controversy here is as to whether the provisions of the contract, above quoted, obligated the appellant to repay to the respondent a part of the tax on the three lines sold which became a lien on the first Monday in March, 1929, representing a pro rata proportion of that tax for the balance of that assessment year, and the entire tax on these three lines which became a lien on the first Monday in March, 1930. In other words, the controversy is as to whether the intention of the parties, as disclosed by their contract, was that the taxes becoming a lien in 1929 and 1930, the amount of which was fixed at 4¼ per cent. of the gross receipts of these lines for the years 1928 and 1929, respectively, should be paid by the seller, or whether it was their intention that these taxes should, in effect, be prorated and that the buyer should pay such taxes as applied to the lines sold, from and after the time it took possession.

In practical effect, the appellant treats the tax which became a lien in March of a given year as a tax on the gross income for the preceding calendar year, and insists that the contract discloses an intention that the seller should pay all of such taxes which became a lien in the years 1929 and 1930, although the tax for the latter year did not exist and did not become a lien until nearly two months after the buyer took possession, and although the first clause of the paragraph in question provided that the seller was to pay the tax therein referred to only up to the time the buyer took possession.

While the appellant concedes that the first clause of the quoted paragraph lends some support to the respondent's position that the buyer was to pay such proportion of these taxes as may be said to cover the period of time after it took possession of the lines sold, it

contends that the second and third clauses of this paragraph, in referring to "gross revenue tax in respect to any revenue received," conclusively disclose the intention of the parties that the one receiving the revenue by which the tax was measured should pay the tax. It is argued that since the revenue for the years 1928 and 1929 was all received by the seller, it could not have been intended that the buyer should repay any part of the taxes which became a lien in March, 1930, since those taxes were "in respect to any revenue received" by the seller and not by the buyer. It is further argued that the only explanation of the second clause is that it was intended to provide for the contingency that the respondent might become insolvent or refuse to pay the tax which became a lien on the first Monday in March, 1930, in which case the appellant might be compelled to pay the tax in order to protect its franchises. The appellant offers no explanation as to the meaning of the third clause. If all of the taxes which became a lien in March, 1929, and in March, 1930, related to the revenues for 1928 and 1929 in the sense contended for by appellant, and not to future revenue during the ensuing year after the tax became a lien, there was no possible tax which the seller might have to pay which related to any revenue which had been received by the buyer, since the seller had received all of the revenue during the years 1928 and 1929. Under that view, the third clause is entirely meaningless.

[1] It is a familiar rule that contracts should be so interpreted, when possible, as to give effect and meaning to all parts thereof. This contract can be so interpreted as not only to give effect to both the second and third clauses of the paragraph, but to avoid any conflict between the second clause and the first clause. The tax affecting the lines sold and the tax affecting the lines retained by the seller, which had become a lien on the first Monday in March, 1929, were tied together in such a manner that neither part could be paid without paying the other. It was natural for the parties to anticipate that a similar situation would obtain with respect to the tax which would become a lien on the first Monday in March, 1930, since the seller had operated all of the lines together during the year 1929, and might well be expected to make his report to the state covering the receipts for that year as one report. Under these circumstances, the presence of the second and third clauses of the paragraph indicates an intention to provide for a contingency which might easily arise, namely, that either one of the parties might neglect or refuse to pay the tax affecting the lines then being operated by him or it, thus jeopardizing the position of the other party, the tax on whose lines was thus tied up with that on the lines of the defaulting party, in which event either party could pay the entire tax with a right of recovery against the other for his proportion.

[2, 3] The first clause of the paragraph refers to a gross revenue tax in respect to the operations of the lines sold. While the contract is not happily worded, the reference undoubtedly is to the tax imposed by article 13, § 15, of the Constitution, and section 3664aa of the Political Code. It is well settled that this tax is in the nature of a property tax upon the operative properties in such a business, including the franchise to use the highways. Alward v. Johnson, 208 Cal. 359, 281 P. 389, affirmed in 282 U. S. 509, 51 S. Ct. 273, 75 L. Ed. 496, 75 A. L. R. 9; Pullman v. Richardson, 185 Cal. 484, 197 P. 346, affirmed in 261 U. S. 330, 43 S. Ct. 366, 67 L. Ed. 682. It seems to be thus settled that the form of taxation here in question is not a form of income tax based upon the gross income received during the preceding year, but the gross receipts of the preceding year are taken only as a means of measuring the valuation of the property interests thus taxed. It would seem to follow that this property tax, becoming a lien on the first Monday of March in a given year, is a tax upon said property for the ensuing year, after the tax becomes a lien, rather than a tax for the preceding calendar year which expired more than two months before the tax becomes a lien. While this tax is not well described in the contract now before us, the only reasonable explanation of the language used is that the parties considered it as a tax for the ensuing year, although based upon the amount of revenue produced in the preceding year.

[4] In the first clause of the quoted paragraph it is plainly agreed that the seller is to pay this tax only up to the time the buyer takes possession. The "gross revenue tax" referred to in the second and third clauses is the same tax mentioned in the first clause and can be no other. Since this tax is not an income tax "in respect to any revenue received" during the preceding calendar year, since the parties definitely agreed that this tax "in respect to the operations herein agreed to be sold" should be paid by the seller "up to the time when Buyer actually takes over said operations," and since it was further agreed that either party might recover any part of the tax he might be required to pay "in respect to any revenue received by" the other, it seems clear

that the references in the second and third clauses to any revenue received by the party not paying the tax and not received by the one paying the same, must be to the revenue so received during the ensuing year after the tax becomes a lien and not to the revenue received during the preceding calendar year, the latter not being a direct basis of the tax but being merely a measure of valuation fixed by the Constitution.

The respondent then came within the provisions of the third clause of the paragraph, since he had paid the tax, referred to by the parties as the gross revenue tax, which was in respect to the revenue received by the buyer during the time after he took possession, because it related to and was in respect to the operations thereafter conducted by the buyer, and was in respect to the income thereafter received by the buyer, within the meaning and intent of the contract. We think it follows that the respondent paid this tax for the balance of the assessment year beginning in March, 1929, and for the entire assessment year beginning in March, 1930, "in respect to any revenue received by the buyer and not received by the seller," and that, under the provisions of the contract, he was entitled to a return of the tax so paid. This interpretation gives effect to all three clauses of the paragraph, avoids a conflict between the first clause and the second clause, is in accord with the usual and just arrangement whereby, in the case of property sold, a vendor and vendee pay taxes in proportion to the time each has possession of the property and, in our opinion, is in accord with the meaning of the contract entered into between the parties.

[5] The appellant further contends that in the event these taxes are to be prorated, since the automotive equipment previously used on these three lines was not transferred, any prorating of the tax must take into consideration the respective values of the property transferred and the property retained by the seller, and that the judgment must be reversed and the cause remanded for the purpose of ascertaining these respective values. While the automobile equipment and other physical property in connection with these three lines was not transferred, other equipment was procured and used by the buyer. The tax becoming a lien in March, 1930, covered the new equipment used by the buyer as well as the franchises and other rights. While the tax which became a lien in March, 1929, also covered the equipment then used in operating the lines, as well as the franchises and other rights, and while there may have been a difference in value between the equipment used by the seller prior to the sale and that used by the buyer after taking possession, any such difference in value could not affect the amount of the tax under the measure of valuation fixed by the Constitution. In any event, and perhaps for this reason, the parties have by their contract provided what might be recovered, namely, the amount of tax that was actually paid.

The judgment is affirmed.

I concur: MARKS, J.

JENNINGS, J., being absent, does not participate in this opinion.



CITY OF LOS ANGELES v. DEACON et al.*

Civ. 9181.

District Court of Appeal, Second District, Division 2, California.

June 29, 1934.

Hearing Granted by Supreme Court Aug. 27, 1934.

1. Judgment ⇐128

"Final judgment" is a judgment which terminates litigation on the merits and leaves nothing to be done but to enforce by execution what has been determined.

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words & Phrases.]

2. Eminent domain ⇐246(2)

Under statute providing that condemnation proceedings might be abandoned at any time before expiration of 30 days "after final judgment" by service of notice of abandonment, "final judgment" referred to is the interlocutory decree, and period during which abandonment might take place would begin on day of entry of interlocutory decree and terminate on the thirtieth day thereafter, even though an appeal was pending (Code Civ. Proc. § 1255a).

3. Eminent domain ⇐246(2)

That right to abandon condemnation proceedings would cease to exist 30 days after day of entry of interlocutory decree under abandonment statute would not destroy right of appeal (Code Civ. Proc. § 1255a).

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 46 P.2d 165.

Appeal from Superior Court, Los Angeles County.

Condemnation proceeding by the City of Los Angeles against A. L. Deacon and others. From the judgment, plaintiff appeals. On appellant's motion to dismiss action as to some of the defendants.

Motion denied.

Ray L. Chesebro, Frederick von Schrader, and Arthur W. Nordstrom, all of Los Angeles, for appellant.

Oliver O. Clark, Victor T. Watkins, and David Fulwider, all of Los Angeles, for respondents.

CRAIG, Justice.

The city of Los Angeles instituted proceedings in eminent domain to acquire an easement over lands of numerous defendants, including those of the respondents in this proceeding, and final awards were allowed and paid for the lands so acquired from all of the other defendants. As to the former, an interlocutory decree was made and entered in which the sum of $78,223.33 was awarded as just compensation, following which the city obtained an order of the superior court to take possession of the respondent's properties, made the requisite deposits as provided by the Constitution, and entered into possession thereof. An appeal was taken by the city from the portion of said judgment which adjudicated the amounts of said awards; all proceedings with respect thereto were transferred to and are in the District Court of Appeal for review. The appellant now moves this court "to dismiss the above-entitled action only as to the defendants," respondents herein, stating in its notice that it has abandoned the condemnation proceedings as to their said properties.

[1] Appellants in their brief have well and properly simplified the issue by the assertion that section 1255a of the Code of Civil Procedure is the only statutory declaration upon the subject of abandonment, and that its provision that the plaintiff may abandon the proceedings at any time prior to "the expiration of thirty days after final judgment" is the only one here involved. That section, in so far as it is pertinent to the discussion, reads: "Plaintiff may abandon the proceedings at any time after filing the complaint and before the expiration of thirty days after final judgment, by serving on defendant and filing in court a written notice of such abandonment; and failure to comply with section 1251 of this code shall constitute an implied abandonment of the proceeding. Upon such abandonment, express or implied, on motion of defendant, a judgment shall be entered dismissing the proceeding and awarding the defendant his costs and disbursements, which shall include all necessary expenses incurred in preparing for trial and reasonable attorney fees." At this point it should be noted that by the words "before the expiration of thirty days after final judgment" is meant before the entry of said final judgment. McDaniels v. Dickey (Cal. Sup.) 25 P.(2d) 404; Vallejo & N. R. Co. v. Reed Orchard Co., 177 Cal. 249, 170 P. 426. It is apparent that the language which we are construing only purports to establish the period during which abandonment may take place, and that period is made to begin on the day of the entry of the final judgment, that is, the entry of the interlocutory decree. Final judgment as used in the Code sections on the subject in question means the interlocutory decree.

Counsel have cited many cases and quoted from several having to do with the right of the defendant to execution after entry of the final judgment, but in the main these authorities are not helpful. Some of them were decided before certain amendments to the State Constitution and to section 1255a of the Code of Civil Procedure. Two decisions in this class are Pool v. Butler, 141 Cal. 46, 74 P. 444, and Lincoln v. Wiswell, 8 Cal. App. 578, 97 P. 536. Both sides rely on Colusa, etc., R. R. Co. v. Superior Court, 31 Cal. App. 746, 161 P. 1011, and Mt. Shasta Power Corp. v. Dennis, 66 Cal. App. 186, 225 P. 877, 879. The first of these last-named cases determined that in an action in eminent domain to secure a railroad right of way the taking of an appeal by the plaintiff from the judgment in condemnation prior to the expiration of the thirty-day period after the interlocutory decree stays execution of the judgment pending the appeal, without giving a stay bond. A supersedeas was issued staying execution until the determination of the appeal. In arriving at its conclusion, the court also held that the "final judgment" referred to in section 1251 means the interlocutory decree, and that prior to the expiration of the thirty-day period after final judgment, within the meaning of section 942, Code of Civil Procedure, this decree amounts to no more than an order fixing the price at which the plaintiff may or may not take the property being condemned. The decision determines nothing about the right to abandon, at any time.

Mt. Shasta Power Corporation v. Dennis, supra, is also a case involving the right to an

execution. The question of the right of the plaintiff to abandon was not in issue. The proceeding was one to condemn certain riparian rights. After interlocutory judgment had been entered and before thirty days had expired plaintiff appealed. It was held that such an appeal stays the issuance of the execution. Also it appears that the plaintiff voluntarily paid the amount of the award into court and had taken possession of the property sought to be condemned. It was held that these two acts constituted a waiver of the right of appeal. It is true that, in considering the arguments of the parties, we have the following statement in the opinion: "Appellant contends that its payment of the damages awarded the defendants was not voluntary, but that, under the provision of section 1251, herein quoted, it was compelled to make such payment within 30 days after final judgment, 'as failure to comply with this provision would have subjected appellant to liability to execution, or to extra damages upon abandonment,' as provided by sections 1252 and 1255a. An appeal by plaintiff, however, within 30 days after entry of the judgment would have operated to stay the issuance of execution under the provisions of the one section or the assessment of damages under the other. Colusa, etc., R. R. Co. v. Superior Court, 31 Cal. App. 746, 761, 161 P. 1011. Plaintiff had the option of paying the damages awarded and taking possession or appealing from the judgment and remaining out of possession until the final determination of the compensation to be paid." Obviously what is said concerning the hypothetical effect of an appeal alone, without taking possession on damages upon abandonment, was outside of any issue involved. As to whether or not such an abandonment could have been made was not an issue, and any intimation of the court's opinion in that behalf was not a judicial commitment of the court. Neither of the decisions in Colusa, etc., R. R. Co. v. Superior Court or Mt. Shasta Power Corporation v. Dennis announces judicially any legal proposition having to do with any contention or argument in the instant proceeding. Whether or not the plaintiff has waived its right of appeal by having taken possession of the property sought to be condemned, as well as having paid the amount of award into court, decided in the last-mentioned decision, need not be discussed here.

[2] The final judgment referred to in section 1255a, like that in section 1251 of the Code of Civil Procedure, means the interlocutory decree. It seems clear that the language in section 1255a, "plaintiff may abandon the proceedings at any time after filing the complaint and before the expiration of thirty days after final judgment," is intended to and does fix the beginning of a period during which abandonment may take place, as beginning with the entry of the interlocutory decree, and that this has no reference to or connection with the rights of the plaintiff on appeal. Decisions holding that an appeal stays execution have no bearing upon the plaintiff's right to abandon, nor with the time when such right begins or when it ends.

The language of the statute seems plain. It states that the plaintiff may abandon before the expiration of thirty days after final judgment. It is clearly the purpose of this provision to allow abandonment to be made within the period therein defined. That period terminates with the end of the thirtieth day "after final judgment." What is final judgment? It is defined to be a judgment which terminates the litigation on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined. Gianelli v. Briscoe, 40 Cal. App. 532, 181 P. 105. "Our system of procedure contemplates that there shall be but one final judgment in a cause." Doudell v. Shoo, 159 Cal. 448, 114 P. 579, 582. No doubt can exist that the interlocutory decree in a condemnation suit is the final judgment.

There can be no connection between this provision or section 1255a of the Code of Civil Procedure, which solely concerns the time within which plaintiff may abandon, and the ordinary steps of an appeal or the rights of the parties incident thereto, such as the defendant's right to execution. If the Legislature had intended that the period during which an abandonment might take place should be thirty days after the judgment had become final, it undoubtedly would have used these or similar words. We must assume that the lawmaking mind knew the meaning of all words and phrases, legal and common, and especially those as elementary as "after," "final judgment," and "after the judgment has become final." In a contract, one year after the 24th day of June would be the following 24th day of June. Vorwerk v. Nolte, 3 Cal. Unrep. Cas. 285, 24 P. 840. "After the time" of transfer, relating to an action to set the transfer aside, began to run the moment the transfer was made, meaning "from the time." Kelley v. Bell, 172 Ind. 590, 88 N. E. 58. "Five days after the completion of the final canvass" means five days "after

the declaration of the result." Miller v. Superior Court, 25 Cal. App. 607, 144 P. 978, 979. Examples might be added without number of the construction of the same language or similar to that herein involved, all to the same import. None would appear necessary.

It is urged that, if the period in which abandonment is allowed be limited to thirty days after the entry of the interlocutory decree, there would exist a hiatus during which the right of abandonment no longer exists but also during which the property owner cannot enforce rights which the condemnor can no longer take away. Just what is meant by this statement is not quite clear. If the plaintiff after the thirty-day period can no longer abandon the proceeding, it is in no different status than any other suit on appeal, and, of course, neither the owner nor the condemnor can take any action affecting the title of the property being condemned or the payment of compensation until the appeal is determined. There is nothing anomalous or incongruous in such a situation.

[3] Again, petitioner sees other dire results if the court does not construe the language in question as urged by it. It is said that "if the thirty day provisions of sections 1251 and 1255a, Code of Civil Procedure, are not given the construction herein urged, there is no right of appeal ever left in a condemnor in a condemnation action, though the judgment may be unconscionable, the trial a travesty of error and the result ruinous to the public." Of course, the right of appeal would not be wiped out if there were no right to abandon after entry of final judgment or if the plaintiff through neglect or otherwise allowed the time in which he might abandon to expire. The appeal would still go on, utterly unaffected by the death of the right to abandon. If the right to appeal from the final judgment in condemnation be lost, in any case it would not be attributable to the expiration of the right to abandon. However, if, well knowing the consequences, the condemnor takes possession of the property sought to be taken and pays the money into court, then, not by reason of there being no right to abandon, but as the result of the taking of possession of the property too soon for the plaintiff's safety, he might lose his right of appeal. But as was said in the Mount Shasta Case: "The fact that a party may find it more profitable to comply with a judgment and accept the fruits thereof than to suffer the losses incident to an appeal cannot be said to render such compliance compulsory. The necessities of the plaintiff and its intention in making payment and taking possession, however, are not decisive of the case. In taking possession, the plaintiff was exercising a statutory right, and the effect of its acts must be measured by the provisions of the statute."

The doctrine of the greatest good to the greatest number has not been carried so far with judicial approval as to induce courts to ignore the intention of the Legislature as expressed in a statute. Nor are we aware of any binding authority which would require us to give such public interest consideration where it would result in an obviously harsh and harmful invasion of the inherent as well as constitutional rights of an individual. In that behalf it must be remembered that this is a proceeding by which the property of an individual is being taken against his consent, that any provision allowing the plaintiff in such a proceeding taking possession of the individual's property before actual payment is stretching the doctrine of the priority of public welfare to its farthest limit of flexibility, and that in doing so an unequal burden is placed upon the individual which may easily result in practice in an award made in the trial court being the end of the litigation though the judgment may be unconscionable and the trial replete with error, because the individual often does not have the financial ability to prosecute an appeal or to maintain himself while such an appeal is being prosecuted, he having already lost possession of his property. Therefore it is not unreasonable, when viewed from a disinterested standpoint, to believe that the Legislature meant what it has quite plainly said when it provided that the right to abandon must be "before the expiration of thirty days after final judgment." In view of the foregoing, we find no merit in other points urged by appellant.

The motion to dismiss is denied.

We concur: STEPHENS, P. J.; ARCHBALD, Justice pro tem.

THROOP v. McGREGOR et al.

Civ. 8384.

District Court of Appeal, Second District, Division 2, California.

June 28, 1934.

Hearing Denied by Supreme Court Aug. 27, 1934.

1. Eminent domain ⇐153

On accrual of right to condemnation award, it becomes a personal right which does not run with the land.

2. Eminent domain ⇐155

Offer of one lessee to cancel his interest in 25-year lease "at any time" on payment of specified sum was required to be accepted within reasonable time by other lessee, and offer was revoked by failure to accept until 10 years had passed and after part of property was condemned, and hence offeree-lessee was not solely entitled to condemnation award to lessees jointly (Civ. Code, § 1587).

[Ed. Note.—For other definitions of "At any Time," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by R. A. Throop against W. W. McGregor and others. From a judgment in favor of plaintiff, named defendant appeals.

Affirmed.

Sebald L. Cheroske, of Los Angeles (A. C. Brydonjack, of Long Beach, of counsel), for appellant.

Bicksler, Smith, Parke & Catlin, of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

From a judgment in favor of plaintiff giving him the balance of an award paid into court in a condemnation action brought by the city of Los Angeles, defendant W. W. McGregor has appealed.

July 1, 1921, Mary McGregor, wife of appellant, executed a lease to plaintiff and her husband covering certain land, together with the buildings and rock-crushing machinery and equipment located thereon, for the period of ten years at an agreed rental, which lease was extended for a further period of fifteen years on April 10, 1926, and on said original date plaintiff executed and delivered to McGregor the following letter: "Mr. W. W. McGregor, Mrs. Mary McGregor, 345 West California St., Pasadena, California. Dear sir and madam: I hereby agree in connection with the lease of the South Pasadena Rock Crusher this day executed by me that in the event of my death my interest in the lease which you and I have on said Rock Crusher with Mary M. McGregor shall be appraised at the sum of not to exceed the sum of Twenty-five Hundred (2500.00) dollars, and I further agree that I shall be willing to cancel said lease on my part and all my interest therein at any time on the payment to me of the sum of Twenty-five Hundred (2500.00) dollars, and I agree further that Mary M. McGregor has the right to sell any portion of said leased premises in not to exceed two (2) acres thereof, outside of the land on which the crusher stands, without paying me any money therefor." Said lessees jointly operated the plant referred to from July 1, 1921, until the time of trial of this action, dividing the profits equally. On March 26, 1926, the action in eminent domain was filed to condemn a portion of the property covered by said lease, resulting in an award being made in 1929 to said lessees jointly of the sum of $30,338.48. Sufficient funds were collected on assessments to pay said award about ten days prior to July 3, 1931, the date the complaint herein was filed, but a dispute arose between said lessees as to the division of said award, which resulted in the filing of the said complaint. September 25, 1931, defendant McGregor tendered plaintiff the sum of $2,500 mentioned in said letter of July 1, 1921, paid same into court, and by his answer claimed the right to the balance of said deposit remaining after certain amounts had been paid out on stipulation of the parties. Appellant contends that by virtue of said letter and said tender he became entitled to such balance.

[1, 2] The letter in question, so far as defendant McGregor is concerned, is simply an agreement by plaintiff to cancel the lease and his interest therein "at any time" upon payment of the sum of $2,500. Nothing is said about surrendering, much less transferring, to McGregor or any one else his interest in any other property jointly belonging to said lessees, and, even assuming the right to take up said option existed at the time it was attempted to be exercised, we fail to see how it would have helped appellant at that late date. It is well settled in this state that, when the right to such an award accrues, it is a personal right which does not run with the land and pass to the vendee. McDaniel v. Dickey (Cal. Sup.) 25 P.(2d) 404. Here the right became personal before the tender was made, and the only right accruing to appellant therefrom was to have the lease and respondent's interest therein canceled. That act of itself could not give him any right to

any part of the award, which became a part of the partnership assets before the tender was made, and could only pass to appellant by an agreement separate from a transfer of the lease, and a transfer could not be implied from a mere agreement to cancel same.

In our opinion, the words "at any time" in the letter above quoted do not mean to the end of time, but only that acceptance of the proposal could be made on payment of $2,500 by appellant within a reasonable time; and under section 1587 of the Civil Code it was revoked by a failure to accept long before the time tender was made.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIG, J.



139 Cal.App. 388

HANSEN et al. v. FARMERS' AUTOMOBILE INTER-INS. EXCHANGE.

Civ. 1257.

District Court of Appeal, Fourth District, California.

June 21, 1934.

Hearing Denied by Supreme Court Aug. 20, 1934.

1. Insurance ⇐12½

Application for membership and insurance in inter-insurance exchange to become effective when application was accepted at home office or thereafter, and entitling applicant to membership and to insure one automobile subject to acceptance of application by attorney in fact, *held* not temporary contract of insurance between date named in application by insurance agent and time when application was rejected (St. 1921, p. 1599).

2. Principal and agent ⇐99

Apparent or ostensible authority of agent can arise by implication only from words, act, or conduct of principal, and not from anything said or done by agent.

3. Insurance ⇐12½

Express authority of insurance agent to solicit insurance under application for membership and insurance in inter-insurance exchange to become effective when application was accepted at home office or thereafter, and entitling applicant to membership and to insure one automobile subject to acceptance of application by attorney in fact, *held* not to imply apparent authority to make temporary contract of insurance between date named in application by insurance agent and time when application was rejected (St. 1921, p. 1599).

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Maria Hansen and others against the Farmers' Automobile Inter-Insurance Exchange, a corporation. From a judgment in favor of plaintiffs, defendant appeals.

Reversed.

Humphrey, Searls, Doyle & MacMillan and Morgan J. Doyle, all of San Francisco, and Francis J. Gabel, of Los Angeles, for appellant.

Tarance S. Magee and H. E. Barbour, both of Fresno, for respondents.

BARNARD, Presiding Justice.

The plaintiffs herein are the widow and children of one H. P. Hansen, who died as a result of injuries sustained in a collision between an automobile in which he was riding and another automobile owned by J. F. Scarbrough, which collision occurred about 8:30 o'clock p. m. on April 24, 1931. In another action the plaintiffs herein recovered judgment against the said James F. Scarbrough and an execution was returned unsatisfied. The plaintiffs then brought this action against this defendant, alleging that at the time of the collision referred to the said James F. Scarbrough was covered by a written contract of insurance with this defendant. The purported contract relied on consists of an application for membership and insurance which had been signed by Scarbrough and forwarded to the defendant, a copy thereof being attached to the complaint and marked "Exhibit A." In its answer the defendant denied that it was a corporation and alleged that it was a reciprocal or inter-insurance exchange. It further denied that Exhibit A, attached to the complaint, constituted a contract of insurance and denied that it ever entered into an insurance contract with Scarbrough. The court found that all of the allegations of the complaint were true except that it found that the defendant was and is a reciprocal or inter-insurance exchange, and that Farmers' Underwriters Association, a corporation, is the attorney in fact for each, all and every of the members of said exchange. From a judgment entered in favor of the plaintiffs the defendant has appealed.

The main question presented is whether the application referred to, and set forth as

Exhibit A to the complaint, constituted a temporary contract of insurance covering the said Scarbrough and his automobile during the interim between the date named in the application and the time when a policy should be issued or when the application should be rejected. Incidentally, there is involved the question as to whether the agent who took Scarbrough's application had the apparent or ostensible authority to bind the appellant by giving the said Scarbrough temporary coverage during the interim referred to.

The application in question was dated April 23, 1931, and was signed by Scarbrough on that date. It is entitled "Application for Membership and Insurance in Farmers Automobile Inter-Insurance Exchange." The first two paragraphs read as follows:

"The undersigned hereby applies for membership in Farmers Automobile Inter-Insurance Exchange, and for insurance in said Exchange for the classes of insurance as set forth below, which shall become effective when the application is accepted at the Home Office of the Exchange, or at such time thereafter as is indicated below.

"Upon payment of the membership fee and premium stated below (subject to acceptance of this application by the Attorney-in-Fact), the undersigned shall be entitled to membership in Farmers Automobile Inter-Insurance Exchange, and to insure one automobile, owned by him, for the kinds of insurance set forth in this application, for so long a period as the Exchange shall continue to write such insurance and such applicant shall remain a desirable risk and pay the premiums and other payments required for the renewal hereof."

It contains blanks to be filled in relating to the kinds of insurance desired with the membership fee and premium deposit to be paid for each, for the description of the automobile to be insured, for the name of the insured, and for answers to a number of questions to be answered by the applicant. Immediately preceding the questions to be answered by the applicant is the following: "Policy to take effect ——— 12 o'clock, noon." In this blank was inserted "April 24, 1931." Following the questions, with blanks for the applicant's answers, is set forth a statement of a number of things to which the applicant agrees by signing the application. Among other things, the applicant agrees with the other subscribers applying for membership in this inter-insurance exchange and with the Farmers' Underwriters Association, as attorney in fact for all of the subscribers, to pay the membership dues and premiums and to exchange inter-insurance contracts with the other subscribers, providing automobile indemnity among themselves for any loss insured against as set forth in their contract of insurance; that the Farmers' Underwriters Association shall be his attorney in fact, with power, among other things, to exchange contracts of indemnity with the other subscribers; that the membership fees and premiums to be paid shall be used in a certain manner; and that his liability to the other subscribers shall be limited to a certain amount. Below the signature of Scarbrough appears the following:

"Accepted:

"Los Angeles, California, ——— 19—,

"Farmers Underwriters Association,

"Attorney-in-Fact,

"By ————"

One J. W. Allen, whose actual authority is shown to have been that of a soliciting agent, filled in the blanks in this application relating to the amounts for membership fee and premium deposit, to the description of the car, the name of the applicant and his answers to the questions asked relating to his automobile, and obtained Scarbrough's signature thereto on April 23, 1931. The agent also inserted the date "April 24, 1931" making that line read: "Policy to take effect April 24, 1931, 12 o'clock noon."

Nothing was paid at the time the application was signed, although it is conceded that the agent told Scarbrough he could pay one-half of the amount due when the policy was delivered and the balance in thirty days. The application was forwarded by the agent to the appellant but the same was never accepted by the attorney in fact named or by the appellant and the application was not signed by either. Scarbrough was notified that the application would not be accepted, but this did not occur until after the collision which resulted in the death of Hansen. Scarbrough testified that some ten days after the date of the application he tendered the amount of the membership fee and premium deposit to the appellant; that the appellant refused to accept the same; that before signing the application he read it in its entirety; that he understood all of it and, in particular, that he understood the first two paragraphs, which are above quoted. He also testified that before he signed the application he stated to the agent, "Suppose anything would happen, this insurance would be no good until I get my policy," and that the agent replied, "It certainly will after 12 o'clock tomorrow." He further testified that the agent told him that it was possible his

application might be turned down by the home office but that the agent also said, "If it should be, you are insured until notified."

[1] The appellant is a reciprocal or inter-insurance exchange organized and existing under and by virtue of the California Reciprocal or Inter-Insurance Exchange Act (Stats. 1921, p. 1599). This act seems to provide for a form of insurance through the mutual inter-exchange of insurance contracts by the members of an organization which is provided for in the act, it being also provided that the insurance contracts may be executed for the subscribers by an attorney in fact, who shall handle for the subscribers the details of making the inter-exchange of insurance contracts. Under the terms of the act it would seem that there could be no contract of insurance until such time as the applicant or subscriber became a member of the organization and until something was done in some way relating his contract to or inter-exchanging the same with the insurance contracts of other members of the organization. The application here in question is drawn in accordance with this arrangement. It is entitled an application for membership as well as insurance. In the opening paragraphs it is set forth that the undersigned applies for membership in the exchange and for insurance therein, and that the applicant is entitled to membership in the exchange and to insure one automobile belonging to him "subject to acceptance of this application by the attorney in fact." It is also provided that the insurance thus applied for "shall become effective when the application is accepted at the home office of the exchange, or at such time thereafter as is indicated below." Down below is a statement that the policy is to take effect at noon with a blank space provided, apparently for a date. The date to be filled in in this blank can only relate to the clause in the first paragraph of the application, which plainly says that the insurance shall become effective when the application is accepted at the home office or at such time thereafter as may be indicated below, and to the second paragraph of the application which states that the applicant is neither entitled to membership in the exchange nor to insure his automobile until his application has been accepted by the attorney in fact. Under these circumstances, it seems clear that there could be no insurance until after the applicant became a member of the association and until after his application was accepted. If this had not occurred on the date inserted in the blank that date could not govern under the provisions set forth in the earlier part of the application, which plainly state that the time of taking effect of the policy must be after and not before an acceptance of the application. Not only does this clearly appear from the application, but Scarbrough's testimony shows that after reading the same he so understood it. Under the plain provisions of the application no contract of insurance was in force, pending an acceptance of the application by the exchange and the attorney in fact. It further appears that in addition to the prerequisite acceptance, the existence of insurance was dependent, under the terms of the act, upon a reciprocal exchange of contracts of indemnity between the applicant and other subscribers or members, a thing which was to be done by the attorney in fact for the respective parties.

[2, 3] The only remaining question is whether the agent who took this application had an apparent or ostensible authority to bind the appellant and did so by assuring him that the insurance would be in force after 12 o'clock noon the next day, and that in the event the application was rejected he would be insured until he was notified. It is well settled that apparent or ostensible authority of an agent can arise by implication only from the words, act or conduct of the principal and not from anything said or done by the agent. No words, acts or conduct of the principal from which such an ostensible authority might here be implied are presented other than the fact that the principal furnished the agent with these application blanks and authorized him to solicit members for the exchange and insurance therein. Assuming that in some cases such ostensible authority might be implied where the principal furnishes blank applications for insurance which include a statement that the policy is to take effect on a blank date at noon, and where the applicant might well assume that the agent had authority to insert any date in the blank so provided, we think such a result cannot here obtain. In the application involved here the blank space for inserting the effective date of the policy is so plainly modified by what goes before and the entire matter of insurance, temporary or otherwise, is so clearly made dependent upon membership in the exchange, acceptance of the application by the exchange and by the attorney in fact, and a mutual inter-exchange of contracts, that the very application blank with which the agent was armed notified the applicant that these other things must take place before he would be entitled to any insurance. No ostensible authority on

the part of the agent to change these requisites could be implied from the blank furnished the agent and we feel compelled to hold that there is no evidence to sustain the finding that a contract of insurance, covering this applicant and his automobile, was in force and effect on the evening of April 24, 1931.

Nothing in this opinion should be taken as a general approval of the inclusion in this application of the definite statement as to the effective date of the policy, a statement which is well calculated to be misleading under some circumstances. An honest intention to provide opportunity for requesting a delay in the effective date of the policy until some date subsequent to the time of acceptance of the application can be carried out without including any misleading features.

For the reasons given the judgment appealed from is reversed.

I concur: MARKS, J.

JENNINGS, J., being absent, does not participate in this opinion.



139 Cal.App. 497

LOS ANGELES COUNTY v. SEABOARD SURETY CORPORATION OF AMERICA.

Civ. 5102.

District Court of Appeal, Third District, California.

July 2, 1934.

Statutes ⇐63

Bail money refunded to surety, without order of board of supervisors, based on superior court order based on statute declared unconstitutional over year after order was made, *held* not recoverable by county, order having force of final judgment satisfied by payment (Pen. Code, § 1306).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the County of Los Angeles against the Seaboard Surety Corporation of America. Judgment for plaintiff, and defendant appeals.

Reversed.

Edgar H. Craddock, of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and Fred M. Cross, Deputy Co. Counsel, both of Los Angeles, for respondent.

GANS, Justice pro tem., delivered the opinion of the court.

In 1929, in a certain case of the People of the State of California v. Jose Alvarez, in the superior court of Los Angeles county, the bail bond was forfeited because of the nonappearance of the defendant for trial, and a summary judgment being entered on the bond in favor of the plaintiff herein, the amount thereof, and of the bond was paid by the defendant in the sum of $3,000, and said sum was deposited in a trust fund by the county treasurer. Thereafter, and within a year, the defendant was arrested in Los Angeles county, and being put upon his trial was convicted of the highest offense charged in the information. The county had incurred no expense for the apprehension of the defendant. The surety company then made application to said superior court for a refund to it of the said sum of $3,000, and upon a hearing being had, at which both plaintiff and appellant were represented, the superior court made an order finding the facts and directing that the $3,000 theretofore paid be refunded to the defendant surety company from the bail bond trust fund in the treasury of Los Angeles county. Complying with the said order of court the said money was refunded as directed.

All of these proceedings were had under and pursuant to section 1306 of the Penal Code as it read in 1929. Thereafter, and on February 25, 1931, in the case of Pacific Indemnity Company v. Meyers, 211 Cal. 635, 296 P. 1084, the Supreme Court declared that portion of section 1306, providing for the refund of bail money in a case like the above, to be unconstitutional. Whereupon, in May, 1931, the plaintiff brought suit against the defendant for the recovery and return to the county treasury of the said sum of $3,000; the board of supervisors having directed that such suit be brought.

There is no dispute as to the facts. The payment was made to the surety company without any order of the board of supervisors. Judgment was had for the plaintiff in the said last-mentioned suit, and the defendant appeals.

The principal point involved is whether a payment made by a county, without order

of the board of supervisors, based upon an order of the superior court which was itself based upon an act of the Legislature which is declared to be unconstitutional more than one year after the said judgment was had, be recovered by the county.

The contention of appellant is that the said judgment of the superior court ordering the refund, having been satisfied by payment of said sum as ordered, has passed beyond review because the satisfaction thereof is the last act, and an end of the proceeding.

This contention seems to be conclusive of the appeal. If the order referred to has the force of a judgment, and we think that it has, no appeal was taken, and it became final before the decision in Pacific Indemnity Co. v. Meyers, supra, was rendered, and having been satisfied by payment, it stands impregnable and will prevent any recovery by the county. In re Baby, 87 Cal. 202, 25 P. 405, 22 Am. St. Rep. 239; Morton v. Superior Court, 65 Cal. 498, 4 P. 489; James v. Superior Court, 35 Cal. App. 148, 169 P. 398.

This makes it unnecessary to discuss the other points raised, since neither they, nor any one of them, can change this situation.

The judgment of recovery from the surety company is reversed.

We concur: PULLEN, P. J.; PLUMMER, J.



139 Cal.App. 240

CALIFORNIA UNITED STATES BOND & MORTGAGE CORPORATION v. GRODZINS.

Civ. 7972.

District Court of Appeal, Second District, Division 1, California.

June 13, 1934.

Hearing Denied by Supreme Court Aug. 9, 1934.

Exemptions ⇐50(1)

Attaching creditor can subject to attachment excess of proceeds of life insurance above amount exempted by law, without succeeding in attaching entire proceeds of policy, when all of proceeds of insurance which he has not succeeded in attaching have been consumed and applied by beneficiary to her living expenses and support of minor children (Code Civ. Proc. § 690, subd. 18).

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by the California United States Bond & Mortgage Corporation against Dora Grodzins, in which plaintiff attached certain funds of defendant on deposit with the Fidelity Savings & Loan Association. From an order releasing the attachment, plaintiff appeals.

Reversed, with directions to enter judgment for plaintiff.

Hearing denied by Supreme Court; THOMPSON, J., dissenting.

Edward W. Moses, of Los Angeles, for appellant.

S. W. Newman, of Los Angeles, for respondent.

HAHN, Justice pro tem.

This appeal is from an order releasing an attachment which plaintiff and appellant had caused to be issued and levied on funds of defendant and respondent on deposit with the Fidelity Savings & Loan Association in Los Angeles. But one question is involved, which appellant states as follows: "The point involved in this appeal is whether an attaching creditor can subject to attachment the excess of the proceeds of life insurance over and above the amount exempted by law, without succeeding in attaching the entire proceeds of the policy, when all of the proceeds of the insurance which he has not succeeded in attaching have already been consumed and applied by the beneficiary to her own living expenses and support of minor children."

It appears from the record that defendant received upon the death of her husband the sum of $10,000 in payment of a life insurance policy issued upon the life of her husband. Of this sum $5,000 was deposited with the Fidelity Savings & Loan Association, while the remaining $5,000 was expended by defendant for the maintenance and support of herself and minor children. The annual premium paid on the policy was $558.

Section 690, Code of Civil Procedure, subdivision 18, provides as follows: "The following property is exempt from execution or attachment, except as herein otherwise specially provided: * * * 18. (Life insurance benefits.) All moneys, benefits, privileges, or immunities accruing or in any manner growing out of any life insurance, if the annual premiums paid to do not exceed five hundred dollars, and if they exceed that sum a like exemption shall exist which shall bear the same proportion to the moneys, benefits, privileges, and immunities so accruing or growing out of such insurance that said five

hundred dollars bears to the whole annual premiums paid."

It is conceded by respondent that at the time the $10,000 was paid to her by the insurance company, under the provisions of the section above quoted, only $8,960.57 was exempt from execution, leaving $1,039.43 subject to levy by her creditors. The situation, respondent contends, had changed when the attachment was levied, in this, that she had expended $5,000 of the insurance money and only had $5,000 left, which amount, being less than the original exempt part of the whole, should all be held exempt from attachment.

Respondent in her brief presents neither authorities supporting her position nor considerations or reasoning that justify this conclusion. Appellant, while citing cases which, it is urged, are persuasive in support of a conclusion contrary to that asserted by respondent, and does offer some considerations in support of its contention that $1,039.43 of the amount on deposit with the Fidelity Savings & Loan Association should be held liable to its levy, cites to us no cases where this question has been decided or even considered.

Prior to 1901 the subdivision of section 690 (subdivision 10), Code of Civil Procedure, providing for exemption of proceeds from life insurance, read: "All moneys, benefits, privileges, or immunities accruing, or in any manner growing out of any life insurance on the life of the debtor, if the annual premiums paid do not exceed five hundred dollars." Influenced undoubtedly by the decision of the Supreme Court in the Estate of Brown, 123 Cal. 399, 55 P. 1055, 69 Am. St. Rep. 74, handed down in 1899, wherein it was held that no part of the proceeds from life insurance where the annual premiums exceeded $500 was exempt from execution, the Legislature in 1901 amended this section so as to provide for exemption of such portion of the proceeds from life insurance, when the total annual premiums paid exceed $500, as said sum of $500 bears to the total premiums paid.

In determining the amount of proceeds from life insurance that would be exempt from the claim of creditors, the Legislature evidently concluded that the amount so fixed would meet the needs for which the statute of exemptions was enacted. If respondent's contention is sound, that because the amount of insurance money she has left of the $10,000 received is less than the $8,960.57 fixed by statute as the portion exempt out of the full sum received, because forsooth she saw fit to expend $5,000 of the insurance fund received before the attachment, the result would be that defendant would have the full $10,000 available for the purposes for which the Legislature determined not to exceed $8,960.57 would be exempt. If this theory should prevail, it would result that no matter how large a sum was received from life insurance, unless the creditor succeeded in levying upon it the moment it was paid, the entire amount could be and undoubtedly would be so disposed of that the amount remaining that could be reached by execution would always be less than the amount exempt. Surely such a result was not intended by the Legislature. When the purpose for which the amendment was evidently enacted is taken into consideration, it would seem that the better reasoning supports the conclusion that when the exempted portion of the $10,000 insurance money, to wit, $8,960.75, has been set apart, as it were, to the beneficiary to serve the uses intended by the act exempting it from the claim of creditors, the balance of the $10,000 whenever and wherever found should be liable for the beneficiary's debts. Nor should the fact that she has expended a portion of the exempted sum affect the status of the balance of the money received by her. If, as it must be conceded, $1,039.43 of the insurance money was liable to creditors' claims at the time it was received by the beneficiary, it would seem reasonable and logical that this amount would, as it were, be earmarked as available for the same purposes until exhausted by creditors' claims or otherwise used or expended.

In our review of the cases cited, as well as others examined in our consideration of this question, we find nothing in the conclusions arrived at, or the considerations established, that conflicts with the views here expressed. Rather, it may be fairly said that the considerations which we feel justify the conclusion reached find more support in the books than does the contrary view.

For the reasons stated, the judgment is reversed.

Inasmuch as it appears from the record that the material facts in the case will be the same, if a new trial were had, it would serve no useful purpose to so direct. It is therefore ordered that the trial court make findings and render judgment in favor of plaintiff and appellant in accordance with the views herein expressed.

We concur: HOUSER, Acting P. J.; YORK, J.

139 Cal.App. 462

MERRILL v. HARE.

Civ. 7985.

District Court of Appeal, Second District, Division 1, California.

June 30, 1934.

Hearing Denied by Supreme Court Aug. 29, 1934.

1. **Courts** ⇐121(1)

Amount for which judgment is demanded may not be determinative of superior court's jurisdiction, where court is called upon to grant equitable relief.

2. **Pleading** ⇐72

Whether complaint affords basis for granting equitable relief must be tested by sufficiency of allegations contained therein, rather than by prayer.

3. **Courts** ⇐122

Action against administrator on claims aggregating less than jurisdictional amount *held* not brought within superior court's jurisdiction by prayer for injunctive relief, where complaint merely alleged on information and belief that plaintiff, in case of distribution, would be unable to receive payment and was without legal remedy (Code Civ. Proc. §§ 1648, 1875).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by E. S. Merrill against Herold P. Hare, as administrator of the estate of Lewis H. Mertz, deceased. Judgment for plaintiff, and defendant appeals.

Reversed.

Hearing denied by Supreme Court; SHENK, J., dissenting.

Welburn Mayock and Ralph C. Curren, both of Los Angeles, for appellant.

Stanley Moffatt, of South Gate, for respondent.

HOUSER, Justice.

Primarily, the instant appeal depends upon the legality of a judgment that was rendered in the superior court in favor of plaintiff in an action on two claims which, before action was commenced thereon, had been duly presented to, and rejected by, an administrator of an estate, and which claims in the aggregate thereof amounted to the sum of $287.

[1] Appellant urges the point that, because the amount for which judgment was demanded in the complaint in the action was only $287, at the time when the action was commenced the superior court was without jurisdiction. In that connection, in effect respondent asserts that, because a part of the relief which he sought was "a restraining order or injunction * * * requiring defendant administrator not to distribute the said assets in his hands" until a judgment could be obtained and entered in the action, notwithstanding the conceded fact that the total amount for which a judgment might be rendered was $287 only, the superior court was vested with jurisdiction. In other words, because of the asserted fact that the superior court was called upon to grant relief that pertained to the equity side of the court, the amount for which judgment was demanded was not determinative of the jurisdiction of that court.

That such a principle of procedure is the law of this state is attested by various decisions, especially as it pertains to actions to foreclose liens and to those which involve the title or possession of real property. 7 Cal. Jur. 685, 687, and authorities there cited. However, in an action brought for the purported purpose of foreclosing a mechanic's lien, it also is the rule that, if no cause of action to enforce such a lien is stated, and the amount for which judgment is demanded is less than the jurisdictional amount in ordinary actions at law, the superior court is without jurisdiction in the premises. Davis v. Treacy, 8 Cal. App. 395, 97 P. 78.

In the case of De Witt v. Hays, 2 Cal. 463, 469, 56 Am. Dec. 352, it was said: "To entitle the plaintiff to the equitable interposition of the Court, he must show a proper case for the interference of a Court of Chancery, and one in which he has no adequate or complete relief at law. In the present case, under an allegation of irreparable injury, the plaintiff seeks to avail himself of the writ of injunction, which has been styled 'the right arm of the law.' The simple allegation of irreparable injury is not sufficient; it should appear to the Court from the facts set forth in the bill."

[2] But, aside from such authority, it is obvious that the decision as to whether the complaint in an action properly may be regarded as a basis for affording relief in equity to the plaintiff therein must be tested by the sufficiency of the allegations contained within such complaint, rather than by the prayer and the demand of the plaintiff. In the instant appeal it therefore becomes important to consider the pertinent allegations of the complaint presented by the plaintiff in

the action in the lower court. In full, such allegations were as follows: "That the estate of the above-named deceased is now ready to be distributed and has been partially distributed, and plaintiff is informed and believes that if the same is fully distributed he will never be able to receive said sums in payment of said claims; that the administrator of said estate will very soon distribute the same unless restrained by order of this court and in case of such distribution plaintiff would be without a remedy at law."

[3] The substance of such pleading is that, solely on information and belief, plaintiff asserts that, if the estate of the deceased be distributed, "he will never be able to receive said sums in payment of said claims"; and that, "in case of such distribution, plaintiff would be without a remedy at law." Without reference to any question which may relate to the general sufficiency of the complaint (Sime v. Hunter, 50 Cal. App. 629, 195 P. 935; Miller v. Miller, 171 Cal. 269, 152 P. 728; Verdier v. Roach, 96 Cal. 467, 31 P. 554), or to the manner in which the substantive facts were pleaded, in the assumed "fact" that the plaintiff was "without a remedy at law" (and which statement was a necessary allegation before plaintiff might become entitled to relief in equity), it is apparent that plaintiff was mistaken. At the time the action was commenced, section 1648 of the Code of Civil Procedure (now section 953 of the Probate Code) contained the following provision: "If there is any claim not due, or any contingent or disputed claim against the estate, the amount thereof, or such part of the same as the holder would be entitled to if the claim were due, established, or absolute, must be paid into the court, and there remain, to be paid over to the party when he becomes entitled thereto; or, if he fails to establish his claim, to be paid over or distributed as the circumstances of the estate require."

By the terms of such statute, a "remedy at law" affecting the claim of plaintiff was completely indicated; and the trial court was required to take notice thereof. Section 1875, Code Civ. Proc.; 10 Cal. Jur. 691 et seq. It follows that, as far as relief in equity was concerned, the complaint failed to state a cause of action, and consequently that the trial court was without jurisdiction to entertain such action.

The judgment is reversed.

We concur: CONREY, P. J.; YORK, J.

KNIGHT, Justice.

139 Cal.App. 474

LUIGI MARRE LAND & CATTLE CO. et al. v. ROSES et al.

Civ. 8953.

District Court of Appeal, First District, Division 1, California.

July 2, 1934.

1. Indians ⇐27(7)

Uncertain state of evidence on question whether defendants were Indians and therefore entitled to have judgment against them vacated on ground they were wards of government precluded interference on appeal with trial court's adverse conclusion.

2. Indians ⇐27(2)

That defendants in action to quiet title were Indians did not render them legally incompetent to take care of their affairs or exempt them from operation of state laws or jurisdiction of state courts as to matters respecting civil rights.

3. Indians ⇐27(2)

Indian defendants *held* not entitled to have judgment vacated in action to quiet title on ground they were wards of federal government, where they did not prove they were descendants of Indian tribe entitled to gov ernment protectorate policies, and that they or ancestors were occupying land involved as homesites when patent was issued to plaintiffs' predecessors, and had been so occupying them continuously since then.

4. Appeal and error ⇐876

On appeal from order denying motion to vacate judgment, questions involving sufficiency of evidence to support findings and judgment could not be considered, since they could only be dealt with on appeal from judgment.

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by Luigi Marre Land & Cattle Company and others against Raymond Roses and others. A judgment was entered for plaintiffs, and defendants moved to vacate the judgment. From an order denying the motion, defendants appeal.

Affirmed.

Samuel W. McNabb, U. S. Atty., Ignatius F. Parker and Clyde Thomas, Asst. U. S. Attys., all of Los Angeles, for appellants.

C. P. Kaetzel, of San Luis Obispo, for respondents.

Plaintiffs, as owners of the record title to 6053 acres of land in San Luis Obispo county, deraigned from a patent theretofore issued by the United States government, brought this action to quiet title thereto. Defendants asserted title to approximately five acres thereof based on allegations of adverse possession for more than twenty years. Upon trial the court found against defendants and entered judgment in favor of plaintiffs. No motion for new trial was made, nor was any appeal taken from the judgment. Later, however, the federal district attorney for the southern district of California and his assistant joined as associate counsel with the firm of attorneys who had represented the defendants throughout the litigation; and approximately five and a half months after the entry of the judgment and more than three months after it had become final by failure to appeal therefrom, notice of motion was given on behalf of the defendants to vacate the judgment under the authority of section 473 of the Code of Civil Procedure and grant defendants permission to file an amended answer, a copy of which was attached to the notice of motion, or to allow defendants to move for a new trial. The theory upon which it was sought to have the trial court vacate the judgment was based upon the claim that the defendants were California Indians, and that therefore they were "wards of the federal government, incompetent in law to take care of their own affairs. That the federal government is the proper guardian to protect their interests under such circumstances * * *" (citing Cramer v. United States, 261 U. S. 219, 43 S. Ct. 342, 345, 67 L. Ed. 622), and that "being incompetents, judgment against them is not binding * * *" (citing Winslow v. McCarthy, 39 Cal. App. 337, 178 P. 720). The motion was heard on May 11, 1931, and by the court denied; and this appeal was taken from the order made to that effect.

[1] At no time during the course of the trial was it intimated by the defendants themselves, their pleadings, their counsel, or the evidence, that they were Indians; and evidently such was the main disputed question of fact presented for determination by the motion to vacate. The first and only assertion to the effect that they were Indians was made in the proposed amended answer, which was verified by the assistant federal district attorney and in an affidavit made by him in support of the motion; and in both documents such assertion appears to be based on information obtained from the defendants themselves; whereas in apparent contradiction thereof it was averred in the affidavit filed at the same time by defendants' counsel who represented them throughout the trial that at no time did the defendants inform him they were Indians, nor was he aware at any time that such was the fact. It would seem, therefore, that the uncertain state of the evidence upon this material question of fact would preclude interference on appeal with the adverse conclusion reached thereon by the trial court.

[2, 3] But even assuming that defendants are Indians, such fact alone did not render them legally incompetent to take care of their own affairs, or exempt them from the operation of state laws or the jurisdiction of state courts as to matters respecting their civil rights, nor does the case of Cramer v. United States, supra, upon which defendants rely, so hold. The facts thereof, as they appear from the opinion, were as follows: In 1904 the United States government issued to the successor in interest of the Central Pacific Railway Company a patent to a series of odd sections of land theretofore granted to said railroad company pursuant to an Act of Congress passed in 1866 (14 Stat. 239, § 2), which excepted from the grant such lands as "shall be found to have been granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of"; and some twenty years after the issuance of the patent the government in its own right and as guardian of three Indians (whose race was not questioned) brought an action to cancel the patent in so far as it purported to convey 175 acres or more which were inclosed with a fence and since the year 1859 had been actually and continuously occupied by said Indians and their parents as home sites. The patentee challenged the government's authority to maintain the suit in so far as it purported to do so in behalf of said Indians; but in answer thereto the Supreme Court said that the general doctrine had been laid down by that court "that the Indian tribes are wards of the nation, communities dependent on the United States," and that this duty of protection and power extended to individual Indians even though they may have become citizens. In other words, the action was one instituted by the government to enforce a governmental right, namely, the cancellation of a patent theretofore issued by it, which included certain lands expressly exempted by the provisions of the congressional act authorizing the issuance of such patent. We have no such situation here. Moreover, even though the doctrine declared in that case respecting the protectorate powers of the gov-

ernment over Indians of the tribal type there described may be extended to cover the kind of case we have here, which involves only private rights, litigated in state courts and under state laws, the ruling of the trial court in denying defendants' motion, in our opinion, must nevertheless be sustained because in order to establish their legal status as wards of the federal government within the scope of such doctrine it was necessary for defendants to prove to the satisfaction of the trial court that they were the descendants of an Indian tribe entitled to such protectorate policies; also that they or their ancestors were occupying the lands as home sites at the time of the issuance of the patent by the government to the predecessors of plaintiffs, and had been so occupying the same continuously since then. Evidently they failed to make such proof.

In this respect the transcript shows that at the opening of the trial defendants stipulated that plaintiffs were the owners of the record title to the premises described in the complaint deraigned as claimed by them through mesne conveyances from a patent theretofore issued by the United States government to their predecessors in interest; but the date of the patent was not disclosed. It was further stipulated that the entire tract had been assessed to plaintiffs and their predecessors; that they had paid all taxes thereon; and that the acreage claimed by defendants was included in the larger tract. In their answers defendants alleged that for more than twenty years they had been in the actual, open, notorious, exclusive, and continuous possession, under claim of right as their own and adverse to plaintiffs' claim, of approximately five acres of said tract of land; and that since the year 1914 the portion so occupied by them had been inclosed with a substantial fence. The evidence introduced in support of such allegations consisted of the testimony given by the defendant Mario Roses, and her son, Raymond Roses. Mario Roses stated she was born on the acreage claimed by them; but she was uncertain as to the year of her birth. She said at first that she was sixty-four years old, and about two years older than her brother, the defendant Joe Baylon; but afterwards she stated her brother was seventy-nine; furthermore she said that her son first entered upon the property to live when he was eight years old. The son testified, however, that all three, his mother, his uncle, Joe Baylon, and himself, went on the property for the first time in 1898; that his stepfather was living there at the time; also that he was eight years old when they went there, and that he was thirty-eight at the time of the trial. They all believed, so he stated, that the acreage on which they settled was government land. His uncle, Joe Baylon, was not a witness, but it was stipulated that if called as such his testimony would be substantially the same as that given by Raymond Roses. In reviewing the trial court's ruling, the testimony given by Raymond Roses must of course be taken as controlling; and, that being so, any possible application to the present case of the doctrine of Cramer v. United States, supra, is excluded. True, in the proposed amended answer, which as stated was verified by the assistant federal district attorney, it is alleged "that the defendants herein and their ancestors for * * * more than a hundred years last past have been in the undisturbed occupation, use and possession" of the acreage claimed by defendants. Obviously, however, such allegation is based on information and belief, and as will be seen the fact so alleged is in sharp conflict with the testimony given at the trial by the defendant Raymond Roses. Moreover, and in any event, it nowhere appears from the record that defendants or any of them were occupying the disputed acreage at the time of the issuance of the patent, because, as above stated, the date of the issuance of the patent was not shown.

[4] It is also contended that prior to the year 1878 in order to acquire title by adverse possession it was not essential to prove payment of taxes, and that therefore the court erred in not awarding defendants judgment establishing in them title to the acreage claimed by them, because it is claimed, in support of the motion to vacate, "that the defendants, by themselves, as well as their ancestors," have been in possession of the land claimed by defendants for upwards of 80 years; also that the lands called for by plaintiffs' patent do not include the lands of these defendants. The above points and the remaining ones urged by defendants for reversal involve the question of the sufficiency of the evidence to support the findings and judgment, which can be dealt with only on an appeal from the judgment; and, as stated, no such appeal was taken.

The order appealed from is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

DISTRICT BOND CO. v. CITY OF SOUTH GATE et al.

Civ. 9528.

District Court of Appeal, Second District, Division 2, California.

July 2, 1934.

Hearing Granted by Supreme Court Aug. 30, 1934.

1. Appeal and error ⇐781(4)

Where time to make levy for current year was past, and appeal was for purpose of reviewing alleged error of court in denying writ of mandamus to compel levy of taxes, questions on appeal were moot, and appeal would be dismissed.

2. Appeal and error ⇐781(4)

Where questions had become moot since time for making levy of taxes sought to be compelled had passed, reviewing court would not review decision denying writ of mandamus on theory that decision in appellant's favor would result in proper action the following year, since neither affirmance nor reversal of judgment would avail appellant anything.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Suit by the District Bond Company against the City of South Gate and others for alternative writ of mandate. The peremptory writ was denied and the alternative writ was discharged, and petitioner appeals.

Appeal dismissed.

Roscoe R. Hess, of Los Angeles, for appellant.

Clyde Woodworth, of Inglewood, for respondents.

SCOTT, Justice pro tem.

Appellant petitioned the superior court for an alternative writ of mandate directed to respondents and commanding them to levy taxes for the year 1933–34 sufficient to pay interest and installment of principal on certain bonds issued under the "Acquisition and Improvement Act of 1925," setting out that defendants had included in the ordinance under and by which it was proposed to levy taxes as for the ensuing year an amount of $14,472 for this purpose, whereas a sum of $54,708 was actually required. The ordinance was proposed August 21, 1933; the petition was filed August 26 and denied August 28, whereupon the ordinance was adopted by defendant city council. At the time of the hearing defendants' demurrer was overruled, no evidence was received, the peremptory writ was denied, and the alternative writ discharged. The judgment recites that the answer raised no essential question of fact.

[1] Taxes for 1933–34 have been levied and, except for delinquencies, have been paid. The time is long since past to make said levy for the current fiscal year. This appeal being for the purpose of reviewing the alleged error of the lower court, the questions here presented have become moot, since respondents could not be compelled to do that which they cannot legally do, to wit, levy at this time additional taxes for the year mentioned.

Appellant urges that the case of Pasadena Junior College District v. Board of Supervisors, 216 Cal. 61, 13 P.(2d) 678, supports his contention that a determination of this appeal in his favor will result in proper action being taken at the time of making the levy of taxes for 1934–35. That case was an original proceeding in mandamus in the Supreme Court, whereas this is an appeal from the superior court, and the principles therein set forth are not available to this appellant.

Appeal dismissed.

STEPHENS, Presiding Justice.

I concur.

[2] Neither the affirmance nor the reversal of the trial court's judgment would of itself avail appellant anything, whereas a new proceeding instituted in time for next year's tax levy would solve its problem. Obviously we are not anticipating the decision if such proceeding should be instituted before us.

I concur: CRAIG, J.



139 Cal.App. 438

MUENCH v. GERSKE.

Civ. 9205.

District Court of Appeal, First District, Division 2, California.

June 27, 1934.

1. Automobiles ⇐254(14)

Whether motorist who collided with automobile making left turn was guilty of negligence proximately causing or contributing to injuries of guest in automobile making turn *held* for jury.

2. Automobiles ⇐170(1)

Motorist must use due care to avoid colliding with another and though he may assume that others will exercise due care, he cannot for that reason omit any of the care which the law demands of him.

3. Appeal and error ⇐1002

Where evidence as to negligence and proximate cause in automobile collision case was conflicting, verdict will not be disturbed on appeal.

4. New trial ⇐162(1)

Trial court may set aside verdict if in its opinion it is not sustained by the evidence, or may direct new trial unless plaintiff remits portion of the verdict, if in its opinion verdict is for more than the evidence will justify.

5. New trial ⇐163(2)

That trial court in automobile collision case ordered that new trial be granted on ground that evidence was insufficient to justify the verdict, unless plaintiff consented to reduction of verdict from $15,000 to $10,000 *held* to show not that court believed that evidence was insufficient to support any verdict, but that court deemed that $10,000 was ample compensation for injuries sustained.

6. Trial ⇐133(6)

In trial of automobile collision cases, it is improper to get before the jury either directly or indirectly any fact which conveys that defendant is insured, and such impropriety cannot be cured by court's striking out such information and admonishing jury to disregard it.

7. Trial ⇐108½

In trial of automobile cases, counsel may ask jurors such questions as may reasonably be necessary to ascertain whether they are free from bias or interest that may affect their verdict, and to this end may in good faith ask each juror whether he is interested in any insurance company insuring against liability for negligence but should not give impression that defendant is so insured.

8. Action ⇐56

Denial of motion to consolidate for trial, automobile guest's separate actions against automobile host and colliding motorist *held* not abuse of discretion (Code Civ. Proc. § 1048).

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Elizabeth Muench against August Gerske. From a judgment for plaintiff, defendant appeals.

Affirmed.

Colding, Hale, Crawford & Myers, of San Francisco, for appellant.

Walter H. Linforth, William M. Cannon, and Jesse H. Miller, all of San Francisco, for respondent.

SCHMIDT, Justice pro tem.

Appellant appeals from the judgment upon the verdict of the jury in favor of respondent in her action for damages against appellant for injuries alleged to have been received by her on account of the alleged negligent manner in which appellant, at or near the intersection of Junipero Serra boulevard and Alemany boulevard in the city and county of San Francisco, drove and operated his automobile so as to cause same to collide with an automobile in which respondent was riding as a guest. The notice of appeal also states that it is from the denial of motion for judgment in favor of appellant notwithstanding the verdict of the jury; from the order of court denying appellant's motion for a new trial; from the order of court denying appellant's motion to consolidate this action with another filed by appellant arising out of the same accident and from the order of court denying appellant's motion for a continuance. Counsel's brief, however, does not discuss the latter matter.

(1) In the order of presentation in appellant's brief the first point is that "the evidence is insufficient to justify the verdict, which is therefore contrary to law, and for that reason this case does not fall within the rule that negligence and proximate cause are usually questions of fact for the jury, the verdict of which will not be disturbed on appeal."

The undisputed evidence shows that at 7:30 p. m. or thereabouts on April 13, 1932, one Ellsworth was driving his Hudson sedan in a southerly direction along said Junipero Serra boulevard, hereinafter referred to as Junipero Serra; that respondent, Muench, was seated with him in his car and was riding with him as his guest; immediately preceding and up to and at the time of the collision the Hudson car did not exceed a speed of from 20 to 25 miles per hour; Junipero Serra runs generally north and south and at the scene of the accident is 100 feet in width from curb to curb; Alemany boulevard, hereinafter referred to as Alemany intersects Junipero Serra from the east side thereof but does not cross Junipero Serra on the west side; Alemany runs in a general northeast and southwest direction so that the intersection is not

at a right angle, and by reason thereof the curb line running from Junipero Serra into Alemany at the northeast corner is rounded semicircularly, making Alemany at the intersection with Junipero Serra approximately 240 feet from curb to curb; both boulevards were completely paved from curb to curb; it was after dark at the time with the street lights lit; the night was clear; the pavement was dry; the headlights on each automobile were lit; a view of the intersection as well as the view from one automobile to the other was clear and unobstructed; Ellsworth in his Hudson made a left-hand turn from his right-hand side of Junipero Serra into Alemany, cutting the turning-button, and while in that act and after he had made the turn and his car was headed east toward Alemany, the right front half of his Hudson car was struck at right angles by the front end of the Packard sedan driven by appellant, the actual position of the two cars where they came to rest after the collision; the force of the collision was such that the Hudson automobile was thrown a considerable distance sideways, coming to rest approximately 80 feet north of the point of the collision; appellant's Packard moved approximately 40 feet forward after the collision, stopping at right angles to the direction in which it was traveling at the time of the impact; and the extent of the injuries to the respondent.

The disputed evidence relates to the actual place in or near the intersection where the collision took place, whether the impact was within the northerly pedestrian lane of Junipero Serra or southerly thereof; the speed of the Packard car just prior to and at the time of the collision; its distance south from the Hudson car at the time Ellsworth started his left-hand turn. The testimony of Ellsworth was that as he approached the point where he was about to make the left-hand turn and as he commenced to make the left-hand turn, the Packard was about 400 feet away to the south; another witness testified the Packard was 125 to 150 feet south of the point of collision after the Hudson had completed the turn and was actually headed easterly; still another witness testified the Packard was from 175 to 200 feet south of the point of collision when the Hudson began to make its left turn. The Hudson was from one-half to two-thirds of the distance across the easterly half of Junipero Serra before the collision took place. The speed of appellant's Packard was estimated at from 55 to 65 miles per hour. A police officer testified he had had a conversation with the appellant at the hospital shortly after the accident at which time appellant stated "He was going about 45 miles an hour." Appellant denies having had such conversation with the officer. Appellant further testified that the Hudson suddenly turned left in front of him when only a few feet from the front of the Packard.

[1-3] Counsel for appellant does not dispute that it is the law "where two parties are guilty of negligence and their negligence concurs in bringing about the accident they are both liable, and the third party not guilty of contributory negligence is entitled to recover from either or both," as set forth in Blackwell v. American Film Co., 48 Cal. App. 681, 192 P. 189; Tucker v. United Railroads, 171 Cal. 702, 154 P. 835; Sego v. Southern Pacific Co., 137 Cal. 405, 70 P. 279; Springer v. Pacific Fruit Exchange, 92 Cal. App. 732, 268 P. 951; Burke v. Dillingham, 84 Cal. App. 736, 258 P. 627; Berges v. Guthrie, 51 Cal. App. 547, 197 P. 356; Truitner v. Knight, 83 Cal. App. 655, 257 P. 447; Deagle v. Shane, 108 Cal. App. 490, 291 P. 652. The contention, however, is made that from all the evidence in this case the trial court should have held as a matter of law, either that there was not any negligence on the part of appellant or any negligence on the part of appellant that in any way contributed to the injuries suffered by respondent, and that the sole proximate cause of injury to respondent was the negligence of her host, Ellsworth, the driver of the car in which respondent was riding as a guest. Counsel claims as a matter of law that a left-hand turn made under the cirumstances presented by the evidence in this case becomes the sole proximate cause of the resulting collision and cites in support thereof Donat v. Dillon, 192 Cal. 426, 221 P. 193, which likewise was a guest case. The negligence of the driver of the car in which that guest was a passenger was conceded at the trial—the question to be determined under the facts was, Was the driver of the other car making the left-hand turn also guilty of negligence? The rule applied in that case applies with equal force to the drivers of both machines, namely, "As we see it, this case falls within the general rule that negligence is a question of fact for the trial court or jury." Bottom page 428 of 192 Cal., 221 P. 193, 194. And, "A motorist must at all times use due care to avoid colliding with another; he must be ever alert and watchful, so as not to place himself in danger, and, while he may assume that others will exercise due care, he cannot for that reason omit any of the care which the law demands of him." Page 429 of 192 Cal., 221 P. 193, 194.

Lynn v. Goodwin, 170 Cal. 112, 148 P. 927,

L. R. A. 1915E, 588, is not of help in this case, as the court found that the defendant was not negligent, but that the negligence of Metcalf, driver of the car in which plaintiff was a guest, in driving around a load of brush on the wrong side of the road, was the proximate cause of the accident that at the time Metcalf was under the influence of liquor and drunk, and that plaintiff "knew this, and a reasonably prudent person would not have ridden in the automobile with Metcalf in his condition of inebriety."

Solko v. Jones, 117 Cal. App. 372, 3 P.(2d) 1028, likewise is not a case in point as that is a case where the widow sued and the evidence showed that her husband, with whom she was driving, was guilty of negligence. His negligence was imputed to his wife.

In Sharkey v. Sheets, 87 Cal. App. 99, 261 P. 1049, another left-hand turn case cited by appellant, the verdict was for the defendant and plaintiff appealed. The court in that case said, page 102 of 87 Cal. App., 261 P. 1049, 1050: "The evidence convinces us that it was entirely a matter within the province of the jury to decide in this case that the truck driver was guilty of no actionable negligence."

A reading of the transcript of the testimony at the trial from which the facts are epitomized as above shows that there was a decided conflict relating to the facts bearing upon negligence and proximate cause. Such a conflict existing, it became a question for the jury and their finding thereon will not be disturbed by the reviewing tribunal.

[4, 5] (2) Appellant contends the trial court erred in denying his motion for a new trial on the ground that the evidence was insufficient to justify the verdict, relying not only on the point hereinbefore discussed but upon the further fact that in its minute order the trial court recited "it is ordered by the Court that said motion be ordered that if plaintiff files a stipulation herein * * * reducing the judgment to $10,000, the motion for a new trial be denied, otherwise the said motion will be granted on the ground of insufficiency of the evidence to justify the verdict." Respondent, within the time fixed by the minute order, filed her stipulation consenting to a reduction of the judgment from $15,000 to $10,000, whereupon the court made its minute order, after reciting that fact, "it is ordered by the court that the motion of defendant for a new trial be and the same is hereby denied" and in addition thereto filed its written "order denying motion for new trial." Appellant argues that by the use in the said minute order of the phrase "on the ground of insufficiency of the evidence to justify the verdict," the trial court could have had in mind only one thing, namely, ground 12 of appellant's motion for a new trial, "insufficiency of the evidence to justify the verdict." Without doubt, had the trial court believed as to the case in its entirety that the evidence was insufficient to justify any verdict or judgment for respondent, it would have so granted a motion for a new trial and not merely have reduced the amount of the damages. This is borne out by the fact that the trial court (a) at the close of the evidence denied a motion by appellant for a directed verdict in his favor and permitted the case to go to the jury for its verdict; (b) after the entry of the verdict, denied the motion of appellant made pursuant to section 629, Code of Civil Procedure, that the court entered a judgment in his favor notwithstanding the verdict of the jury; (c) after respondent had filed her consent to the reduction of the amount of the judgment, made its minute order denying the motion for a new trial; and (d) filed its written order denying motion for new trial.

We agree with respondent that the trial judge "apparently felt that the evidence was amply sufficient to support the verdict in favor of the plaintiff and against the defendant, but, in his opinion, the jury had granted too much in damages and it was his judgment $10,000 would compensate the plaintiff for the injuries sustained by her * * * the evidence was insufficient to justify a verdict in the sum of $15,000, but was sufficient to justify a verdict for $10,000."

In Etchas v. Orena, 121 Cal. 270, 272, 53 P. 798, 799, we find: "The rule that the trial court may set aside a verdict, if in its opinion it is not sustained by the evidence, or may direct a new trial unless the plaintiff will remit a portion of the verdict if in its opinion the verdict is for more than the evidence will justify, is so well established that it is not necessary to cite authorities in its support." And this has been and is the rule in this state.

In Dreyer v. Cyriacks, 112 Cal. App. 279, commencing bottom page 283, 297 P. 35, 37, "Furthermore, where a trial court grants a new trial upon the ground that the verdict is excessive, the declaration of the court that it is excessive does not necessarily mean that the trial court was of the opinion that the verdict was the result of passion or prejudice. It is susceptible of the interpretation that the trial court was not satisfied that the finding of the jury as to the extent of the damage suffered by the plaintiff was supported by the evidence adduced upon that phase of the case.

Meinberg v. Jordan, 29 Cal. App. 760, 157 P. 1005, 1007."

In Griffey v. Pacific Electric Railway Co., 58 Cal. App. 509, bottom page 512, 209 P. 45, 46, we find: "Whether it (the order granting motion for a new trial on the ground of excessive damages) was made on the ground that, irrespective of the influence of any passion or prejudice, the evidence fails to show that the pecuniary loss suffered by plaintiffs amounted to $10,000—or whether it was made * * * on the ground that the verdict was influenced by passion and prejudice, in either case the statement in the order that it is made on the ground of 'excessive damages' is tantamount to a specification that the new trial was granted on the ground of the insufficiency of the evidence to sustain a verdict for $10,000. * * * For, as our Supreme Court has pointed out, to say that a verdict has been influenced by passion or prejudice is but another way of saying that it exceeds any amount justified by the evidence." (Citing cases.)

For these reasons we cannot agree with the contention of appellant on this point.

(3) In the examination of jurors for cause counsel for respondent asked: "Q. Are any of you ladies and gentlemen policy holders in the Pennsylvania Indemnity Company? * * * Q. Are any of you stockholders in any insurance company writing automobile liability insurance?" To each of these questions counsel for appellant objected on the ground that "it is incompetent, irrelevant and immaterial." The trial court overruled the objection.

Appellant claims the ruling to be reversible error for the reason that appellant was precluded from having a fair trial and in support of his contention cited Ashley v. Pinney (Cal. App.) 24 P.(2d) 824 (in which case is cited Citti v. Bava, 204 Cal. 136, 266 P. 954, and Squires v. Riffe, 211 Cal. 370, 295 P. 517); Daniel v. Asbill, 97 Cal. App. 731, 276 P. 149; Arnold v. California Portland Cement Co., 41 Cal. App. 420, 183 P. 171, 172.

In the Ashley Case there was evidence of compromise by the insurance carrier.

In the Citti Case there was evidence of compromise and settlement (page 138 of 204 Cal., 266 P. 954, 955): "The evident purpose of counsel for the plaintiff was to prove the fact of the compromise and settlement * * * by the insurance carrier of the defendant as an admission of liability on the part of the defendant and to get before the jury the fact that the defendant was indemnified by a policy of insurance." Page 139 of 204 Cal., 266 P. 954, 955: "The natural tendency of a line of examination that suggests to the jury that the defendant is indemnified against any judgment for damages against him is highly prejudicial to his rights. * * * Such attempts on the part of counsel have frequently been held to be improper and prejudicial." (Citing cases.)

In Squires v. Riffe, supra, we find that the evidence given was that that was "the reason she had insurance."

In Arnold v. California Portland Cement Co., supra, also cited by appellant, we have an exhaustive discussion as to the limits to which counsel may or may not go in this matter. In that case it was found to be reversible error for counsel to propound questions carrying "with it the implication, if not the direct assertion, that appellant was insured by a casualty insurance company against any financial loss it might sustain by reason of the injury to respondent." That ruling has been repeatedly sustained. Ashley v. Pinney, supra; Citti v. Bava, supra; Squires v. Riffe, supra.

[6] Without citing other authorities it is without question the law of this state that it is improper either directly or indirectly to get before the jury any fact which conveys the information that the defendant is insured against loss in case of a recovery against him; and for the trial court to strike answers conveying such information and to instruct the jury not to consider such information will not correct the error.

[7] Likewise, in Arnold v. California Portland Cement Co., supra, at page 425 of 41 Cal. App., 183 P. 171, 172, we find: "It is entirely proper for counsel to ask the jurors such questions as may reasonably be necessary to ascertain whether they are free from a bias or interest that may affect their verdict. To this end it is proper for counsel, in good faith, to ask of each juror whether he is interested as an agent or stockholder or otherwise in a specified casualty company. Or he may be asked the broad question whether he is interested in any insurance company insuring against liability for negligence. * * * But counsel must take pains to propound such questions in such a manner as not unnecessarily to convey the impression that the defendant is in fact so insured."

This, supported by a long line of opinions, is the recognized law of the state. Williamson v. Hardy, 47 Cal. App. 377, 190 P. 646; Nichols v. Nelson, 80 Cal. App. 590, 252 P. 739 (hearing denied by Supreme Court); Daniel v. Asbill, supra; Hasty v. Trevillian, 102 Cal.

App. 405, 283 P. 148 (hearing denied by Supreme Court).

[8] It necessarily follows that the questions asked were entirely proper.

(4) The final contention made is that the trial court erred in denying the motion of appellant to consolidate for trial this case with one brought by appellant against Ellsworth et al., which latter case arose out of the same collision which was the basis of the action at bar. Section 1048, Code of Civil Procedure, provides: "An action may be severed and actions may be consolidated, in the discretion of the court, whenever it can be done without prejudice to a substantial right." We can see no abuse of discretion in the actions of the two trial judges, each of whom denied the respective motions to consolidate.

Judgment affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



139 Cal.App. 417

PEOPLE v. RUSSELL.

Cr. 1802.

District Court of Appeal, First District, Division 2, California.

June 25, 1934.

Hearing Denied by Supreme Court July 23, 1934.

1. Criminal law ⇐641(2)

Plea of not guilty by reason of insanity merely raised question of insanity at time offenses were committed, where there was no claim of present insanity, so that permitting accused to conduct his own defense was not improper on ground that he was incompetent to conduct it.

2. Criminal law ⇐998

Court had no jurisdiction to vacate judgment of conviction where grounds assigned were all matters which could have been raised on appeal (Code Civ. Proc. § 473).

3. Criminal law ⇐998

Court has jurisdiction to set aside judgment after time for new trial and appeal has passed only when judgment is void on its face or for reasons specified by statute (Code Civ. Proc. § 473).

4. Criminal law ⇐636(9)

Constitutional right of accused to appear and defend in person *held* not to extend after judgment to hearing of appeal or other review of judgment (Const. art. 1, § 13).

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Joe Russell was convicted of violations of section 288 of the Penal Code with prior convictions, and he appeals.

Affirmed.

Joe Russell, in pro. per.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

NOURSE, Presiding Judge.

On October 17, 1932, the appellant was sentenced to the state penitentiary at Folsom following a conviction on two separate violations of section 288 of the Penal Code and a finding of two prior convictions of felony in a foreign state. On his appeal the judgment and the order denying him a new trial were affirmed. People v. Russell, 131 Cal. App. 646, 21 P.(2d) 959.

On February 19, 1934, the appellant filed a motion to vacate the judgment on three grounds—that he was not given an opportunity to secure counsel, that he was not confronted with the witnesses regarding his prior convictions, and that the judgment does not affirmatively declare that he served the terms imposed by these prior convictions. The second point was the only one urged on the former appeal, and this was determined against appellant. The third point is one which might arise when the prison board fixes appellant's term of imprisonment under section 1168 of the Penal Code. Here the judgment was in harmony with section 1202a of that Code in directing the appellant to be taken to the state prison at Folsom.

[1] The third ground assigned in the motion to vacate is plainly frivolous. It was based upon asserted errors occurring during the trial and particularly that, having become dissatisfied with his counsel, the defendant moved in open court to be relieved of counsel and to be permitted to conduct his own defense; that his motion was granted, and that he thereupon requested and was granted leave to amend his answer and to plead "not guilty by reason of insanity"; that, because of this plea, the trial court should have assumed that he was incompe-

tent and should have refused to permit him to conduct his own defense. The obvious answer to the point is that the plea merely raised the question of insanity at the time the offenses were committed; there was no claim of present insanity.

[2, 3] But, in addition, the trial court was without jurisdiction to grant the motion because the grounds assigned were all matters which could have been raised on the appeal from the judgment. It is only when a judgment is void on its face (or for reasons specified in section 473, Code of Civil Procedure) that a motion can be entertained to set it aside after the time for new trial and appeal has passed. People v. Davis, 143 Cal. 673, 675, 77 P. 651; In re Sackett, 53 Cal. App. 592, 597, 200 P. 742; Worth v. Emerson, 3 Cal. App. 158, 160, 85 P. 664; 14 Cal. Jur. p. 1022.

[4] The motion was presented in written form, accompanied by a written argument. At the time these papers were filed, the appellant made a written request that he be released from the state penitentiary at Folsom for the purpose of appearing in court to urge the motion. The trial court did not grant this request, and the appellant now argues that his constitutional right to appear and defend in person was denied him.

Assuming that the point is one which can be raised on this appeal, we are satisfied that it is without merit. Section 13 of article 1 of the Constitution gives a defendant the right to appear and defend in person and with counsel "in criminal prosecutions." This right to be present throughout a criminal trial has been recognized both at common law and by statute, and the decisions relating to that right are in practical harmony. In general, the rulings are that it is essential to a valid trial that he should be present, not only when arraigned, "but at every subsequent stage of the trial." 16 C. J. p. 813; 12 Cyc. p. 523. There is some conflict in the decisions as to the necessity of defendant's presence on preliminary motions and motions for new trial or in arrest of judgment. 16 C. J. p. 816. But we have found no conflict in the holdings that his presence is not necessary after entry of judgment at the hearing of an appeal or other review of the judgment. 12 Cyc. p. 526; 8 R. C. L. p. 91; Schwab v. Berggren, 143 U. S. 442, 448, 12 S. Ct. 525, 36 L. Ed. 218; Dowdell v. U. S., 221 U. S. 325, 331, 31 S. Ct. 590, 55 L. Ed. 753; Hogan v. State, 42 Okl. Cr. 188, 275 P. 355, 357.

The reason for the ruling requiring defendant's presence is stated in Southerland v. State, 176 Ind. 493, 96 N. E. 583, to be, first, to enable the prosecution to identify him, and to punish him in case of conviction; and, second, to secure him full facilities for defending himself as he is advised in the progress of the trial of the evidence against him. On the other hand, as said in Schwab v. Berggren, supra, page 449 of 143 U. S., 12 S. Ct. 525, 527, "neither reason nor public policy require that he shall be personally present pending proceedings in an appellate court whose only function is to determine whether, in the transcript submitted to them, there appear any error of law to the prejudice of the accused. * * *"

On this motion to set aside the judgment the only question before the court was whether, on the face of the record, errors at law appeared to the prejudice of the accused that would render the judgment void on its face. So far as the question presented here is concerned, there is no substantial difference between such a motion and an appeal or other review of the judgment in an appellate court. As there is no constitutional nor statutory right of a defendant to demand his presence at a proceeding brought to review or set aside a judgment, the failure of the trial court to order his presence on the hearing of this motion was not error.

The order is affirmed.

I concur: STURTEVANT, J.



BOSQUI et al. v. CITY OF SAN BERNARDINO et al. (two cases).*

Civ. 1485.

District Court of Appeal, Fourth District, California.

June 28, 1934.

Rehearing Denied July 28, 1934.

Hearing Granted by Supreme Court Aug. 27, 1934.

1. Railroads ⇐95(5)

Railroad Commission's order requiring railroad to "maintain" certain portion of viaduct over tracks *held* to require keeping such portion in proper repair, but did not include duty of keeping roadway clean and free of

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 43 P.2d 547.

foreign substances; such duty resting on city.

[Ed. Note.—For other definitions of "Maintain," see Words & Phrases.]

2. Municipal corporations ⇐762(2)

Railroad Commission's order placing on railroad responsibility of maintaining certain portion of viaduct crossing railroad tracks *held* not to affect city's liability for injuries caused by dangerous or defective condition thereof (St. 1923, p. 675, § 2).

The Railroad Commission's order did not affect city's liability because city has control over its streets and has both power and duty of keeping them in repair, and order did not purport to release city from its duty and liability, even if it might have done so, but left railroad liable with city for any damages resulting from their separate obligations arising on the part of the railroad under the order, and on the part of the city under Public Liability Act (St. 1923, p. 675).

3. Appeal and error ⇐927(3)

On review of judgment of nonsuit, every favorable inference and presumption fairly arising from evidence must be considered as facts proved in plaintiff's favor.

4. Appeal and error ⇐927(3)

On review of nonsuit, view most favorable to plaintiff must be taken, where evidence is fairly susceptible of two constructions.

6. Appeal and error ⇐927(3)

On review of nonsuit, relevant evidence must be given its full probative strength, and any question arising from variation between testimony of witnesses cannot be considered.

7. Trial ⇐139(1)

Motion for nonsuit must be denied where plaintiff establishes prima facie case.

8. Automobiles ⇐308(10)

Whether viaduct crossing tracks was dangerous, due to splintered and defective wooden barrier at curve, and whether such condition, for which both railroad and city would be liable, was proximate cause of automobile crossing curb, crashing through guard rails, and falling to street below, resulting in death of occupants, *held* for jury (St. 1923, p. 675, § 2).

9. Automobiles ⇐276

Evidence of many previous automobile accidents at curve in viaduct crossing railroad tracks, and knowledge thereof by responsible city officials, *held* sufficient notice to city officers of defective condition of viaduct (St. 1923, p. 675, § 2).

10. Automobiles ⇐308(1)

Ordinarily, question of contributory negligence in automobile cases is for trier of facts.

11. Negligence ⇐136(9)

Contributory negligence is question of law only when court is impelled to say that from facts reasonable men can draw but one inference which points unerringly to plaintiff's negligence contributing to injury.

12. Automobiles ⇐308(11)

Contributory negligence of driver of automobile which crossed curb barrier of viaduct over railroad tracks, crashed through guard rails, and fell to street below, resulting in death of occupants, *held* for jury (St. 1923, p. 675, § 2).

13. Statutes ⇐71

Statute giving right of action against cities, counties, and other public agencies, and not against state, for damages resulting from defective condition of public streets, *held* not unconstitutional as not having uniform operation (St. 1923, p. 675, § 2; Const. art. 1. § 11).

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Actions by Daniel Van Allen Bosqui, Jr., and another against the City of San Bernardino and another, which actions were consolidated for trial. From an adverse judgment, plaintiffs appeal.

Reversed.

Swing & Swing, of San Bernardino, for appellants.

William Guthrie and Wardwell D. Evans, both of San Bernardino, for respondent City of San Bernardino.

Robert Brennan, M. W. Reed, Leo E. Sievert, and H. K. Lockwood, all of Los Angeles, for respondent Atchison, T. & S. F. Ry. Co.

MARKS, Justice.

The plaintiffs are the adult children of Daniel Van Allen Bosqui and Mary Bosqui, his wife, who were killed in an automobile accident at about noon on the 17th day of April, 1932. For the sake of brevity we will refer to the city of San Bernardino as the city, and to the Atchison, Topeka & Santa Fé Railway Company as the company.

The plaintiffs filed separate actions for damages resulting from the death of each parent. They were consolidated for trial and come here on one record. At the close of plaintiffs' case, the trial court granted a non-

suit, and the judgment thereafter entered is now before us for review.

The fatal accident occurred on an overhead crossing which is popularly known as a viaduct built over the tracks of the company. The history of the construction of the original viaduct and its extension (describing only a portion thereof) and proceedings before the Railroad Commission are described by the Supreme Court in the case of San Bernardino v. Railroad Commission, 190 Cal. 562, 213 P. 980, as follows:

"In 1907, and for a long time prior thereto, Mt. Vernon avenue was a public highway in the city of San Bernardino, which was crossed, at grade, between Third street and Fourth street, in said city, by three or more tracks of the railway company. The latter, being desirous of laying additional tracks to extend its switching yards, entered into negotiations with the city authorities which resulted in an agreement or understanding to the effect that the city should vacate that portion of Mt. Vernon avenue between Third and Fourth streets, in consideration whereof the railway company should erect over the portion thus vacated a viaduct for highway purposes, on condition that the city should thereafter maintain the same 'so long as the same shall be used by the public for travel thereon.' This agreement was carried out. The city by ordinance abandoned and vacated that portion of the highway, on the expressed condition that the railway company should construct the viaduct in accordance with plans and specifications therein referred to, and when completed should convey the same to the city; 'said deed or conveyance to be upon condition that the expense of maintaining said viaduct will thereafter be borne solely by said city.' The viaduct was constructed and conveyed to the city by deed of conveyance containing the above-quoted condition and the city by resolution accepted the same. Upon the completion of the viaduct there were 15 tracks laid across the land which previous to the closing had been Mt. Vernon avenue. In 1916 the railway company desiring to further extend its yards, negotiations resulted in a further agreement, or understanding, similar to the first, as a result of which an additional portion of Mt. Vernon avenue was vacated by ordinance. The railway company constructed an addition to the viaduct, extending the same approximately 300 feet further south, and conveyed the extension thereof to the city by deed. With respect to this extension, however, so far as the evidence discloses, nothing was said, either orally or in writing, upon the subject of the cost of future maintenance thereof. After completion of the extension to the viaduct there were approximately 38 tracks crossing thereunder. The viaduct consisted of a steel structure with a wood floor, constituting an elevated highway about 20 feet in width, in addition to the sidewalk thereon, and at a height sufficient to permit the operation of trains underneath. In 1920 the plank roadway of the old portion of the viaduct was and for three years had been, very badly out of repair, so much so that it constituted a danger to traffic passing over it.

"In this situation the railway company filed an application before the Railroad Commission setting forth the facts above outlined and praying that the Commission after a hearing 'make such orders and directions with respect to the maintenance and care of said viaduct as may be just.' The city filed an answer and an amendment thereto, substantially admitting the facts alleged in the petition, but denying the jurisdiction of the Railroad Commission in said matter, and alleging that the city had no power or authority to enter into the agreement therein referred to for the maintenance of the viaduct by it. After hearings therein the Commission made the order which is now up for review, wherein it found as a fact that public safety, convenience, and necessity require the maintenance and repair of the viaduct, and require the making of an order apportioning the cost of such maintenance and repair between the railway company and the city, and ordered that the railway company shall maintain 'at its sole cost and expense' the new portion of the viaduct, and that the city shall maintain 'at its sole cost and expense' the old portion thereof."

To the foregoing description of the viaduct as constructed in 1916 we must add a description of that portion over what is now Third street in the city. The original viaduct was extended south beyond the boundaries of Third street to, or near, the line of Broadway, and is described in the above-quoted paragraphs of the Supreme Court opinion in the case of San Bernardino v. Railroad Commission, supra. Third street was relocated and bore southerly and probably into what had been Broadway. At its southerly extremity the new portion of the viaduct was extended in a turn to the east for about 631 feet, where, descending a 6 per cent. grade, it ended in Third street as relocated. While the main portions of the viaduct on Mt. Vernon avenue and Third street approached each other at an angle of ninety degrees, the actual junction did not form a right angle. A short distance

before the viaduct's west line on Mt. Vernon avenue would have joined with its south line on Third street, its direction was broken by a deflection of approximately forty-five degrees to the east for a distance of 37 feet, where it joined the south line of Third street a few feet east of the east line of the Mt. Vernon portion of the viaduct produced southerly across the end of the Third street portion. There is a similar deflection at the south end of the east line of the Mt. Vernon avenue portion of the viaduct for 23 feet, although at a different angle, which forms the extreme east end of the north line of Third street portion of the viaduct. This north line proceeds easterly with two slight changes of direction for about 50 feet to where it joins the regular north line of the Third street portion of the viaduct, where, as on Mt. Vernon avenue, the roadway is 20 feet wide with a 6-foot sidewalk for pedestrians on the south and west sides. This construction gives a roadway on the turn with a maximum width of 32 feet. The roadway of the main or level portion of the viaduct is 32 feet above the ground.

While the terms of the order of the Railroad Commission under review in the case of San Bernardino v. Railroad Commission, supra, were sufficiently set forth for the purpose of that case, the details of the order not having been under attack, as the sole question decided was the power of the commission to make any order apportioning the cost of maintaining the viaduct, they become important here. The order made was as follows:

"Public hearings having been held upon the above-entitled application, briefs having been filed subsequent to the hearings, the matter having been submitted and is now ready for decision,—

"It is hereby found as a fact, that public safety, convenience and necessity require the maintenance and repair of the overhead crossing or viaduct over the tracks of The Atchison, Topeka and Santa Fe Railway Company at Mt. Vernon Avenue, in the City of San Bernardino;

"It is further found as a fact, that public safety, convenience and necessity require that an order be made by this Commission apportioning the cost of such maintenance and repair between The Atchison, Topeka and Santa Fe Railway Company and the City of San Bernardino, in accordance with the order hereinafter contained; and basing its order upon the foregoing findings of fact and upon the opinion preceding this order,

"It is hereby ordered that the cost of maintenance of the overhead crossing or viaduct over the tracks of The Atchison, Topeka and Santa Fe Railway Company at Mt. Vernon Avenue in the City of San Bernardino be borne as follows, to-wit:

"1. Applicant shall maintain, at its sole cost and expense the new level portion of said viaduct, as shown outlined in red, and marked 'Level' on applicant's Exhibit No. 1, otherwise described as that portion of said viaduct extending along Mt. Vernon Avenue from a point 513 feet south of the south line of Fourth Street to a point 39 feet north of the north line of West Broadway.

"2. The City of San Bernardino shall maintain, at its sole cost and expense, the old level portion and both sloping approaches to both old and new level portions, as shown on applicant's Exhibit No. 1, otherwise described as that portion of said viaduct not herein ordered to be maintained by applicant.

"3. The word 'new' as used above in this order, refers to those portions of said viaduct constructed in or subsequent to the year 1916."

The meaning of the foregoing is made somewhat uncertain by the fact that, while a copy of Exhibit No. 1, which is there referred to, is represented in the record here by a photograph of the original, no portion of it is outlined in red. The new level portion extended around the turn from the north and south portion on Mt. Vernon avenue a distance of about 25 feet to meet the incline approaching it on Third street. Without the red outlining it is not as clear as it should be that the order of the Railroad Commission placed the duty of maintaining this particular 25 feet of the viaduct on the company. It was probably within the exterior boundary lines of Mt. Vernon avenue existing prior to the abandonment of portions of that street. As the case was tried upon the theory that the order placed the obligation of maintaining this part of the new level portion of the viaduct upon the company, and this position is not questioned in its brief, we will assume that this particular 25 feet was included within the description in the order of that portion to be maintained by the company.

Along the east and north sides of the viaduct guard rails were constructed by mounting 3-inch pipes as upright posts into which were fastened three lateral pipes serving as rails. The upper pipe was 3 inches and the other two were 2 inches in diameter. A further guard was furnished by bolting 4 by 6 inch Oregon pine timbers to the floor of the viaduct along the north edge of the Third

street portion. The timbers were so placed that the 4-inch dimension rested on the floor.

As a further protection to the traveling public using the roadway, a curbing had been constructed along the roadway edge of the sidewalk along the entire turn. Four by eight inch Oregon pine timbers were fastened along the upper outer edge of the sidewalk, and these timbers and the sidewalk were faced on the roadway edge with timbers of 3 by 12 inch Oregon pine, so that, when these timbers were newly installed, they presented a vertical, solid 12-inch obstruction to vehicular traffic which might be inclined to mount onto the sidewalk. At one time 16-inch facing timbers had been used, but at and before the time of the accident here in question the 12-inch timbers were in place. For lack of better names we will refer to all of these timbers resting on and along the face of the sidewalk as a curbing and the 3 by 12-inch timbers as the facing.

It does not appear from the record whether the curbing was part of the original construction of the viaduct, and, if not, when or by whom it was installed. The city repaired and replaced timbers of the curbing several times between June 1, 1929, and June 1, 1931.

There were two warning signs that could be observed by travelers crossing the viaduct from the north. One was a sign about 20 by 20 inches attached to an iron pipe 10 feet high with "Slow Left" and an arrow pointing to the left upon its face. It was about 271 feet north of the turn. The other was an electric "blinker" with a red glass lens about 4 inches in diameter placed in the center of the south end of the Mt. Vernon avenue portion of the viaduct. The light was illuminated about three times each minute. Besides these two signs, photographs introduced in evidence show that the entire portion of the viaduct from the level of Third street to the turn was clearly visible to an automobile driver traveling south on the viaduct for a considerable distance before he reached the turn.

The viaduct accommodated vehicular traffic to the extent of between a minimum of 2,111, and a maximum of 4,496, automobiles each day.

Considerable sand, gravel, wood splinters, and other débris continually accumulated on the west and south side of the roadway, along the turn and to the north and east of it. Between June 1, 1929, and June 1, 1931, employees of the city had cleaned off this débris at intervals. On the day of the accident, it had accumulated in such quantities that it completely covered the portions of the west and south side of the roadway in the turn and in places extended several feet outward from the curbing.

The entire curbing was badly worn and splintered and in a very dilapidated condition on the day of the accident. This was caused by the wheels of vehicles hitting and rubbing against it in making the turn. The eastmost timbers of the curbing, the ones involved in this accident, were particularly dilapidated. The four by eight inch timber resting on the top of the sidewalk was badly splintered. The facing timber had been so worn that its top and front sides formed an oval instead of joining in a rectangle. Its east end had been completely worn away for a portion of its original length. Long splinters had been torn from it and many protruded from its side, all pointing westerly.

Daniel Van Allen Bosqui and his wife, Mary, were on a journey from Seattle, Wash., to Baltimore, Md., on the day on which they were killed. They were traveling in a 1929 model Hupmobile eight-cylinder sedan that had a wheel base of 132 inches. The tragedy was observed by one witness who testified at the trial. He was approaching the viaduct, traveling west on Third street. His testimony may be summarized as follows:

He saw a procession of about 15 cars traveling south on the Mt. Vernon avenue portion of the viaduct led by the Hupmobile, which came to a complete stop when a few feet north of the entrance to the turn. Two cars were traveling west on the Third street portion of the viaduct, with the leading car, a large one, near the turn. The Hupmobile started, and again came to a complete stop at about the middle of the turn close to the curbing. At that time the leading west-bound automobile was directly opposite in the turn on its own right-hand half of the roadway. The Hupmobile started again, and, after proceeding a few feet, it was suddenly tilted with its right front wheel elevated above the roadway. At this point it either came to a stop or was practically stopped. Its wheel suddenly came down from the elevation, and the automobile proceeded at a speed of 6 or 7 miles an hour across the roadway in a northeasterly direction, crashed through the guard rails on the north side of the viaduct, and fell to the ground below, killing Mr. and Mrs. Bosqui.

An officer, a member of the California highway patrol, furnished the only other direct evidence bearing upon the causes of the accident. He arrived at the scene shortly after the crash and inspected the roadway and automobile which was lying on its crushed top

with the wheels in the air. There was a smear of red about a foot long on the curbing on the level portion of the viaduct about 6 or 8 feet west of where the incline from Third street joins the level floor. (The Hupmobile wheels were painted red.) Slivers of wood which were newly torn from the facing were on the roadway; one of them being about one foot long. Directly opposite this point was a skid mark about one foot long and about 40 inches from the face of the curbing presumably made by the left front tire of the Hupmobile. Extending back and northerly for about 60 feet was a distinct track of an automobile tire in the débris. The north end of the track started about 2 feet from the west curb on the Mt. Vernon avenue portion of the viaduct and proceeded on a curve to the east, ending where the red appeared on the facing. About 30 feet east from the east side of the Mt. Vernon viaduct and on the north side of the incline to Third street one of the guard timbers had been torn out, together with four upright iron pipes and their connecting pipes. The Hupmobile lay on the ground directly beneath this break. A number of slivers of Oregon pine were forced between the tire and the rim of the right front wheel of the Hupmobile.

The Hupmobile was driven after the accident, and its working parts were found to be in good order, with the wheels in line and the brakes properly adjusted.

It should be observed that the débris on the roadway over which the Hupmobile passed and the dilapidated timbers of the curbing with which the wheel of the automobile came in contact and mounted were on the portion of the viaduct to be maintained by the company, and the guard rail through which the automobile crashed was on that portion to be maintained by the city under the order of the Railroad Commission as we have interpreted it on this appeal under the evidence before us.

[1] Any liability of the company must arise under the order of the Railroad Commission requiring it to maintain the new level portion of the viaduct at its own cost and expense. This obligation was placed upon it by the order which the Supreme Court has held the Railroad Commission had the power and authority to make. City of San Bernardino v. Railroad Commission, supra. While the word "maintain" is used in the formal portion of the order, it is clear from what precedes that it was intended that this maintenance should include keeping the viaduct in a proper state of repair. The Supreme Court of Kansas, in a case construing a contract requiring an electric service company to maintain a transmission line, said: "The ordinary meaning of the word 'maintain' is to keep in a particular state or condition, especially with reference to efficiency; to support; to sustain, to keep up; not to suffer to fail or decline." Electric Service Co. v. City of Mullinville, 125 Kan. 70, 262 P. 536, 537. See, also, Davis Holding Corporation v. Wilcox, 112 Conn. 543, 153 A. 169; Plimpton v. New York, N. H. & H. R. R. Co., 221 Mass. 548, 109 N. E. 732; Board of Education of Earlville Community High School Dist. No. 380 v. Board of Education of Non-High School Dist. of La Salle County, 343 Ill. 464, 175 N. E. 810. The duty to maintain and keep in repair related to the structure itself and included a duty to repair or replace weakened or worn portions of the framework, roadway, curbing, or sidewalk. It could hardly include the duty to keep the roadway clean and free of foreign substances. Street sweeping is a work which pertains more to the convenient use, good appearance, and sanitary condition of a roadway or causeway than the maintenance of its integral parts or of the whole structure. The duty to maintain a portion of the viaduct would hardly include a duty to keep the roadway clean and to remove sand, gravel, and other débris falling upon it. The duty to keep the roadway clean rests upon the city, as the viaduct was part of its system of public streets. City of San Bernardino v. Railroad Commission, supra, at page 568 of 190 Cal., 213 P. 980.

The liability of the city must arise under the provisions of an act of the Legislature which we will term the Public Liability Act (St. 1923, p. 675). In Pittam v. City of Riverside, 128 Cal. App. 57, 16 P.(2d) 768, 769, it was said: "This action was brought under the provisions of section 2 of an act of the Legislature approved June 13, 1923 (Stats. 1923, p. 675). Under this section of the act municipalities are made liable for injuries to property resulting from the dangerous or defective condition of public 'grounds, works and property in all cases where the governing or managing board * * * or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such * * * grounds, works or property and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to

protect the public against such dangerous or defective condition.' * * *

[2] "Under the provision of that portion of section 2 of the act, which we have quoted, the following conditions must exist to support the judgment of the court below: (1) The injuries to respondent through the destruction of his personal property must have resulted from a dangerous or defective condition of the dumping ground; (2) the city council of the city of Riverside, or some officer or person having authority to remedy such condition, must have had notice or knowledge thereof; (3) it, or he, must have failed or neglected to remedy such dangerous or defective condition within a reasonable time after acquiring such knowledge or receiving such notice; or (4) must have failed to take such action as might be reasonably necessary to protect the public against such dangerous or defective condition within a reasonable time after such knowledge or notice." The question arises: What effect did the order of the Railroad Commission placing the responsibility of maintaining the new level portion of the viaduct upon the company have on the liability of the city for injuries caused on that portion, by its dangerous or defective condition? We conclude that it had none. The entire viaduct remained a public street of the city. The city has control over its streets, and has both the power and the duty of keeping them in repair. Under the terms of the Public Liability Act (St. 1923, p. 675, § 2), the city is made responsible for injuries resulting from their dangerous and defective conditions under the limitations we have outlined. The order of the commission did not purport to relieve the city of this duty and liability, assuming, but not holding, that it might have done so. It merely placed an added duty upon the company without relieving the city from any of its duties or liabilities. It left the company liable with the city for damages resulting from their separate obligations arising on the part of the one under the order of the railroad commission and the other under the terms of the Public Liability Act.

[3-7] The rules governing us in reviewing a judgment entered after granting a motion for nonsuit are clearly stated in Berger v. Lane, 190 Cal. 443, at page 452, 213 P. 45, 49, as follows: "Every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence adduced must be considered as facts proved in favor of the plaintiffs. Where evidence is fairly susceptible of two constructions, or if one of several inferences may reasonably be made, the court must take the view most favorable to the plaintiffs. If contradictory evidence has been given, it must be disregarded. Estate of Arnold, 147 Cal. 583, 82 P. 252. The plaintiff must also be given the benefit of every piece of evidence which tends to sustain his averments and such evidence must be weighed in the light most favorable to plaintiffs' claim. Anderson v. Wickliffe, 178 Cal. 120, 172 P. 381. Evidence, whether erroneously admitted or not, if relevant to the issues joined, must be given the credit and benefit of its full probative strength and any question arising from the fact of variation between the evidence of the witnesses cannot be raised or considered. The evidence must be taken most strongly against the defendant, and, if the plaintiff has introduced proof sufficient to make out a prima facie case under the allegations of his complaint, the motion, if made upon the close of the case, should be denied."

[8] From the evidence in this case the jury might have drawn the conclusions that the deceased persons were traveling south on their right-hand side of the viaduct at a prudent and safe speed, and as they entered the curve a large sedan was approaching the curve from the east; that this required the driver of the Bosqui car to approach close to the curb on his right; that large splinters projecting from the facing came into contact with the front portion of the right front wheel and were forced into it between the tire and the rim; that this caused the wheel to cramp to the right and mount the curving and broken side of the facing and mount the curbing. It should be observed that the skid mark made by the left front wheel of the Hupmobile was only 40 inches from the curbing, which was 11 inches in thickness before it was worn by traffic. This would make the left front wheel about 51 inches from the sidewalk side of the curbing or less than the standard tread of an automobile. The jury might have concluded that the right front wheel crossed the curbing and dropped onto the sidewalk on its inside; that the driver had the car in one of its lower gears as he had come to a stop shortly before; that to extricate himself from this difficulty with his front wheels astride of the curbing and the right resting on the sidewalk behind a timber 4 inches high he opened his throttle; that the wheel climbed the obstruction and dropped from the curb onto the roadway; that to complete this maneuver he had to cramp the front wheels to the left; that the impetus given by forcing the wheel over the obstruction and its

dropping onto the roadway from a 12-inch curbing with one of the lower gears engaged caused the car to rapidly follow the direction of the cramp of the front wheels; that the jar caused by the drop from the curbing might have displaced the driver from the position where he had complete control of his vehicle; that before he could regain control of the car it crashed through the north guard rail to the street below.

This is but one of several inferences that might be drawn from the evidence, but is one that we feel is justified and is favorable to the case of appellants. From it the conclusion may be drawn that the accident would not have happened but for the splinters entering the wheel and pulling its front sharply to the right where it mounted the curving face of the curbing instead of sliding along it as might have happened had the facing timber not been worn into an oval shape. This disposes of the contention that the evidence demonstrates that the condition of the curbing could not have been a proximate cause of the accident.

[9] The evidence shows that many motor vehicle accidents, some of them involving deaths, had happened at this particular curve prior to the one involved here. This was well known to the responsible officers of the city, including its mayor. It was also known to the street superintendent that the planks and timbers forming the curbing were rapidly worn away by vehicles coming in contact with them. This constituted sufficient notice of the condition to the officers of the city. Boyce v. San Diego High School District, 215 Cal. 293, 10 P.(2d) 62; Magnuson v. City of Stockton, 116 Cal. App. 532, 3 P.(2d) 30. There is nothing to show that the city had taken any action immediately prior to the accident to remedy the dangerous or defective condition, if one existed. We believe that the question of whether the condition of the roadway was dangerous or defective should have been left to the jury for determination.

[10-12] Both respondents urge that the driver of the Bosqui car was guilty of contributory negligence as a matter of law; this being the principal defense of the company. They urge that, after the right front wheel had mounted the curb and the car was stopped, it was in a position of safety; that the driver caused it to leave this position and to proceed across and off the viaduct without the use of ordinary care or prudence. Under the conditions presented here, we are required to resolve all reasonable inferences to be drawn from the evidence in favor of appellants. The question of the prudence of the actions of the driver after the right front wheel of the Hupmobile mounted or crossed the curbing is one upon which reasonable minds might well differ. Ordinarily the question of contributory negligence is one for the trier of fact in motor vehicle cases. In Mast v. Claxton, 107 Cal. App. 59, 290 P. 48, 49, it was said: "No two cases of automobile collisions are exactly alike, and each must be decided upon its own state of facts. According to the well-settled law of this state, negligence is, generally speaking, a matter of fact, and the same is true of contributory negligence. Contributory negligence is a question of law only when the court is impelled to say that from the facts reasonable men can draw but one inference, and that inference points unerringly to the negligence of the plaintiff contributing to his injury."

[13] The city urges that the Public Liability Act is unconstitutional and in violation of the provisions of section 11 of article 1 of the state Constitution, in that it gives a right of action against cities, counties, and other such public agencies and not against the state for damages resulting from the dangerous or defective condition of public streets. The history of the immunity of a public agency against suit for an injury suffered while it was acting in its governmental capacity takes us back to that doctrine of the common law which gave the sovereign immunity from suit upon the theory that "it was the 'right divine of kings to govern wrong.'" Chafor v. City of Long Beach, 174 Cal. 478, 163 P. 670, 672, L. R. A. 1917E, 685, Ann. Cas. 1918D, 106. The doctrine is applied in California, and no action is permitted against the state or its political subdivisions when acting in a governmental capacity without legislative consent, for without such consent the wrong is without a remedy. A somewhat similar contention was made in the case of Heron v. Riley, 209 Cal. 507, 289 P. 160, 164, where the constitutionality of section 1714½ of the Civil Code was considered. The Supreme Court said: "It is objected that the section is class legislation, in that it inures to the benefit of a favored class of citizens, that is, only those who are damaged through the negligent operation of automobiles owned by or used in the service of the state, and thereby makes a distinction in their favor as against citizens who may suffer damages through being injured by other state owned and operated instrumentalities, and who are without recourse against the state because it has made no such remedial provision for them. This objection goes only

to the policy of such legislation, and the wisdom of the Legislature in enacting it. A right of action to one injured through the operation of an instrumentality used by the state did not exist at common law. It is not an inherent right, and exists only so far, and in favor of such persons, as may be declared by the legislative power of the state. The provisions of the Constitution were not intended to make it necessary that the Legislature, when conferring new rights of action upon particular classes of citizens for injuries not previously actionable, should, by the same act, declare that all persons who may suffer damages from injuries of that character shall also have such right of action. Pritchard v. Whitney Estate Co., 164 Cal. 564, 568, 129 P. 989. Consequently, a law, to be general in its scope, need not include all classes of individuals in the state. It answers the constitutional requirements if it relates to and acts uniformly upon the whole of any single class of individuals or objects, and the classification is founded upon some natural, intrinsic, or constitutional distinction. Abeel v. Clark, 84 Cal. 226, 230, 24 P. 383; People v. Jordan, 172 Cal. 391, 397, 156 P. 451. If good ground for the classification exists, such classification is not void because it does not embrace within it every other class which might be included." We can find no merit in this argument of the city.

Judgment reversed.

I concur: BARNARD, P. J.

JENNINGS, J., being absent, does not participate herein.

PACIFIC NAT. AGRICULTURAL CREDIT CORPORATION v. WILBUR et al. *

Civ. 5050.

District Court of Appeal, Third District, California.

June 27, 1934.

Rehearing Denied July 27, 1934.

1. Chattel mortgages ⇐229(3)

In chattel mortgagee's action for conversion of sheep, evidence required finding that sheep taken by defendant from chattel mortgagor in settlement of defendant's claim against chattel mortgagor were covered by chattel mortgage.

2. Fraudulent conveyances ⇐141

Oral agreement between conditional seller and buyer whereby buyer sought to substitute mortgaged sheep for those originally covered by conditional sales contract and previously sold by buyer *held* void as to chattel mortgagee of sheep not advised of agreement, where not accompanied by immediate change of possession (Civ. Code § 3440).

3. Chattel mortgages ⇐229(1)

Original chattel mortgagee who pledged mortgage *held* "real party in interest," entitled to bring action for conversion of mortgaged sheep, where mortgage was reassigned to original mortgagee before institution of action.

[Ed. Note.—For other definitions of "Real Party in Interest," see Words & Phrases.]

4. Chattel mortgages ⇐241

Reduction in new chattel mortgage of interest rate called for by prior chattel mortgage does not indicate intention to create new obligation and abandon lien of prior chattel mortgage.

5. Chattel mortgages ⇐241

Chattel mortgage including sum remaining due on prior chattel mortgage and additional advances and covering some of sheep covered by prior mortgage and additional sheep constituted renewal of prior mortgage, rather than payment thereof releasing lien created thereby, notwithstanding record of prior mortgage was marked "discharged" after execution of later mortgage, so that mortgagee was entitled to recover balance unpaid on prior mortgage for conversion of sheep covered thereby and taken by defendant before execution of later mortgage.

6. Chattel mortgages ⇐47

Description in chattel mortgage, as against third persons, must point out subject-matter so that third persons may identify chattels covered, but need not be so specific that property may be identified by it alone, if such description suggests inquiries or means of identification which will disclose property covered.

Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

Action by the Pacific National Agricultural Credit Corporation against R. A. Wilbur and Hazel Hoke Smith, wherein the first-named defendant defaulted. From an adverse judgment, plaintiff appeals.

Reversed, with directions.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 42 P.2d 314.

George R. Freeman, of Willows, and Erling S. Norby, of Marysville, for appellant.

Huston, Huston & Huston, of Woodland, and Rich, Weis & Carlin, of Marysville, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This action was begun on August 27, 1931, to recover from the defendants the sum of $7,642.94, for and on account of the alleged conversion by the respondent of 1,439 head of sheep. The defendant Wilbur defaulted, and the action thereafter was prosecuted against the respondent Hazel Hoke Smith.

The undisputed facts disclosed by the record show that on the 5th day of July, 1927, the defendant Wilbur purchased from the defendant Smith a band of sheep consisting of 1,415 ewes and 24 rams on a conditional contract of sale; title to remain in the defendant Smith until the sheep were all paid for. This contract was not recorded until July 8, 1930. On the 5th day of August, 1929, the defendant sold all of the sheep referred to in the contract of sale, together with the increase thereof, while he was still indebted to the defendant Smith under the conditional contract of sale. The sheep were sold without the knowledge or consent of the defendant Smith. After the sale the defendant Wilbur owned approximately 1,400 head of sheep. At this period Wilbur owed no money to any one, save and except to the defendant Smith. The defendant Wilbur suggested to the defendant Smith that the 1,400 head of sheep he then had be substituted for the sheep he had purchased from her under the conditional contract of sale. The defendant Smith agreed to this substitution, but no written contract was executed between them in relation thereto, nor was the original contract of sale modified in any particular. Wilbur continued to hold possession of the 1,400 head of sheep just as he formerly had. The sheep were not in fact turned over to the possession of the defendant Smith; the transaction consisting solely of the oral agreement between the two parties. The plaintiffs in this action had no knowledge of such oral agreement until long after the transactions hereinafter set forth.

During the months of September and October, 1929, Wilbur purchased approximately 4,486 head of sheep from various sources. The money for these purchases was furnished by the plaintiff under an agreement with Wilbur. At the close of 1929 Wilbur had on hand the 1,486 head of sheep just referred to, and also the 1,400 head of ewes mentioned in the oral agreement between the parties. On March 18, 1930, the defendant Wilbur and his wife made, executed, and delivered to the plaintiff a promissory note in the sum of $25,000, with interest thereon at the rate of 7 per cent. per annum. This note was due November 9, 1930, and, to secure the payment thereof, executed and delivered to the plaintiff a chattel mortgage on the sheep in his possession, which chattel mortgage included the 1,400 head of sheep referred to in the oral agreement between the parties.

On the 25th day of July, 1930, the defendant Smith, after giving notice to the defendant Wilbur, with her agents, went through the sheep described in the chattel mortgage dated March 18, 1930, and selected 1,439 head of sheep, without any reference being made as to whether the ones selected were or were not the sheep possessed by Wilbur at the time of the oral agreement herein referred to. These sheep were set apart by themselves, but remained on premises controlled by Wilbur until after the 15th day of August, 1930. Subsequently the defendant Smith sold the sheep, and they were removed by the purchaser. Between July 25, 1930, and September 15, 1930, Wilbur purchased various bands of sheep from different sources with funds furnished by the plaintiff. On September 13, 1930, the defendant Wilbur and his wife executed and delivered to the plaintiff a second chattel mortgage for the sum of $25,000, bearing interest at the rate of 6 per cent. per annum. At the time of the execution of this mortgage the defendant Wilbur was still indebted to the plaintiff in the sum of $7,642.94 on the note dated March 18, 1930. The second note and mortgage included the sum remaining due upon the first note and mortgage, which, with additional advances for the purchase of additional sheep, brought the indebtedness of the defendant Wilbur to the plaintiff up to the sum of $35,000. The sheep described in the mortgage of September 13, 1930, covered all the sheep described in the mortgage of March 18, 1930, which had not been disposed of, including the 1,439 head taken by the defendant Smith on July 25, 1930. The sheep covered by the mortgage of September 13, 1930, were located both in Colusa and Sutter counties. The chattel mortgage was recorded in both counties and registered in the office of the secretary of state.

On March 20, 1930, the plaintiff pledged the note of March 18, 1930, together with the chattel mortgage securing its payment, to the Intermediate Credit Bank of Berkeley, to secure advances made by the latter bank to the

plaintiff. After the execution of the second note and mortgage on September 13, 1930, the plaintiff pledged a new note and mortgage to the Intermediate Credit Bank of Berkeley. Thereafter, on October 25, 1930, the Intermediate Credit Bank of Berkeley released the mortgage dated March 18, 1930.

On April 23, 1931, the plaintiff discharged its indebtedness to the Intermediate Credit Bank of Berkeley and took a reassignment of the note and mortgage dated September 13, 1930. At the time of the beginning of this action there was still due on this note and mortgage the sum of approximately $24,500, exclusive of the interest. All of the property referred to in the mortgage has been taken by other persons than the plaintiff, and the plaintiff is without any security whatever for the payment of the note dated September 13, 1930. Judgment was entered for the respondent, and the plaintiff appeals.

The court found that the value of the 1,439 head of sheep taken by the respondent on the 24th day of July, 1930, was the sum of $7,987. The court made the following findings, the correctness of which is challenged by the appellant, which findings are numbered as follows, to wit:

"5. It is not true that said note and mortgage of September 13th, 1930, was made as a renewal of the first described chattel mortgage attached to said second amended complaint and marked Exhibit 'A'.

"6. It is not true that said mortgage of September 13th, 1930, was never intended as a satisfaction or discharge of said first described chattel mortgage.

"7. It is not true that said mortgage of September 13th, 1930, described the same sheep described in said mortgage, marked Exhibit 'A' and additional sheep, and it did not include the description of the fourteen hundred thirty-nine (1439) head of sheep referred to in said complaint.

"8. It is true that on or about the 25th day of July, 1930, the defendant, Hazel Hoke Smith, took into her possession the said fourteen hundred thirty-nine (1439) head of sheep described in said complaint, but it is not true that said defendant, Hazel Hoke Smith, converted said sheep, or any of them."

While the contention is made that the chattel mortgage dated March 18, 1930, did not include the 1,439 head of sheep taken by the defendant Smith on the 25th day of July, 1930, no evidence is called to our attention in support thereof. The record shows that on July 25, 1930, when the defendant Smith took the 1,439 head of sheep, the defendant Wilbur had on hand no sheep except those described in the mortgage dated March 18, 1930. This is shown by the uncontradicted testimony of the defendant Wilbur:

"Q. Now, at that time Mrs. Smith took 1439 head of sheep from you on July 25, 1930, did she take any of the sheep described in that mortgage (of March 18, 1930)? A. She did.

"Q. How many of the sheep that she took were described in that mortgage (of March 18, 1930)? A. All the sheep."

And that the sheep were likewise described in the chattel mortgage of September 13, 1930, appears from the uncontradicted testimony of the defendant Wilbur as follows:

"Q. Now, do you recall, Mr. Wilbur, an inspector coming to the Houch ranch to inspect your sheep after Mrs. Smith had come in and segregated 1439 head? A. Yes, sir.

"Q. At the time that inspector was there, were those same sheep on the Houch ranch? A. Yes, sir.

"Q. Did he count them as your sheep? A. Yes, sir.

"Q. Did you tell him anything to the contrary? A. No, sir.

"Q. Then, when the mortgage was made up, which is dated September 13, 1930, were those 1439 head of sheep included in that mortgage? A. Yes, they were."

The testimony as to the different brands borne by the various bands of sheep in nowise controverts the foregoing testimony.

[1] The finding of the court that the sheep covered by the oral agreement were not included in the mortgage dated September 13, 1930, is directly contrary to the uncontradicted testimony. The finding of the court, likewise, that the defendant Hazel Hoke Smith did not convert the sheep to her own use is shown by the uncontradicted testimony that she took and sold said number of sheep covered by the chattel mortgages executed and delivered to the plaintiff by the defendant Wilbur.

The right of the plaintiff to recover in this action depends upon whether the note and mortgage dated September 13, 1930, was a renewal of the note and chattel mortgage dated March 18, 1930, and not a payment of the original indebtedness or a release of the lien created by the first chattel mortgage. The alleged error of the trial court consists in holding that the second note and mortgage was a payment in satisfaction of the original indebtedness, in addition to finding against the uncontradicted evidence to which we have referred.

To clarify the situation somewhat we may state that the plaintiff is a corporation organized and existing under the laws of California, having its principal place of business in the city of Fresno, being organized for the purpose of loaning money to purchasers of live stock, and obtaining funds for such purpose from the Intermediate Credit Bank of Berkeley, which was authorized by an act of Congress to make loans for the purposes just mentioned.

The testimony of the witness Ramsey shows that the plaintiff, when an application was made for a loan on live stock, would send an inspector to look over the stock, report the same to the company, and then the amount of money required or desired, if approved, would be advanced, and a note and chattel mortgage taken to cover the same. If the plaintiff did not have on hand sufficient funds to make the loan, the note and mortgage would be assigned to the Intermediate Credit Bank of Berkeley; that these mortgages were renewed from year to year, taking new paper and including the balance that might be due on account of previous notes and mortgages, the sum due being always included in the subsequent mortgage; that this procedure had been followed for several years.

As we have stated, the record shows that the note and mortgage dated March 18, 1930, was assigned to the Intermediate Credit Bank of Berkeley, and, likewise, the note and mortgage dated September 13, 1930. The balance due on the note and mortgage dated March 18, 1930, was entered into, and became a part of the note of September 13, 1930, to wit, in the sum of $7,642.94. The testimony of the witness Ramsey shows that this sum had never been paid; that it was simply incorporated into the September note and mortgage.

It is further shown that at the date of the execution of the note and mortgage of March 18, 1930, the plaintiff had no knowledge of any one claiming any interest in any of the mortgaged sheep.

Our attention has not been called to any testimony, and a careful search of the transcript fails to disclose any testimony indicating that there was an agreement or intention on the part of the plaintiff in this action, in taking the note of September 13, 1930, to consider the same as a payment or discharge of the lien due on the note of March 18, 1930, and the lien created by the chattel mortgage executed on the same date, though the transcript does show that some time after the execution of the note and mortgage dated September 13, 1930, the record of the mortgage dated March 18, 1930, is marked "discharged."

[2] That the oral agreement referred to in the transcript by which it was sought, between the defendants Wilbur and Smith, to substitute the 1,400 head of sheep for those originally covered by the contract of sale, and which the defendant Smith had disposed of, is absolutely void and of no effect, is shown by reference to section 3440 of the Civil Code, which specifies that: "Every transfer of personal property * * * is conclusively presumed if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against * * * encumbrancers in good faith subsequent to the transfer." The uncontradicted testimony shows that there was no change of possession; that the only transfer consisted of an oral agreement, of which the subsequent incumbrancer was not advised.

[3] The contention that this action was not prosecuted by the real party in interest is without merit. This clearly appears from the case of Graham v. Light, 4 Cal. App. 400, 88 P. 373. That was a case where an assignment had been made of personal property to secure an indebtedness, but before the action was begun, there had been a reassignment. The court held: "Where there was a reassignment by the pledgee to the pledgor pending suit before trial, it was proper to render a judgment in favor of the pledgor upon the note, without the necessity of an order bringing in the pledgee as a party to the action." In the present case there had been a reassignment of the note and mortgage upon which this action is based, prior to the institution of suit, and the lien created by the first mortgage as well as the amount due upon the first note were carried into and became a part and parcel of the second note and mortgage, as the authorities hereinafter cited establish.

[4, 5] The respondent calls our attention to a number of cases holding that the discharge of a mortgage raises the presumption of satisfaction of indebtedness and the release of the lien. The application of the principles enunciated in the various cases cited cannot be made here, for the simple reason that the action at bar involves the renewal of a note and mortgage carrying into it the indebtedness and lien created by a prior note and mortgage, where the presumption is directly

contrary to the contention advanced by the respondent.

In White v. Stevenson, 144 Cal. 104, 77 P. 828, while the opinion does state that the entry of satisfaction of an old mortgage is presumptive evidence that it has been satisfied, it is not conclusive. The case, however, involves the execution of a new mortgage. And it is further held that "the acceptance of the new note and mortgage as a renewal of the former note and mortgage, in the absence of evidence of any agreement that the new note and mortgage should be accepted in payment and satisfaction of the old, does not operate as an extinguishment or discharge of the latter."

Again, the contentions of the respondent that the release of the mortgage dated March 18, 1930, in the record, extinguished the lien, is fully answered in the case of Palmer v. Emanuel, 77 Cal. App. 766, 247 P. 609, 610. We quote therefrom the following: "In Comptoir D'Escompte v. Dresbach, 78 Cal. 15, at page 20, 20 P. 28, 30, the court said: 'It has been repeatedly held by this court that the acceptance of a note for a debt does not discharge the debt unless expressly agreed to be payment; that in such case the right of action on the debt is suspended until the maturity of the note given, and suit may be brought on the original debt in case of the nonpayment of the accepted note.' The burden of showing that an express agreement has been made rests on the party relying on it, and the presumption is that the later notes were not taken in absolute payment. Bridge v. Connecticut Mut. Life Ins. Co., 167 Cal. 774, 781, 141 P. 375. A receipt in full does not prove the existence of the agreement. Comptoir D'Escompte v. Dresbach, supra. Neither does a formal release. Tolman v. Smith, 85 Cal. 280, 290, 24 P. 743. Nor that the note was marked canceled. Steinhart v. National Bank, 94 Cal. 362, 367, 29 P. 717, 28 Am. St. Rep. 132. The foregoing rules were applied to a debt secured by mortgage. Van Sandt v. Alvis, 109 Cal. 165, 41 P. 1014, 50 Am. St. Rep. 25. In White v. Stevenson, 144 Cal. 104, at page 108, 77 P. 828, 830, the court said: 'The acceptance by the plaintiff of the note and mortgage of 1895 as a renewal of the note and mortgage of 1890, or in substitution therefor, did not of itself operate as an extinguishment or discharge of the latter. One executory agreement is not extinguished by the execution of another between the same parties; nor is a security for an obligation merged in another security of the same degree which is accepted for the same obligation. It is a well-settled rule that, in the absence of an agreement to that effect, a promissory note is not paid by the execution of another note, but that the time for its payment is thereby merely suspended until the maturity of the new note.'" That case likewise holds that it is the duty of the party alleging payment, satisfaction, and discharge, by reason of such entry, to make proof thereof, and that the taking of the new note and mortgage was, by agreement, that the same should operate as a payment of the note, and a discharge of the lien. Nothing of that kind appears in the transcript in this case. There is no testimony of any agreement to the effect, or any intimation of any intention whatever that the note and mortgage dated September 13, 1930, should be considered as a payment and discharge of the indebtedness and lien created by the note and mortgage dated March 18, 1930.

The holding in the Palmer Case is in accordance with the ruling had in the case of Parker v. Tout, 207 Cal. 590, 279 P. 431, in which case it was held that without an agreement to such effect, where the indebtedness, secured by a first note and mortgage, was carried into a second note and mortgage, the lien created by the first mortgage would be continued. It appears, also, in the case of Parker v. Tout, supra, that the later note and mortgage included sums in addition to the amount specified in the first note and mortgage. The lien was held to exist, limited, however, to securing the amount of the indebtedness still remaining due, as evidenced by the first note and mortgage.

In the case of United States v. Grover et al. (D. C.) 227 F. 181, 183, where a similar question was under consideration, the court held: "So long as the same debt, or some part of it, subsists, the presumption ordinarily is that the new mortgage is intended, as a renewal of the old, and a continuance of the same security. Sloan v. Rice, 41 Iowa, 465; Markell v. Eichelberger, 12 Md. 78; McDonald v. McDonald, 16 Vt. 630. Nor does the including in the new mortgage of an additional indebtedness not covered by the first discharge the lien of the old mortgage, so far as the indebtedness secured thereby remains unpaid, unless such be the purpose of the parties. London & S. F. Bank v. Bandmann, 120 Cal. 220, 52 P. 583, 65 Am. St. Rep. 179; De Cottes v. Jeffers, 7 Fla. 284. And very clearly the difference in the rate of interest between the two mortgages where, as here, the rate is less in the last mortgage than in the first, cannot be regarded as material to indicate an intention to create a new obligation and abandon

the security of the old. Kern v. Hotaling, 27 Or. 205, 40 P. 168, 50 Am. St. Rep. 714."

The reduction of the rate of interest, just as appears in the present case, was held not to be material.

In Howard v. First National Bank of Hutchinson, 44 Kan. 549, 24 P. 983, 986, 10 L. R. A. 537, where the same questions were being considered as are now before this court, it was held: " 'The taking of a new note and mortgage on personal property to secure an indebtedness already evidenced by a note and secured by a mortgage on the same property does not, even when the first note and mortgage are canceled, operate to discharge the lien of such first mortgage.' Packard v. Kingman, 11 Iowa, 219. 'Nothing but payment in fact of the debt, or the release of the mortgage, will discharge a mortgage.' Crosby v. Chase, 17 Me. 369; Hadlock v. Bulfinch, 31 Me. 246. In Gregory v. Thomas, 20 Wend. [N. Y.] 19, the court says: 'But it is said that the defendant's second mortgage extinguished the first; and consequently, being put to stand exclusively on the last, which was in 1835, the plaintiff's mortgage of the previous September is let in. The argument is against all the books, ancient and modern. Adjudications of several centuries upon such cases, of every variety of form, in England, in this state, and in neighboring states, settle the proposition that a subsequent security for a debt of equal degree with a former, for the same debt, will not, by operation of law, extinguish it.' "

In 33 A. L. R., beginning on page 149, are collected a number of cases supporting the rule that the taking of a second mortgage without any agreement to the contrary is not a payment, but is simply a means of carrying the original indebtedness and lien into the second mortgage. The citation of cases is preceded by the following general statement: "It is a general rule that the cancellation of a mortgage on the record is not conclusive as to its discharge, or as to the payment of the indebtedness secured thereby. And where the holder of a senior mortgage discharges it of record, and contemporaneously therewith takes a new mortgage, he will not, in the absence of paramount equities, be held to have subordinated his security to an intervening lien unless the circumstances of the transaction indicate this to have been his intention, or such intention upon his part is shown by extrinsic evidence." This statement of the general rule is supported by a long list of cases. It is further stated in the same annotation, as follows: "As between the parties and the holders of liens existing against the property at the time a senior lien is discharged and another lien taken in renewal, it has been held that the transaction does not amount to a payment, and will not affect the priority of lien; at least, unless the subsequent lien holder has acted to his prejudice in the matter by relying upon the apparent discharge of the senior lien." Nothing of that kind appears in the present action. The 1,439 head of sheep were taken by the respondent several months before either the execution of the second mortgage or the cancellation on the record of the first mortgage.

The same rule is set forth in the text in 11 C. J. 683, to wit: "The validity of a chattel mortgage is not affected by the fact that the mortgagee holds independent collateral security, and the taking of a new or additional security to secure the same debt and covering the same property as a prior chattel mortgage does not, of itself, and in the absence of an agreement or understanding to that effect, operate to release or discharge the prior mortgage, or to destroy the priority obtained by virtue of the original mortgage. The same rule has been held to apply where the second mortgage is for an increased amount, or where it secures an additional claim, or covers additional property."

The testimony in the instant case shows that the second mortgage was taken to continue the lien created by the first mortgage, but also to create a lien on additional sheep for which the plaintiff had advanced money to the defendant Wilbur in order to enable him to purchase the same. The record likewise shows that cancellation was not entered of the first mortgage until some time after the lien on the sheep in question, created by the first mortgage, had been carried into the second mortgage, and also the amount of money remaining due upon the first note, carried into and evidenced by the second note.

[6] The respondent further contends that the location of the sheep covered in the mortgage is insufficient. In this particular, without going into the evidence as to the location, we think the rule set forth in 11 C. J. 457, applicable, which rule is as follows: "As against third persons the description in the mortgage must point out the subject-matter so that such persons may identify the chattels covered, but it is not essential that the description be so specific that the property may be identified by it alone, if such description suggests inquiries or means of identification which, if pursued, will disclose the property covered. This rule is based upon the maxim, that is certain which is capable of

being made certain. So a description is sufficient if it may be aided by parol proof and the property covered by the mortgage identified." See, also, United Bank & Trust Co. v. Powers, 89 Cal. App. 690, 265 P. 403; 5 Cal. Jur. 54.

The respondent also contends that there should be credited on the balance of $7,642.94, due on the note dated March 18, 1930, and carried into the September note, the sum of $4,500, which the court found was paid on account of the September note. We fail to find in the record any testimony showing payment of the sum of $4,500. The record does show that on September 28, 1930, the sum of $4,000 was realized from the sale of 500 head of Oregon sheep, and applied on the note. This amount, as contended for by the appellant, should properly be credited against the amount advanced for the purchase of the same sheep, and not as against any balance due on the March note.

It follows from what we have said that finding No. 5 of the trial court should be, and the same is, hereby corrected to read as follows: It is true that said mortgage of September 13, 1930, was never intended as a satisfaction or discharge of said first-described chattel mortgage, or of the lien created thereby.

That finding No. 7 should be, and the same is, hereby corrected to read as follows: It is true that said mortgage of September 13, 1930, described the same sheep described in said mortgage marked Exhibit A, and additional sheep, and it did include the description of the 1,439 head of sheep referred to in said complaint.

That finding No. 8 should be, and the same is, hereby corrected to read as follows: It is true that on or about the 25th day of July, 1930, the defendant Hazel Hoke Smith took into her possession the said 1,439 head of sheep described in the complaint, and that said defendant Hazel Hoke Smith converted said sheep to her own uses and purposes.

That finding No. 12 be corrected by eliminating therefrom the following words: That thereafter, the said Wilbur paid on account of said note the sum of $4,500.

It is further ordered that the conclusions of law be corrected to read as follows: That the plaintiff is entitled to recover of and from the defendant Hazel Hoke Smith the sum of $7,642.94.

It further appearing from the record that the value of the sheep converted by the respondent Hazel Hoke Smith is in excess of the amount due of $7,642.94, and that by reason of what we have said there can be no change effected by a retrial herein, and that the plaintiff is entitled to judgment against the respondent Hazel Hoke Smith on account of the conversion of the sheep mentioned herein, in an amount equal to the balance remaining unpaid on the note and mortgage dated March 18, 1930, and carried into the note and mortgage dated September 13, 1930.

It is further ordered that the trial court be and is hereby directed to enter judgment in favor of the plaintiff against the respondent Hazel Hoke Smith for the sum of $7,642.94, and costs.

We concur: PULLEN, P. J.; THOMPSON, J.



139 Cal.App. 421

MOAKLEY v. LOS ANGELES PAC. RY. CO. et al.

Civ. 8975.

District Court of Appeal, First District, Division 1, California.

June 26, 1934.

1. Deeds ⇐93

Grant is to be interpreted so as to give effect to intention of parties, and for such purpose whole instrument should be considered.

2. Easements ⇐1

Term "right of way" in deed is frequently used to describe not only easement but the strip of land occupied by such use.

[Ed. Note.—For other definitions of "Right of Way," see Words & Phrases.]

3. Railroads ⇐69

Grant to electric railroad of "right of way for railroad purposes," providing that if grantee should cease to operate railroad "right of way and land" should revert to grantors, *held* to convey easement only and not fee, notwithstanding use of word "land" in reverter clause.

4. Deeds ⇐100

When language of deed is equivocal, question of construction may rest on extrinsic facts and circumstances.

5. Easements ⇐14(2)

In determining whether clause relating to rights of way previously granted constituted reservation, it was proper to compare

estimated area with acreage of described parcel.

6. Easements ⇐14(2)

Clauses in deed relating to rights of way previously granted are to be given reasonable construction according to intention of parties as ascertained from entire instrument together with attendant circumstances before parties at time of making deed.

7. Appeal and error ⇐1008(3)

Construction of clause in deed relating to rights of way previously granted *held* primarily for trial court, so that, where construction appears to be consistent with true intent of parties, appellate court would not substitute another, though it may appear equally tenable.

8. Quieting title ⇐10(2)

In suit to quiet title, judgment obtained during pendency of suit quieting plaintiff's title to property involved against other parties *held* inadmissible as muniment of plaintiff's title.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action to quiet title by Emily Moakley against the Los Angeles Pacific Railway Company and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

John F. Poole, of Los Angeles, for appellant.

James W. Bell, of Los Angeles, for respondents.

PER CURIAM.

In the year 1900 Robert M. Turner and wife, who were the owners of certain real property in Los Angeles county, executed a conveyance of a right of way over the same to Los Angeles Pacific Railway Company, a corporation. This conveyance, so far as material, reads as follows: "Grant, bargain and sell, convey and confirm unto the said party of the second part and to its successors and assigns forever a right of way for railroad purposes over and along all that certain lot, piece or parcel of land situate, lying and being in the county of Los Angeles, state of California, and bounded and particularly described as follows, to wit: a strip of land 35 feet in width the center line of which is described as follows: * * * containing 0.67 of an acre of land. Said first parties reserving and excepting unto themselves, their heirs and assigns forever, from above conveyance the right to cross and recross said strip of land and to construct and maintain crossings for vehicles in such manner as may be necessary and at the same time interfere as little as possible with the use of said strip for railroad purposes. To have and to hold all and singular the said premises together with the appurtenances unto the said party of the second part, its successors and assigns forever. If said second party, its successors or assigns, shall cease to operate a railroad over said strip for passenger traffic for a period of six months then said right of way and land shall immediately thereafter revert to said first parties, their heirs and assigns."

The railway company was the owner and operator of electric railway lines in Los Angeles county. In 1902 Turner and wife conveyed the whole parcel of land over which the right of way ran to Leslie W. Gray. This conveyance contained the following clause: "excepting therefrom so much as has been taken for the county road known as Vermont avenue, for the street known as Benefit street and for electric car lines across said land." Thereafter in the same year Gray conveyed the same property to Union Trust & Realty Company, and in 1903, together with A. S. Culver and F. R. Strong, executed a second conveyance of the same property to the same grantee, and these conveyances contained clauses similar to that above quoted. The Turners in 1923 executed to Emily Moakley a quitclaim deed of their interest and reversionary rights in the property. This grantee in turn conveyed to Bessie Purvis, who was substituted for Mrs. Moakley as the plaintiff in the action. It appears that in 1915 the railway company was granted permission to abandon the strip in question and remove its tracks therefrom. The present action was brought to quiet the alleged title of plaintiff Moakley to the right of way described in the deed to the railway company. Certain defendants, namely, D. B. Young, Alphonzo Swaboda, and Margaret Swaboda, the respondents here, answered, denying plaintiff's alleged title. Following a trial the court found against the plaintiff and entered judgment accordingly. Plaintiff has appealed.

Whether the deed to the railway company conveyed the fee in the strip or an easement is the first question presented by the appeal.

The intention to grant an easement merely would be plain, but for the use of the word land in the last clause of the Turner deed to the railway company. It is claimed that the

use of this word shows that more than an easement was intended.

[1, 2] It is the rule that a grant is to be interpreted so as to give effect to the intention of the parties, and that for this purpose the whole instrument should be considered. Montgomery v. Sturdivant, 41 Cal. 291; Barnett v. Barnett, 104 Cal. 300, 37 P. 1049; Leala v. Carroll, 207 Cal. 542, 279 P. 443; Jacobs v. All Persons, 12 Cal. App. 167, 106 P. 896. The term "right of way" is frequently used to describe not only the easement but as well the strip of land itself occupied by such use (Anderson v. Willson, 48 Cal. App. 289, 295, 191 P. 1016), and language similar to that in question has received consideration in a number of cases, in which it was held that an easement only was intended. In Jones v. Van Bochove, 103 Mich. 98, 61 N. W. 342, 343, the deed conveyed "all that certain piece or parcel of land situate * * * and described as follows, to wit: The right of way for a railroad * * * described as follows: 'A strip of land forty feet wide; * * * and being nine hundred fifty-two feet in length.'"

So in Biles v. Railroad Co., 5 Wash. 509, 32 P. 211, the deed read "do grant and convey to said railroad company the following piece or tract of land * * * for the construction of said road, to have and to hold to said company forever."

In Vermilya v. Chicago, etc., Ry. Co., 66 Iowa, 606, 24 N. W. 234, 55 Am. Rep. 279, there was conveyed "* * * the right of way over and through the following described tract or parcel of land, * * * hereby conveying, for the use above mentioned a strip of land one hundred feet in width across the premises aforesaid."

The defendant in Ottumwa, etc., R. R. Co. v. McWilliams, 71 Iowa, 164, 32 N. W. 315, leased a right of way of indefinite size through certain land, and agreed to convey in fee simple when desired a strip of ground by metes and bounds not less than fifty feet on each side of the railroad track.

In Flaten v. City of Moorhead, 51 Minn. 518, 53 N. W. 807, 808, 19 L. R. A. 195, a tract of land was conveyed to a municipality. The deed contained the provision "said tract of land hereby conveyed to be forever held and used as a public park."

A deed granted "a strip of land four rods in width across my land, and being the same land now occupied by the St. Albans & Richfield Plank Road Co. for their road." To the description was added the clause "for the use of a plank road." It was held that although the granting part of the deed would convey a fee the last clause was a limitation upon the grant and only an easement was conveyed. Robinson v. Missisquoi Ry. Co., 59 Vt. 426, 10 A. 522.

To the same effect as the above cases is Blakely v. Chicago, etc., R. R. Co., 46 Neb. 272, 64 N. W. 972.

In Moakley v. Blog, 90 Cal. App. 96, 265 P. 548, which involved the same right of way here in question, it was held that the original deed to the company conveyed the fee, but there the language of the conveyance differed materially from that of the deed in the case at bar, and clearly showed an intention to pass the fee.

[3] In view of the above cases we think it sufficiently appears from the language of the deed to the railroad company that the parties intended to create an easement only.

[4] As stated, the deed from the Turners to Gray contained a clause excepting therefrom "so much as has been taken for the county road known as Vermont avenue, for the street known as Benefit street and for electric car lines across said land." Such clauses have frequently been before the courts for interpretation. In cases where the clause referred merely to the right of way previously granted it has been generally held that it was not the intention to reserve the fee (Bolio v. Marvin, 130 Mich. 82, 89 N. W. 563; Mahar v. Grand Rapids, etc., Ry. Co., 174 Mich. 138, 140 N. W. 535; Moakley v. Blog, supra); but where the deed in terms excepts the piece of land occupied by the right of way it has been held that an exception was plainly intended and that title remains in the grantor subject to the easement. Such in effect were the following decisions: Reynolds v. Gaertner, 117 Mich. 532, 76 N. W. 3; Pritchard v. Lewis, 125 Wis. 604, 104 N. W. 989, 1 L. R. A. (N. S.) 565, 110 Am. St. Rep. 873; Studebaker v. Beek, 83 Wash. 260, 145 P. 225; Hannah v. Southern Pacific Co., 48 Cal. App. 517, 192 P. 304. However, when the language of the deed is equivocal the question of construction may rest upon extrinsic facts and circumstances. 18 Cor. Jur., Deeds, pp. 272, 273. Thus in Derby v. Hall, 2 Gray (68 Mass.) 236, the deed of a parcel of land contained an exception of "such parts thereof as have been conveyed to the Medford Turnpike and Middlesex Canal Corporations." An easement had been previously conveyed to these corporations. It was held that had the land described in the previous conveyance been in terms excepted, the intention to retain the fee would have been plain,

but as written the language of the instrument was equivocal; and it appearing from physical and other circumstances that this conclusion was not reasonably supported it was held that the deed passed the fee in the whole tract subject to the easement. To the same effect is Higgins, etc., Oil Co. v. Victory (C. C. A.) 230 F. 421.

[5-7] In the case at bar the clause refers not only to the part taken for the railroad right of way, but also rights of way for streets. The record contains nothing to show the location of these strips or the effect of interpreting the clause as an exception. In the Massachusetts case the facts showed that such an interpretation would have resulted in a division of the land granted into separate parts without means of access, and for aught that the record discloses such might be the effect here. Moreover, the estimated area of the parcel conveyed, which was described by metes and bounds, was 16¾ acres. This too was a fact which might properly be considered by the trial court (Hall v. Shotwell, 66 Cal. 379, 5 P. 683; Hostetter v. Los Angeles T. Ry. Co., 108 Cal. 38, 41 P. 330), as a computation shows that the estimated area exceeded the acreage of the described parcel by less than .02 of an acre. The area of the strips occupied by streets is not shown, but, as stated, that taken by the railroad was .67 of an acre. The aggregate acreage of these strips, of course, much exceeded the difference shown by the above computation; and had the parties intended to convey less than this difference they could easily have made their intention plain. Such clauses are to be given a reasonable construction according to the intention of the parties as ascertained from the entire instrument together with the attendant facts and circumstances which were before the parties at the time of making the deed. 18 Cor. Jur., Deeds, § 350, p. 346; Pitcairn v. Harkness, 10 Cal. App. 295, 101 P. 809. These questions are primarily for the trial court (Thompson v. McKenna, 22 Cal. App. 129, 133 P. 512); and where its construction appears to be consistent with the true intent of the parties an appellate court will not substitute another although it may seem equally tenable (Kautz v. Zurich, etc., Ins. Co., 212 Cal. 576, 300 P. 34).

[8] During the pendency of the present suit plaintiff obtained a judgment quieting her title to the property against the Union Trust & Realty Company, the estate of A. S. Culver, deceased, and Frank R. Strong, the grantees named in the deed from Gray; each defendant having filed a disclaimer. The judgment roll was introduced in evidence at the trial, but following a motion by defendants upon general grounds the same was stricken, and appellant complains of this ruling. Had the judgment been obtained previous to the commencement of the present action it would have been admissible as a muniment of plaintiff's asserted title. Chapman v. Moore, 151 Cal. 509, 91 P. 324, 121 Am. St. Rep. 130; Alameda, etc., Ins. Co. v. U. S. Fidelity & Guaranty Co., 121 Cal. App. 73, 8 P.(2d) 912. A plaintiff without title at the commencement of the action may not rely upon an after-acquired title except by way of defense to a cross-complaint (22 Cal. Jur., Quieting Title, §§ 34, 41, pp. 155, 166; Rowley v. Davis, 34 Cal. App. 184, 167 P. 162), and here no affirmative relief was sought by respondents.

The conclusions of the trial court are fairly supported, and no valid reason for a reversal of the judgment has been shown.

The judgment is affirmed.



139 Cal.App. 266

McKAY v. HEDGER et al.

Civ. 1311.

District Court of Appeal, Fourth District, California.

June 14, 1934.

Hearing Denied by Supreme Court Aug. 13, 1934.

1. Appeal and error ⇐1039(2)

Complaint, alleging that careless and negligent parking of automobile truck directly caused injuries to child struck by another automobile, *held* not prejudicially erroneous because not alleging that negligence was proximate cause of injuries, defendants not being misled.

2. Negligence ⇐85(2)

Child is only required to exercise degree of care which is ordinarily exercised by minors of like age, mental capacity, and discretion.

3. Automobiles ⇐245(74)

Whether boy five years and seven months old struck by automobile had capacity to exercise care to avoid danger *held* for jury.

4. Automobiles ⇐162(1)

Child running from behind parked truck and struck by automobile could predicate

truck owner's negligence on double parking in violation of statute, such statute being for benefit of all persons lawfully using streets, not only for those parked next to curb (St. 1931, p. 2129, § 138, par. 9).

5. Negligence ⇐1

"Negligence" is doing of act which reasonably prudent person would not do, or the failure to do act, or to take some precaution which reasonably prudent person would do under circumstances.

[Ed. Note.—For other definitions of "Negligence," see Words & Phrases.]

6. Negligence ⇐2

Negligence, to be actionable, must result in injury to person or property so situated or related to negligent actor in time and place that he owes duty of not committing injury, and under such circumstances that, if he had used ordinary prudence and foresight, he should have anticipated injury.

7. Automobiles ⇐245(8)

Where child, after getting ice from ice truck, which was double parked in residential district, ran from behind truck and was struck by automobile, whether double parking of truck was negligence *held* for jury (St. 1931, p. 2129, § 138, par. 9).

8. Negligence ⇐61(1)

Defendant's negligence need not be sole cause of injury to entitle plaintiff to recover, it being sufficient if negligence was proximate cause of injury.

9. Negligence ⇐61(1)

Primary causation may be so continuous that concurrent wrongful act precipitating injury will in law be regarded not as independent, but as conjoining with original act to cause injury.

10. Automobiles ⇐244(7, 36).

Where child, after getting ice from ice truck which was double parked, ran from behind truck and was struck by automobile, evidence supported jury's finding that automobile driver was free from negligence and that negligence of truck driver was proximate cause of accident (St. 1931, p. 2129, § 138, par. 9).

11. Appeal and error ⇐1053(2)

In automobile accident case, error, if any, in requiring truck driver to testify that he made report of accident to person whom he thought was insurance adjuster, *held* cured by instruction to disregard testimony.

12. Appeal and error ⇐1052(5)

Admitting physician's testimony that injured boy "might" develop epileptic attacks *held* not prejudicial, where it was evident from size of verdict that jury paid little attention to such testimony.

Appeal from Superior Court, Fresno County: T. R. Thomson, Judge.

Action by Myron R. McKay, an infant, by his guardian ad litem, Roy W. McKay, against Orville Hedger, the Central California Ice Company, and others. From a judgment for plaintiff, defendants named appeal.

Affirmed.

W. M. Conley, Philip Conley, Matthew Conley, and Conley, Conley & Conley, all of Fresno, for appellants.

Douglas A. May and Ernest Klette, both of Fresno, for respondent.

F. C. Huebner, of Fresno, for defendants.

MARKS, Justice.

Myron R. McKay, on July 27, 1932, was a minor of the age of five years and seven months. He was seriously injured by being knocked down by a model A Ford automobile, owned by Robert De Jarnatt and driven by J. B. De Jarnatt, his brother. Suit was brought by the minor against all the defendants. The jury returned a verdict in favor of J. B. and Robert De Jarnatt, and against appellants in the sum of $2,000. This appeal is taken from the judgment entered upon the verdict.

Lewis avenue is a public street of the city of Fresno which runs in an easterly and westerly direction. Its roadway is paved and is thirty-six feet in width between curbs. It is in the residence section of the city, with seventeen private dwellings facing on it in the block where the accident occurred.

At a little after 11 o'clock on the morning of July 27th there were a number of children playing in and along this portion of the street. A bakery delivery truck driven by Charles E. Turnbow was parked along the northerly curb, facing in a westerly direction on Lewis avenue. Its right front wheel was about three inches and its right rear wheel about six inches from the curb. This truck was five feet five inches wide. While the driver was making his delivery, an ice delivery truck belonging to the Central California Ice Company and driven by Orville Hedger, its employee, was stopped on Lewis avenue with its right wheels about one foot south of the bakery truck. It was also facing in a westerly direction on Lewis avenue and was five feet five inches in

width and had a high panel body. Hedger made a delivery of ice at the same house where the bakery delivery was being made. During the absence of Hedger, Turnbow returned to the bakery truck, drove it west and across Lewis avenue, where he stopped it along the curb on his left-hand side of the street. While Hedger was making his delivery of ice, several children, including Myron R. McKay, gathered around the rear of the truck, which had been left open, to get pieces of ice. At about this same time J. B. De Jarnatt was driving east on Lewis avenue with the left wheels of his car about two feet south of the center line of the street. When he was nearly opposite the ice truck, Myron ran from behind it and into the path of the on-coming automobile. De Jarnatt applied his brakes so that his wheels skidded for a number of feet. He could not stop in time, and the right half of his front bumper struck Myron, throwing him onto the pavement. His skull was fractured and he was otherwise seriously injured.

Appellants present the following five grounds for a reversal of the judgment:

"Does a complaint which alleges specific acts of negligence state a cause of action if it fails to show that such alleged negligence is a proximate cause of the accident?

"When a minor is injured as the proximate result of his own act in heedlessly running across a busy street, and the acts of an automobile driver who runs into him, can the original negligence of the driver of an ice truck in double parking his vehicle near the scene of the accident (but which double parking entirely ceased prior to the accident) constitute the proximate cause of the youth's accident?

"Is it misconduct for plaintiff's attorney to inject the insurance question into a jury case?

"Did the court err in permitting plaintiff's doctors to testify as to the *possible* (as distinguished from the *reasonably probable)* effect of his injuries?

"Did the court commit error in permitting evidence of a report and of a conversation which were not part of the res gestæ and which did not constitute impeachment, in restricting the cross-examination of a hostile witness and in limiting the effect of certain other evidence?"

When the complaint was filed it stated four causes of action. The first and second sought recovery of damages by Myron for his injuries, and the third and fourth sought recovery by the father for money which he had expended in the care of his injured son. On motion of the father his causes of action were dismissed during the trial.

[1] Appellants attack the sufficiency of the allegations of the first and second causes of action upon the ground that they fail to state that their alleged negligence was the *proximate cause* of Myron's injuries. The allegations of the first cause of action under attack, which are substantially repeated in the second, are as follows:

"That at or about the hour of 11:30 a. m. of July 27, 1932, the defendant, Orville Hedger, while so employed by the defendant, Central California Ice Company, and in the general course of his employment as the agent of defendant corporation, carelessly and negligently parked a Ford Ice Truck, the property of defendant corporation, and left unattended said ice truck on Lewis street, between Clark and Thesta Streets, on the roadway side of an automobile parked at the north curb of said street; that said defendant, Orville Hedger, parked said truck in a manner that said truck obscured, blocked and cut off the view of all traffic going easterly along the southerly side of Lewis street; that said truck was parked as alleged, at a time prior to, at, and after the time said plaintiff, Myron R. McKay was struck by the defendant, J. B. De Jarnatt; that said negligent and careless parking of the truck existed and was concurrent in point of time with the negligent and careless driving and operating of the automobile by the defendant, J. B. De Jarnatt; that the said careless and negligent parking of said truck by the defendant, Orville Hedger, was a concurrent and contributing cause to the injuries received by the plaintiff, Myron R. McKay.

"That the said careless and negligent acts of said defendants, to-wit, the careless and negligent driving and operating of the automobile by the defendant, J. B. De Jarnatt, and the careless and negligent parking of the automobile truck by the defendant, Orville Hedger, directly caused and resulted in the injuries received by plaintiff, Myron R. McKay.

"That as the result of the carelessness and negligence of said defendants, to-wit, the careless and negligent driving and operating of an automobile by the defendant, J. B. De Jarnatt, and the careless and negligent parking of the automobile truck by the defendant, Orville Hedger, plaintiff has been greatly damaged. * * *"

Of course, it is nowhere directly alleged in the complaint that the negligence of appellants was the *proximate* cause of Myron's injuries. However, we cannot see how appellants could have been misled by the pleading.

It seems to allege two acts of negligence, the first, statutory negligence in "double parking" the ice truck in violation of the provisions of paragraph 9 of section 138 of the California Vehicle Act (St. 1923, p. 562, § 138, par. 9, as amended by St. 1931, p. 2129); the second, negligence in so parking the ice truck in the street that it obstructed the view of the drivers of vehicles lawfully traveling easterly on Lewis avenue, as was De Jarnatt. It would have been better to have alleged that the negligence of appellants was a *proximate* cause of the injury to Myron. It was alleged that it was a *direct* cause of his injury. "A proximate cause may be either a direct or an indirect cause." Goehring v. Rogers, 67 Cal. App. 253, page 259, 227 P. 687, 689. In concluding that the informality of the complaint did not mislead appellants, and therefore is not prejudicially erroneous, we can adopt the following language from Tietke v. Forrest, 64 Cal. App. 364, 221 P. 681, 682: "The matter of pleading becomes unimportant when a case is fairly tried, as this one apparently was, upon the merits and under circumstances which indicate that nothing in the pleadings misled appellant to his injury. Stein v. United Railroads of San Francisco, 159 Cal. 368, 113 P. 663."

Appellants' second specification of error is divided into two subdivisions: First, contributory negligence on the part of Myron; and, second, the question of the negligence in double parking.

[2, 3] On the question of contributory negligence, it must be borne in mind that Myron was an infant of tender years. Respondent suggests that under the record before us we could conclude, as a matter of law, that the child was not guilty of contributory negligence because of his age. Without deciding this question, we can dispose of this contention of appellants with the following quotation from Woodman v. Hemet Union High School District (Cal. App.) 29 P.(2d) 257, 259: "The answer to this contention is found in the tender years of the boy. In Barrett v. Harman, 115 Cal. App. 283, 1 P.(2d) 458, 459, a boy of the age of eleven years was injured. The court there said: 'The defense of contributory negligence may be invoked in an action by or on behalf of a child where the latter was of an age sufficient to exercise discretion for the avoidance of injury; but a child is not held to the same degree of care as an adult, and is only required to exercise that degree of care which is ordinarily exercised by minors of like age, mental capacity, and discretion. There is no precise age at which as a matter of law a child is to be held accountable for his actions to the same extent as one of full age, and the question as to the capacity of a child at a particular time to exercise care to avoid a particular danger is one of fact for the jury. Cahill v. E. B. & A. L. Stone Co., 167 Cal. 126, 138 P. 712. And the rule has been applied where the child sought to be charged with contributory negligence was considerably older than the plaintiff in the present case. (Citing cases.) The presumption is that the child was at all times exercising due care for its own safety (Code Civ. Proc. § 1963, subd. 4). Until overcome, the presumption was evidence in accordance with which the jury was bound to decide. Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 239 P. 709, 41 A. L. R. 1027; Smellie v. Southern Pac. Co., 212 Cal. 540, 299 P. 529.' The jury by its verdict having absolved Donald Woodman from the charge of contributory negligence, the record furnishes no evidence upon which we can disturb this finding."

[4] While appellants admit that the ice truck was originally parked on the roadway side of the bakery truck in violation of the provisions of paragraph 9 of section 138 of the California Vehicle Act, they urge that this paragraph was enacted for the benefit of the motor vehicle drivers lawfully parked next to the curb, and not for the benefit of other persons using the street, to which class Myron belonged. They also urge that, as the "double parking" had been ended prior to the time of the accident and at that time the parking of the truck in the street was not in violation of any law or any ordinance of the city of Fresno, "double parking" could not be considered the proximate cause of the accident.

We cannot conclude that paragraph 9 of section 138 of the California Vehicle Act was passed solely for the benefit of the drivers of motor vehicles parked next to the curbing so such drivers could conveniently leave their parking places and proceed upon their business. In the instant case, Turnbow found no difficulty in driving his bread truck from its position along the curb while the ice truck was parked on the roadway side of his vehicle. The vehicular and pedestrian traffic lawfully upon a street is entitled to the unobstructed use of as much of the roadway as may be conveniently afforded. To show the fallacy of appellants' argument, it should be sufficient to call attention to the too frequent spectacle of a long line of impatient motorists stopped in a public street by a motor vehicle parked at a distance from the curb which entirely obstructs the progress of those behind

it who cannot proceed because of the thoughtless or willful act of the driver of the parked vehicle who for the time has entirely usurped the use of his right-hand half of the street. These drivers certainly should benefit from the terms of the act. The enactment in question was undoubtedly passed for the benefit of all persons lawfully using public streets.

Appellants contend that, while the double parking of the ice truck was unlawful, still, as the bread truck left the curbing and proceeded down the street before the accident, the violation of law and the resulting negligence per se was then ended, and therefore the double parking could not be considered a proximate cause of the injury. This is not controlling here, even though the argument be assumed to be sound. There yet remain the questions, Was the leaving of the ice truck, with its large body cutting off the view of a considerable portion of the street, the exercise of ordinary care by Hedger under the circumstances here presented? Would a number of small children playing along and in the street near the place where the ice truck was parked come within his orbit of duty to the extent that he owed them the duty not to expose them to the risk of injury? Should such an accident as we have here been foreseeable by him under the obvious circumstances existing at the time he double parked the truck with its right side about seven feet from the curb and its left side not more than six feet from the center of the street?

[5-7] Omitting from consideration negligence arising from the violation of some law or ordinance, negligence is either positive or passive in its nature. It is the doing of some act which a reasonably prudent person would not do, or the failure to do some act, or to take some precaution, which a reasonably prudent person would do under the circumstances. It must result in some injury to person or property which must be so situated or related to the negligent actor in point of time and place that he must owe the duty of not committing the injury, and under such circumstances that the one guilty of negligence, if he had used ordinary prudence and foresight, should have foreseen that the injury was a result to be anticipated. Measured by these rules, we have concluded that the question of whether or not the parking of the ice truck in Lewis avenue at a considerable distance from the curb was negligence under the facts here disclosed was a question of fact to be determined by the jury. The place of the accident was in a residential district with residences in close proximity. A number of small children were playing in and along the street. After Hedger had stopped his truck, he took a hundred pounds of ice from its rear and made a delivery to the back door of one of the dwellings, leaving the rear doors of his truck open and the ice exposed to view. Any adult should know that children like ice on a summer day. Had Hedger thought at all, he must have realized that the children would gather around the open doors at the rear of his truck and help themselves to small pieces of ice. It would follow as a natural result that, having secured the ice, they would continue their play in and along the street. He should have foreseen that some of them might run from behind the ice truck where they were hidden from the view of any motorist approaching from the east, and in their play they might run southerly across the street. Vehicular traffic is to be expected on a city street. In other words, we conclude that any reasonably prudent person should have anticipated the exact accident which happened had he thought of the results likely to occur. We have been cited to no law or ordinance which prohibited a child from crossing from one side of Lewis avenue to the other between intersections. Contributory negligence was a slender staff for Hedger to lean upon and has proven unavailable to him. Any adult should realize the nature of children at play and should so regulate his conduct that his carelessness does not result in unnecessary injury to them.

[8-10] Appellants urge that, assuming the negligence of Hedger, it was not the proximate cause of Myron's injury. Proximate cause may be a direct or an indirect cause. Goehring v. Rogers, supra. In Hill v. Peres (Cal. App.) 28 P.(2d) 946, 949, it is said: "The law does not require that the negligence of a defendant must be the sole cause of the injury in order to entitle the plaintiff to recover therefor. All that is required is that the negligence in question shall be a proximate cause of the injury. Griffith v. Oak Ridge Oil Company, 190 Cal. 389, 212 P. 913; Dewees v. Kuntz, 130 Cal. App. 620, 20 P.(2d) 733. The primary causation may be so continuous that a concurrent wrongful act precipitating the disaster will in law be regarded not as independent, but as conjoining with the original act to create the disastrous result. Merrill v. L. A. Gas & Elec. Co., 158 Cal. 499, 111 P. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134; Rauch v. So. Cal. Gas Co., 96 Cal. App. 250, 273 P. 1111; Carroll v. Central Counties Gas Co., 74 Cal. App. 303, 240 P. 53; Marton v. Jones, 44 Cal. App. 299, 186 P. 410; Sawyer

v. Hooper, 79 Cal. App. 395, 249 P. 530. The rule is stated in Hale v. Pacific Telephone & Telegraph Co., 42 Cal. App. 55, 183 P. 280, 281, and approved in Sawyer v. So. Cal. Gas Co., 206 Cal. 366, 274 P. 544, that 'where the original negligence of a defendant is followed by an independent act of a third person, which results in a direct injury to a plaintiff, the negligence of such defendant may nevertheless constitute the proximate cause thereof if, in the ordinary and natural course of events, the defendant should have known the intervening act was likely to happen; but if the intervening act constituting the immediate cause of the injury was one which it was not incumbent upon the defendant to have anticipated as reasonably likely to happen, then, since the chain of causation is broken, he owes no duty to the plaintiff to anticipate such further acts, and the original negligence cannot be said to be the proximate cause of the final injury.' Whether the negligence of the two appellants here was independent or concurrent was largely a question for the jury whose finding is conclusive on appeal if there be evidence to support it. Jordan v. Great Western Motorways, 213 Cal. 606, 2 P.(2d) 786." The jury found that J. B. De Jarnatt was free from negligence and that the negligence of Hedger was the proximate cause of the accident. Under the facts before us we cannot disturb this finding, as it is supported by material and competent evidence.

Appellants strongly rely upon the case of Powers v. Standard Oil Co., 98 N. J. Law, 730, 119 A. 273, as supporting their theory that the evidence shows no negligence upon their part. An examination of that case discloses that a large Standard Oil truck was parked at the curb on the wrong side of Twelfth street in the city of Trenton in violation of the provisions of the New Jersey Traffic Act (P. L. 1915, c. 156); that a nine-year-old child in attempting to cross the street ran from behind the truck and into an automobile lawfully traveling along the street. A judgment was entered in favor of the automobile driver and in favor of plaintiff and against the Standard Oil Company and the driver of its truck. This judgment was reversed by the Supreme Court of New Jersey upon the grounds that the evidence showed contributory negligence as a matter of law on the part of the child and no negligence on the part of the driver of the truck that proximately caused the accident. We have already considered the question of the contributory negligence of a minor child. The law in California on this question is not in harmony with the New Jersey rule as announced in the Powers Case. The only other question presented by the Powers Case is that of the negligence of the driver of the truck. The only negligence charged against him was that of parking on the wrong side of the street. It is obvious that, regardless of the direction in which the truck was headed, it would present the same obstruction to a view of a portion of the street. That this was the reason why the Supreme Court of New Jersey held that the incorrect parking was not the proximate cause of the injury is shown by the following quotation from that opinion: "It appears from the testimony of McGuire that, even if the position of the truck had been reversed, so as to entitle it legally to park on the side of the street where it was stationed, the same difficulty of an obstructed vision would have been presented. * * * In the case at bar it was unimportant whether the defendant's car rested legally or illegally upon the street, since its obstruction to the vision of the crossing pedestrian, or to the driver of a moving car upon the roadway, would, under the testimony, be equally effective." This holding is parallel to and based upon the same reasoning as the rule prevailing in California in a case where an unlicensed motor vehicle driver is involved in an accident and it is held that the fact of the driver being unlicensed cannot of itself, and alone, support a civil judgment against him. The Powers Case is not in conflict with the conclusion we have reached concerning the negligence of Hedger.

[11] Appellants maintain that respondent injected into the case, the fact that the California Ice Company carried insurance on its trucks. They cite the cross-examination of Dr. F. L. R. Burks. There is no reference made to any insurance in any of the questions asked or answers given by this witness. They also cite the following which occurred in the cross-examination of Hedger: "Q. You state you made a report on the evening of the accident. Who did you make that report to?

"Mr. Conley: Objected to as immaterial.

"The Court: The objection is overruled.

"A. To Mr. Algy.

"Mr. Klette: Q. And he is someone in connection with the Central California Ice Company, is he?

"Mr. Conley: Objected to as irrelevant, incompetent and immaterial, improper cross-examination.

"The Court: The objection is overruled.

"A. I think he is an insurance adjuster.

"Mr. Conley: Now we move to strike that out, and assign the asking of the question as prejudicial misconduct, and object to the ques-

tions, all this series of questions, and charge counsel's asking it as improper, with improper motive, for a purpose that is improper in this case.

"The Court: This answer may go out, and the jury is instructed to disregard it."

The instruction of the trial court to the jury cured the error, if any.

[12] Appellants urge that the trial court committed prejudicial error in admitting testimony as to the possible results of the injuries to Myron as distinguished from the reasonably probable results. The following is cited by them:

"Mr. Klette: Q. Doctor, from your observation in this case, and your experiences as a physician and surgeon can you state to this jury what the probable result of these injuries will be? * * * A. Well, I couldn't say definitely that this boy will or will not develop epileptic attacks. He might develop it and he might not.

"Mr. Conley: We move that that be stricken out on the ground that it is not within any issue and does not tend to prove anything probable in this case, therefore conclusion and opinion and no proper foundation laid.

"The Court: The motion is denied."

In 22 Corpus Juris, at page 675, it is said: "While absolute certainty of statement is not required, a mere conjecture or speculation of the witness is excluded, nor should he be allowed to state future apprehended conditions."

The evidence discloses that Myron was seriously injured. He suffered a severe fracture of his skull, was confined to a hospital for a substantial period of time, and his hearing was impaired. The jury returned a verdict in his favor in the sum of $2,000. In view of the size of the verdict, when measured by the seriousness of the injuries, it is evident the jury paid little attention to the medical testimony to which appellants object, and that it did not prejudice them.

Appellants make numerous other specifications of error on rulings of the trial court on objections to questions propounded to several witnesses. We have examined all of them, and can find no prejudicial error in any of them.

Judgment affirmed.

I concur: BARNARD, P. J.

JENNINGS, J., being absent, did not participate herein.

CALIFORNIA RAISIN POOL v. BALIAN et al.

Civ. 1248.

District Court of Appeal, Fourth District, California.

June 19, 1934.

Hearing Denied by Supreme Court Aug. 16, 1934.

1. Vendor and purchaser ⇨305

Where vendor has elected to forfeit purchaser's rights, vendor cannot thereafter recover unpaid installments of purchase price.

2. Vendor and purchaser ⇨105(1)

Where contract for purchase and sale of realty provided for delivery to vendor of raisin crops harvested from land for sale and application of proceeds on purchase price, forfeiture of contract relieved purchaser of obligation to make future deliveries, since provision for delivery of raisins was merely provision for making payments in that form.

3. Assignments ⇨48

Where raisins harvested from land sold were delivered to vendor as part payment of purchase price pursuant to contract, there was an equitable assignment to vendor of right to receive proceeds, unaffected by subsequent forfeiture of purchaser's rights.

4. Bills and notes ⇨497(2)

Where it was shown that mortgagor of crop had no right to check involved, burden rested on defendant to whom check was transferred in payment of a note to prove that he acquired it without notice of any infirmity in mortgagor's title (Civ. Code, §§ 3106, 3140).

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by California Raisin Pool against Mike Balian and Pete D. Dames. From a judgment for plaintiff, defendants appeal.

Affirmed.

Glenn L. Moran and Russell & Heid, all of Tulare, for appellants.

Feemster, Perkins & McCormick, of Visalia, and Sutherland, Dearing & Jertberg, of Fresno, for respondent.

HAINES, Justice pro tem.

Defendant and appellant Mike Balian, in 1924, bought for $3,000, on a contract providing for installment payments from one Smith, 40 acres of vineyard property in Tulare county. Smith's rights as vendor under the contract were subsequently acquired by the Bank of Italy National Trust & Savings

Association. In 1927 Balian bought directly from the Bank of Italy National Trust & Savings Association for $8,244.48 a further 20 acres of vineyard in the same county, also on a contract providing for installment payments. The two contracts followed the same form and each authorized the vendor in the event of the vendee's default in any of its terms or conditions to re-enter the premises and remove all persons therefrom if such default should continue for a period of 10 days. There was embodied in each contract a crop mortgage by which the vendee mortgaged to the vendor all crops to be grown on the premises during the life of the contract and among the provisions of such mortgage was in each case the following: "Said party of the second part agrees that he will properly and in a husbandlike manner attend to, care for, and protect said crop or crops until the same shall be ready for harvesting, and then harvest and prepare the same for market, and when so prepared to deliver the marketable product to said party of the first part to be by it sold and disposed of at the then market price, and the proceeds of said sale shall be applied by said party of the first part to the payment of the debt hereby secured according to the terms of this agreement and mortgage, with interest according to the terms of said agreement and mortgage, together with any sums paid or charges incurred by said party of the first part in making said sale or any provisions thereof, and any surplus of said proceeds remaining shall be paid to said party of the second part."

Balian took possession under these contracts of the respective properties and continued to farm the same until the contracts were foreclosed as hereinafter stated and on June 16, 1930, entered into an agreement with plaintiff and respondent California Raisin Pool, a corporation, providing for his delivery to it of all raisins grown or matured on both properties. While Balian continued in possession of the two properties under his contracts for the purchase of the same, there were, pursuant to his agreement with the California Raisin Pool, from time to time delivered to it raisins aggregating in amount about 48 tons, which was the 1930 crop. There is a dispute as to whether the deliveries were made by Balian direct. One Nielsen, the bank's assistant manager, testified that what the bank did with Balian's 1930 crop was to hire its own trucks and with them pick up the raisins and itself make delivery of them to the Raisin Pool and get the weight tags for them and turn them in to its collection department for collection of the amounts payable thereon. The testimony of one Brown, secretary of respondent Raisin Pool, however, incidentally refers to the 1930 crop of raisins as having been delivered by Balian, and the evidence shows that the Raisin Pool kept the account for the same in Balian's name, in addition to which Balian, on being asked, "Were all the raisins you delivered to the Pool produced upon this property you were buying from the Bank of Italy or Bank of America?" answered: "Yes." For these deliveries the Raisin Pool from time to time drew its checks in Balian's favor to correspond with the weight tags and sent them to the Visalia branch of the Bank of Italy National Trust & Savings Association, where it was Balian's practice to indorse and deliver them to the bank to apply on the sums which he owed it. Not only was he indebted to the bank under his said contracts and crop mortgages for the unpaid portions of the purchase price of the land with the interest accruing thereon but, in addition, the bank each month loaned him moneys to meet his living and ranch expenses and under the terms of the crop mortgage the repayment of such advances was also to be secured thereby. Balian having been for some years seriously in default on his contracts, the bank at the end of the year 1930 foreclosed both contracts and took possession of both parcels of land and in the spring of 1931 turned the same over to its land department to operate. The land department employed Balian to farm the property on a salary and this he continued to do on the bank's behalf for a long time thereafter. On November 2, 1931, a written agreement was executed between Balian and his wife (as well as a former wife) as first parties, and Bank of America National Trust & Savings Association as successor to Bank of Italy National Trust & Savings Association as party of the second part, whereby Balian et al. quitclaimed both parcels of land to the bank and it was provided that "by mutual consent of the parties thereto and hereto the following two agreements of sale and crop mortgages are hereby canceled, annulled and terminated," after which follows the description of the two original contracts and crop mortgages. This agreement of November 2, 1931, continues as follows: "Third: The said first parties hereby acknowledge, certify and declare that all matters, claims and accounts between them and the said second party herein have been fully settled, and they have not nor has either of them, any claim or demand whatsoever against the said second party or its predecessor in interest, or any of them, arising out of or based upon said two agreements of sale and crop mortgages mentioned

aforesaid, or either of them, or arising out of or based upon any other fact or circumstance whatsoever and said first parties hereby fully release said second party and its said predecessors in interest from any and all claim, demand or liability whatsoever from the beginning of the world to the date hereof. Said second party hereby acknowledges, certifies and declares that all matters, claims and amounts between it and the said first parties have been fully settled and satisfied and said second party has no claim or demand whatsoever of any kind against said first parties or either of them, and said second party hereby fully and forever releases and discharges the said first parties and each of them from any and all claim and demand from the beginning of the world to the date hereof."

At the time this last agreement was made respondent California Raisin Pool had not completed its settlement payments for the 1930 crop of raisins delivered to it, but about a month later, that is on December 3, 1931, it issued a check negotiable in form for the final payment on the 1930 crop drawn on any bank in Fresno, Cal., and payable to Balian's order, for $520.76 and mailed the same to Balian with a statement made out in his name of the 1930 deliveries which showed the check to be in the amount due to complete the settlement therefor. This check Balian received in due course of mail. At that time there appears still to have been a sum of $942.42, part of which had been advanced to Balian by the commercial department of the bank, presumably for living expenses, during 1931, but some of which, according to the testimony, represented advances made by that department to him at previous times which had never been actually repaid to the bank and which Balian would still have owed to it had not this indebtedness been included in that wiped out by the agreement of November 2, 1931.

Balian had on May 4, 1931, executed, in consideration of money loaned, his promissory note to defendant and appellant Dames for $575, and on December 7, 1931, showed Dames the check just received from the Raisin Pool and at Dames' request indorsed the same and turned it over to Dames, who credited its amount on the note to him and handed the check to one Belshaw, who cashed it, Dames eventually receiving the proceeds. Something like three days later both respondent California Raisin Pool and the Bank of America National Trust & Savings Association sent representatives to both appellants Balian and Dames, demanding the return of the check on the theory that it had been issued and sent to Balian by mistake, whereas it should have been issued and sent to the bank. Balian and Dames having both refused the demand, the Raisin Pool brought the present action to recover the amount paid by means of the check and obtained judgment against both Balian and Dames therefor, from which the present appeal is taken.

[1, 2] It is undoubted law that a vendor having elected to forfeit and terminate a vendee's rights, under a contract for the sale and purchase of real estate, cannot thereafter recover the unpaid installments of the purchase price, since by virtue of the termination of the contract these cease to be enforceable obligations. Glassell v. Coleman, 94 Cal. 260, 29 P. 508; Dishian v. Kishishian, 64 Cal. App. 440, 221 P. 669; Hovsepian v. Eskender, 69 Cal. App. 379, 231 P. 364; Yakoobian v. Johnson, 102 Cal. App. 10, 282 P. 522. So far as Balian's indebtedness represented the purchase price of the land or any interest thereon, it is apparent that after the contract was terminated he was no more obligated to deliver in futuro raisins that he had severed from the ground while the contract was in force than he was to make in futuro payments that had accrued under it while it was in force. The stipulation for delivery of the raisins amounted merely to a stipulation for making payments in that form. In Hovsepian v. Eskender, supra, where a contract of sale of land which the vendor had elected to terminate for the vendee's default provided for delivery of the crops in the joint names of vendor and vendee and that 60 per cent. of their proceeds should apply on the payments to be made under the contract to the vendor, the court said of the vendor (page 383 of 69 Cal. App., 231 P. 364, 366): "However, by her notice of cancellation and subsequent proceedings she canceled that instrument. She may not now assert any claim to a share of the crop, resting the same on the provisions of that instrument. Glassell v. Coleman, 94 Cal. 260, 266, 29 P. 508. If, instead of the 60 per cent. mentioned as a share of the crop, the contract had provided for a cash payment, then it is clear that she would not be entitled to the cash payment. Glassell v. Coleman, supra; * * * Dishian v. Kishishian, 64 Cal. App. 440, 221 P. 669. The rule remains the same when the payment provided in the contract was expressed as a portion of the crop, instead of being expressed as so much money."

[3] Respondent claims, however, that these principles are inapplicable to its situation for the reason that not only did the crop mortgages here require Balian to deliver his crops

to the bank which was to market them and apply the proceeds on his indebtedness to it but also because the bank had in pursuance thereof actually taken possession, as it asserts, of the raisins here involved and delivered them to respondent. As we noticed, this claim that the bank took possession of the 1930 crop and itself made the deliveries to respondent rests on Nielsen's testimony to that effect. Appellant claims that Nielsen admitted that his connection with the Visalia branch of the bank began later and therefore that his testimony on the subject is mere hearsay or a conclusion. The trial, however, occurred in February of 1932, and his testimony was that he had then been connected with the bank at Visalia for three years, which would indicate that he must have been there through all of the year 1930, and while there is some confusion in the transcript on the subject, a careful reading of the record shows that a statement made by him that what occurred preceded his time there applied to the making of the contracts and chattel mortgages, not to the handling of the 1930 crops. We must presume, in support of the judgment, that the trial court believed his testimony that the bank had obtained possession of the 1930 crops while the contract was in force and in pursuance of its provisions, from which it would follow that an equitable assignment to the bank of the right to receive the proceeds from respondent had already been, as of that time, accomplished. McIntyre v. Hauser, 131 Cal. 11, 63 P. 69; Williams v. Corker, 144 Cal. 468, 77 P. 1004; National Bank of New Zealand v. Finn, 81 Cal. App. 317, 253 P. 757. It may be added that the evidence shows that even had the entire proceeds of the 1930 raisin crop been paid to the bank, the same would not have sufficed to repay the advances made by it to Balian for living and ranch expenses but would have fallen short thereof by $42.89 and left nothing from that year's crop to apply on the purchase price of the land or the interest thereon and that respondent claims that, even if the termination of the contracts had destroyed the bank's right to any further payments on the land from the proceeds of the crops, its effect was not to terminate the provisions of the contracts and crop mortgages affording the bank security upon the crops for its advances. Whether, in view of the broad terms of the release contained in the agreement of November 2, 1931, any such claim would be tenable we need not decide, since we must treat it as settled that the bank had already become fully entitled to the proceeds of the 1930 crop in that year.

[4] It remains to mention Dames' claim to have been an innocent purchaser for value of the $520.76 check without notice of any right of the bank to it. That Dames was a purchaser for value cannot be doubted since an "antecedent or pre-existing debt" amounts to "value" (Civ. Code, § 3106), and the testimony is undisputed that Balian was indebted to him and that the amount of the check was credited on the debt. It must be conceded that the affirmative showing in the present record to the effect that Dames, when he took the check and obtained the money on it, was aware of the bank's rights, is somewhat tenuous. However, under section 3140 of the Civil Code, once it was shown that Balian had no right to the check it was Dames' burden to prove that he acquired it without notice of any infirmity in Balian's title and we cannot say that the evidence is such that the trial court was bound to find that to be the fact.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.



139 Cal.App. 447

RISSMAN v. NATIONAL THRIFT CORPORATION OF AMERICA.

No. 8334.

District Court of Appeal, Second District, Division 2, California.

June 28, 1934.

1. Appeal and error ⇐187(3)

Defendant who had not sought to have joined as parties, defendants who held note in escrow, and as pledgee and assignee of payee, *held* not entitled on appeal to complain of plaintiff's failure to make such defendants parties (Code Civ. Proc. § 379).

2. Bills and notes ⇐460

In suit on note, failure to join as parties defendant assignee of payee and pledgee of payee did not constitute defect of parties, where each had assigned his interest to plaintiff.

3. Bills and notes ⇐443(3)

Assignee of payee of note who had pledged note with third party, but still had substantial interest in note, was entitled to maintain action to enforce rights or protect interest.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

4. Pledges ⇐21

Mere pledging of note or other evidence of indebtedness as collateral security for payment of debt does not divest pledgor of title and vest title in pledgee.

5. Bills and notes ⇐313

Assignee of pledgor of note could demand payment of installment due on note, and, upon promisor's failure to make payment, could exercise option accelerating payments and declaring whole amount due.

6. Appeal and error ⇐1122(2)

Court of Appeal could remedy failure of trial court to make specific finding that demand had been made for payment of note, since court was empowered to make findings of fact in addition to those made in lower court (Const. art. 6, § 4¾; Code Civ. Proc. § 956a).

7. Appeal and error ⇐1071(6)

Where it was apparent from evidence in record, judgment ordered, and effort of court to find upon all the issues that, if a more complete finding had been made, it would have been adverse to appellant, failure of court to specifically find that demand had been made for payment of note *held* not reversible error.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Elizabeth Rissman against the National Thrift Corporation of America. From a judgment for plaintiff, defendant appeals.

Affirmed.

Halverson & Halverson, of Los Angeles, for appellant.

Goldman & Lieberman, Alfred Kehde, E. P. Peers, and Aaron B. Rosenthal, all of Los Angeles, for respondent.

SCOTT, Justice pro tem.

On March 16, 1931, defendant executed and delivered to payee an installment note in the principal sum of $25,000, payable in monthly installments of $4,000 each, commencing June 16, 1931, with a final payment of $1,000 in December of that year. The payee of the note was Sierra Reserve Holding Company, Limited, a Nevada corporation. On the same day that it was executed, payee assigned the note to Edison Securities Company, a corporation, as collateral security for the payment to it of a note of the Sierra Company to it, and the note was placed in escrow with Metropolitan Trust Company, a corporation, as escrow holder. Thereafter, on June 26, 1931, one installment of $4,000 having been paid, Sierra Company assigned its interest in the balance of the note to Daniel Rissman, and the latter on that date assigned it to plaintiff. Daniel Rissman testified that as agent for plaintiff he demanded payment of defendant of the second installment the day after it became due, to wit, July 17, 1931, stating that, if defendant could not pay it, he demanded full payment of the note and intended to bring suit immediately. The payment was not made, and plaintiff filed suit on July 21, 1931. After the commencement of the action, on October 19, 1931, Edison Securities Company assigned its interest in the note to plaintiff for collection. The trial of the case commenced October 21 and concluded October 28, 1931, and the plaintiff recovered judgment for the unpaid principal, plus interest, and $754.50 attorney's fees.

[1] Appellant contends that the trial court should have held and found that there was a defect of parties defendant, in that the Edison Securities Company, Metropolitan Trust Company, and Daniel Rissman were parties in interest and indispensable to the determination of the case. Defendant did not seek to have joined any of the said parties as defendants which it had the right to ask under the law. Code Civ. Proc. § 379. The relationship of Metropolitan Trust Company to the parties, as shown by the evidence, was that of escrow holder, that is, a mere agent of the Sierra Company, Edison Securities Company, and Rissman, with no interest in the subject-matter of the action, its sole duty being to carry out their orders.

[2, 3] It appearing at the trial that both Daniel Rissman and Edison Securities Company had assigned their interest to plaintiff, there was no such defect of parties as to preclude recovery by plaintiff. The note sued upon was delivered at the trial and was admitted in evidence. The payee of a note who has pledged it with a third party but still has a substantial interest therein is entitled to maintain an action to enforce his rights or protect his interest. 19 Cal. Jur. 968; 65 A. L. R. 1321 annotation. In Graham v. Light, 4 Cal. App. 400, 88 P. 373, 374, plaintiff sued on a note which he had pledged as collateral security for a loan, and defendants urged that he had no cause of action when the suit was brought. After declaring that plaintiff had the right to sue, the court said: "Had the note still been held by the bank under its assignment *at the time of the trial*, it would

have been the duty of the court * * * to have ordered the bank to be brought in. But in this case, as it appeared that the bank had reassigned the note to the plaintiff, this was unnecessary." (Italics ours.) That the interest of Sierra Company in the note was substantial was shown by evidence that, although the amount of the note here sued on was but slightly greater than the note for which it was security, it constituted less than two-fifths of the total securities thus pledged.

On the day the trial started defendant by leave of court filed an amended answer setting up a third defense not embodied in the original answer, to the effect that no proper demand for payment was made of it before the suit was filed, and that it (the defendant) was at all times ready, able, and willing to pay the installment when it became due. The court found "that it is untrue that the defendant on the 16th day of July, 1931, or at any time thereafter, was ready, able and willing or that it is now ready, able and willing to pay the said note or any part thereof, and that there is now due on said note the sum of $21,122.50 with interest at 7% per annum from July 16, 1931. * * * The court further finds that all allegations in the answer of defendant herein inconsistent with the findings of fact herein are untrue."

[4-7] "The question seems to have been well settled that the mere pledging of a promissory note or other evidence of indebtedness as collateral security for the payment of a debt does not divest the pledgor of title and vest title in the pledgee." Simansky v. Clark, 128 Me. 280, 147 A. 205, 208, 65 A. L. R. 1316. Plaintiff, as assignee of pledgor, had the right to make a demand for payment of the installment due July 16, and, upon failure of defendant to make the payment, plaintiff had the right to exercise the option accelerating the payments and to declare the whole amount due. The evidence shows that this was done. Appellant suggests that the cause should be reversed because the trial court failed to make a more specific finding to this effect. This court could remedy any such inadvertence, being empowered to make findings of fact in addition to those made by the court below [section 4¾, art. 6, Const.; Code Civ. Proc. § 956a; Sessions v. Trott (Cal. Sup.) 32 P.(2d) 374], but the exercise of that power is unnecessary here. From the evidence in the record, from the judgment ordered, and from the effort of the court to find upon all the issues, it is evident that, if a more complete finding had been made, it would have been adverse to appellant, and in such case the failure to find is not a ground for reversal of the judgment. Krasky v. Wollpert, 134 Cal. 338, 66 P. 309. The findings were signed twelve days after the date on which the final payment on the note was due, even had there been no acceleration, and it is not suggested by appellant that any offer to pay had been made by it up to that time.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIG, J.



139 Cal.App. 534

PEOPLE v. BUCKNER.

Cr. 1367.

District Court of Appeal, Third District, California.

July 3, 1934.

Criminal law ⇐1182

Judgment of conviction must be affirmed, where no brief is filed in appellant's behalf or appearance made for him at time fixed for oral argument (Pen. Code, § 1253).

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Louis B. Buckner, alias Ricardo Sanchez, was convicted of second degree burglary, and he appeals.

Affirmed.

Louis B. Buckner, in pro. per.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

PER CURIAM.

The appellant was convicted in the superior court of San Joaquin county of a felony, to wit, burglary of the second degree.

The transcript on appeal was filed in this court April 20, 1934. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argu-

ment on June 11, 1934. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order are affirmed.



139 Cal.App. 500

MATHEWS et al. v. TANNENBAUM et al.

Civ. 5106.

District Court of Appeal, Third District, California.

July 2, 1934.

Hearing Denied by Supreme Court Aug. 30, 1934.

1. Vendor and purchaser ⇐109

Court may rescind land contract where less than agreed amount of land was transferred and purchasers never approved title nor accepted deed, since contract was not "executed" within rule that court cannot rescind executed land sale at instance of purchaser on ground of partial failure of consideration.

[Ed. Note.—For other definitions of "Executed Contract," see Words & Phrases.]

2. Deeds ⇐94

Where purchasers never accepted deed, rescission of land contract was not barred under rule that agreement and all prior negotiations are merged in accepted deed.

3. Vendor and purchaser ⇐116

Vendors' failure to object to purchasers' form of tender, and failure to demand tender of rents, issues, and profits by purchasers suing to rescind land contract, *held* to constitute waiver of such tender (Civ. Code, § 1501).

4. Vendor and purchaser ⇐119

Purchasers *held* not barred by laches in rescinding land contract, where delay was due to negotiations at instance of vendors who were endeavoring to procure title to additional land which they were obligated to convey.

5. Vendor and purchaser ⇐43(1)

Purchasers *held* not to have ratified sale by payment of taxes and assessments after discovery of alleged failure of consideration, where payment was made to enable purchasers to reconvey land as it was received by them.

6. Appeal and error ⇐917(1)

Where there was nothing in record to show that no leave to amend was asked, reviewing court on appeal from judgment sustaining demurrer to fourth amended complaint without leave to amend must presume that all that was necessary in that matter was done.

7. Vendor and purchaser ⇐123

In suit to rescind land contract, words "good and sufficient," applied to deed, sufficiently describe it for purpose of tender, as against demurrer to petition for uncertainty; and under such offer, purchasers obligated themselves to make conveyance sufficient to pass their title back to vendors.

[Ed. Note.—For other definitions of "Good and Sufficient Deed," see Words & Phrases.]

8. Vendor and purchaser ⇐116

Tender of "every right, title, interest or thing" received is tender of everything received in action to rescind land contract.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by A. A. Mathews and others against M. Tannenbaum and others. From judgment sustaining a demurrer to an amended complaint, plaintiffs appeal.

Reversed, with directions.

McKenna & McKenna, of Los Angeles, and N. O. Byers, of Huntington Park, for appellants.

Lissner, Roth & Gunter, Louis M. Lissner, and I. H. Prinzmetal, all of Los Angeles, for respondents.

GANS, Justice pro tem., delivered the opinion of the court.

To the fourth amended complaint a demurrer was sustained without leave to amend. The appeal is from the judgment sustaining the demurrer.

The said complaint alleged in substance as follows: That the Golden States Metals Refining Company, Inc., was, on June 15, 1928, a corporation; that said corporation was dissolved by the superior court on or about May 1, 1929, and its assets were distributed to the defendants as trustees; that on June 15, 1928, said corporation and plaintiffs entered into an agreement in writing for the sale and purchase of certain land in Huntington Park, Cal. This land was described as having a frontage of 65 feet on Laura avenue and 150 feet on Regents street. The consid-

eration was to be the sum of $11,846.71, to be paid through an escrow. The seller was to furnish a certificate of title insurance showing the lands free and clear of any incumbrance, and was to execute a "good and sufficient deed" of said lands conveying a marketable title. That the plaintiffs paid the purchase price into escrow as agreed, and that they fully complied with said agreement on their part. That on July 20, 1928, the said corporation delivered to plaintiffs a deed describing a parcel of land by lot and block number, and fronting only 50 feet on Laura avenue, and only 140 feet on Regents street, together with a certificate of title insurance for the smaller tract. That said corporation was never the owner of a tract as described in the contract, and was never able to convey such tract to plaintiffs. That at the time of the execution of the contract the defendants, who were both stockholders and directors and officers of said corporation, and were conducting its affairs, well knew that said corporation did not have, and could not deliver, title to the parcel of the size described in the contract, and at the time the corporation accepted the purchase price, they well knew the corporation had no title to, and could not convey or furnish title to plaintiffs of or for, such parcel. That plaintiffs relied on the representations of the corporation that it could convey title, and had no knowledge at the time they paid the sum of $11,846.71 into escrow that said corporation could not convey said lands, as described in said agreement.

That immediately upon receipt of said deed, and the discovery of the discrepancy in size of the parcel of land as aforesaid, on or about July 20, 1928, plaintiffs tendered to said corporation a "good and sufficient deed conveying the land so conveyed to these plaintiffs by said corporation, and tendered to the said corporation a conveyance of every right, title or interest or thing received by plaintiffs by reason of the said deed, and by reason of the contract made on the 15th day of June, 1928, and then and there demanded that said corporation return to these plaintiffs the said sum of $11,846.71 paid as the purchase price of the said lands." That the corporation, acting through the defendants as its trustees, requested plaintiffs to extend time to it, and it would secure for the plaintiffs a conveyance of the size of the land described in the contract; and that thereafter on many occasions plaintiffs repeated their demands for a reconveyance or refund of cash, and on each such occasion said corporation asked for further time, promising that it would secure title and make conveyance of the land as described in said agreement, and plaintiffs consented to these extensions from time to time until they became aware that the corporation could never secure a parcel of the size agreed upon. And so, on or about December 3, 1929, plaintiffs being convinced that defendants neither could nor would convey a tract of the size agreed upon, made demand in writing upon defendants that within ten days they refund to plaintiffs the said purchase price and the taxes and assessments paid by plaintiffs on the property conveyed to plaintiffs since July 20, 1928, and "offered to convey to the said defendants all right and interest they, or either of them had acquired in or to the said lands by reason of the said contract or said deed so made by the said corporation, and to deliver a good and sufficient conveyance to the said defendants of same, on payment to the said plaintiffs of the said sums so paid by these plaintiffs on or under the terms of said agreement" of June 15, 1928.

That defendants failed and refused, for more than ten days after service on them of the said demand and offer, to pay to plaintiffs, or either of them, the said sums so paid by plaintiffs, or any part of same, and still retain said sums, and the whole thereof, and refused, and still refuse, to pay said sums.

That the defendants and said corporation have wholly failed to comply with the agreements of said contract of June 15, 1928, on their part to be kept. That the plaintiffs have paid in all some $367.48 for taxes and assessments on said land; that said land is now, and has been ever since the making of said contract, in the same condition as it was on June 15, 1928, and plaintiffs have neither encumbered said land nor caused or permitted waste thereon; and plaintiffs have been, ever since July 20, 1928, able, ready, and willing to restore said land in the same condition as when conveyed to them. That plaintiffs tender any sums determined by the court to be equitable for use or occupation of said land by plaintiffs since July 20, 1928. That plaintiffs tender everything they have received from defendants, or have, or may have, by reason of said contract or deed to plaintiffs, on repayment to them of the sums expended by plaintiffs under said agreement, and for taxes, etc., as aforesaid. The demurrer filed is both general and special, the latter alleging several uncertainties.

[1] In their brief, respondents rest their attack upon the complaint on several points or grounds, as follows: First: May a court rescind an executed sale of land at the in-

stance of the purchaser upon the grounds of partial failure of consideration?

The original agreement was to convey a certain parcel of land of a given stated size. This was never done. Immediately upon receipt of their deed, which came to them through an escrow, the purchasers made an immediate objection thereto, and a demand for performance or return of their money. Through the negotiations following, which were had at request and instance of the sellers, purchasers maintained their same position. They paid certain taxes and assessments for the protection of the property, as they allege. It may not be said that they ever approved the title or accepted the deed, or that the contract of sellers was ever executed on the part of the sellers. This distinguishes this case from those cited by counsel in their brief.

Conceding the application of the rule cited, in a proper case, it is sufficiently clear that this is not such a case. Craig v. White, 187 Cal. 489, 202 P. 648.

[2] The second point is based upon the premise that the purchasers accepted the deed. Such is not the case presented by this complaint, and hence, whatever merit there be in the contention that where a deed is accepted, the purchaser may not later complain that it did not comply with the terms of a prior executed agreement, and that the agreement and all prior negotiations are merged in the deed, that principle does not apply in this case. The deed being not accepted by the purchasers, they stand upon different ground than that furnished by Bryan v. Swain, 56 Cal. 616; Gaffey v. Welk, 46 Cal. App. 385, 189 P. 300; and other cases cited from other states.

[3] Third. Does a failure to allege a tender of rents, issues and profits warrant the sustaining of the demurrer? If it be true that tender of such sums should have been made, seller had opportunity to object to the form of tender, and did not do so, and made no demand for such sums, and under section 1501 of the Civil Code this objection should be held as waived. Winkler v. Jerrue, 20 Cal. App. 555, 561, 129 P. 804; Kofoed v. Gordon, 122 Cal. 320, 54 P. 1115; Latimer v. Capay Valley Land Co., 137 Cal. 286, 70 P. 82; Shermaster v. California Building Co., 40 Cal. App. 668, 181 P. 409.

[4] Fourth. Does laches appear upon the face of the complaint? The action to rescind was taken within reasonable time, and delay in this matter was due to negotiations at the instance of vendors, who were endeavoring to procure title to the additional land they thus admit being obligated to convey. This delay cannot be charged to vendee. Promis v. Duke, 208 Cal. 420, 281 P. 613; French v. Freeman, 191 Cal. 588, 217 P. 515.

[5] Fifth. Has plaintiff ratified the sale by payment of taxes and assessments upon the land after discovery of the alleged failure of consideration?

Purchaser was engaged in negotiations seeking the return of their money or conveyance of the amount of land agreed upon, and these negotiations and all of the delay were had by special request and repeated request by vendors. Payment of taxes that intervened was for the protection of vendors as well as vendees, and to enable vendees to reconvey the land as it was received by them, free and clear from lien or incumbrance. This was not such an act of ownership as evinced an intention to abide by the contract which they were seeking to have performed.

[6] Sixth. Should the fact that three prior demurrers had been sustained, and this demurrer to the fourth amended complaint was sustained without leave to amend, deter the court from disturbing the action of the lower court because no request to amend was made?

The fourth amended complaint was filed and demurrer thereto considered by the court, being now on appeal. This complaint recites that it is filed by stipulation and leave of court. There is nothing in the record presented showing that no leave to amend was asked, and this court must presume that all that was necessary in that matter was done.

[7, 8] Seventh. The matters presented as matters of uncertainty have no merit warranting a demurrer sustained without leave to amend. The words "good and sufficient" applied to the deed sufficiently describe it for the purpose of a tender. No objection was made on account of the form of tender. Under such offer the purchasers obligated themselves to make conveyance sufficient to pass their title, whatever it might be, back to the vendors. 4 Words and Phrases, First Series, 3109, 3110. Tender of every right, title, interest, or thing received is a tender of everything received. That should be, and was, sufficient. Fountain v. Semi-Tropic L. & W. Co., 99 Cal. 677, 34 P. 497; Dunger v. Whitney, 92 Cal. App. 216, 267 P. 933.

The judgment is reversed, and the trial court is directed to overrule the defendants' demurrer to plaintiffs' fourth amended com-

plaint, with leave to defendants to file an answer within such time as may be deemed reasonable.

We concur: PULLEN, P. J.; PLUMMER, J.



139 Cal.App. 480

CITY OF LOS ANGELES v. DAWSON et al. (JOSEPHSON et al., Interveners).

Civ. 8933.

District Court of Appeal, Second District, Division 1, California.

July 2, 1934.

Rehearing Denied July 26, 1934.

Hearing Denied by Supreme Court Aug. 30, 1934.

1. Appeal and error ⇨1071(6)

Where condemnation award was claimed by purchaser of land condemned and by vendors under written instruments, trial court's failure in finding for vendors to expressly find that instruments were assignments or that vendors' rights were not barred by limitations *held* not prejudicial to purchasers, where findings if made would have been adverse to purchasers.

2. Eminent domain ⇨153

Where purchasers executed to vendors of land, against which condemnation proceeding was pending, instrument waiving all claims to proceeds of condemnation proceedings which purchasers "might have in the future," and escrow instructions contained provision for waiver, and instruction from purchaser waived interest in condemnation award that "will be made," notwithstanding pending condemnation proceeding was dismissed, vendors were entitled to proceeds of condemnation proceedings instituted four years thereafter.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by the City of Los Angeles against John B. Dawson and others, wherein Julien Josephson and another intervened. Judgment for interveners, and defendants Henry West Brown and another appeal.

Affirmed.

Hearing denied by Supreme Court; CURTIS, J., dissenting.

Dana R. Weller, of Los Angeles, for appellants.

Lois Webb, of Los Angeles, for interveners and respondents.

HOUSER, Justice.

It appears that the plaintiff brought an action against each of several defendants for the condemnation of their several interests in certain real property, and that in said action Julien Josephson and Vera Josephson intervened for the asserted reason that preceding the date of the commencement thereof of the defendants Henry West Brown and Eunice Eilene Brown had purchased from the interveners the particular property then owned by the said defendants and affected by said proceedings, and as a part of the agreement between the defendants and the interveners had executed and delivered to them an instrument in writing of which the following is a copy: "This is to advise you that we herewith waive any and all claims, right, title and interest in and to the proceeds accruing from condemnation proceedings against the Second Street property more particularly known as Lot 2 of the Allison Barlow Tract at 6/150 of Maps that we may have had or might have in the future against the above described property which we are acquiring in the above numbered escrow at the Citizens Trust & Savings Bank, 736 S. Hill Street, Los Angeles, California."

In substance, it was alleged by the interveners that the effect of such instrument was that the said defendants did waive in favor of the interveners "all claims, right, title and interest in and to the proceeds accruing from condemnation proceedings" which the defendants "may have had or might have in the future against the above described property. * * *" The defendants Brown answered the complaint in intervention; and, following a trial of the issues raised by the pleadings, the trial court rendered judgment in favor of the interveners. It is from such judgment that the defendants Brown have appealed to this court.

[1] Appellants first contend that because no finding was made by the trial court either on the issue as to whether the purported assignment by appellants to the interveners actually constituted an assignment, or upon the issue of whether the interveners' assumed right in the premises was barred by the statute of limitations, the judgment should be reversed. In that connection, an inspection of the record discloses the fact that, following

the finding of the value of the property taken, the trial court found that:

"Total compensation proper to be paid to the defendants, Julien Josephson and Vera Josephson, as per assignment to said defendants from Henry West Brown and Eunice Eilene Brown, owners of said parcel of land, $4,000.00.

"Total compensation proper to be paid to the defendants, Henry West Brown and Eunice Eilene Brown, as the owners of said parcel of land, none."

It would seem apparent that a finding as to whether the particular instrument pleaded by the interveners, together with other pertinent instruments and evidence, constituted an assignment, would have been but a conclusion of law, and consequently, dependent upon the particular instrument alone, properly should not be included within the findings of fact; likewise, with reference to the statute of limitations. If the statute was operative against the claim of the interveners, it became so solely by reason of all the facts which dealt with the so-called assignment by defendants to the interveners. In addition thereto, it may be noted that, in so many words, the interveners did not plead an assignment, but that they merely pleaded the instrument in hæc verba, and in effect alleged that by reason of the provisions of such instrument the interveners became entitled "to any and all damages awarded as compensation for the taking of the property. * * *"

Although it may appear that by no express finding did the trial court either declare that the instruments by which the said defendants purportedly transferred their rights in and to the award constituted an assignment thereof, or that such rights of the interveners were not barred by the statute of limitations, in the circumstances, and especially considering the findings that were made, it is clear that any finding which the trial court might have made with reference to such issues necessarily would have been against the allegations of the defendants in those respects; from which it follows that the contention of appellants in that regard cannot be sustained.

[2] But it is also urged by appellants that the purported assignment was insufficient to result in a transfer of their rights in the award. With respect to such claim on the part of appellants, it appears that it was at a time when a former condemnation proceeding that affected the property of the interveners Josephson was pending, the interveners sold said property to the defendants Brown. As a "part of the deal," the purchasers executed the instrument which hereinbefore has been set forth. In addition thereto, it appears that the sale of the property to defendants was handled through an escrow, and that the escrow instructions on the part of the defendants contained the following provision: "I will hand you a waiver covering the credit accruing from the condemnation proceedings which you will deliver to the vendor or W. W. F. Cavanaugh or his nominee. (In pencil—Josephson—out.)"

Furthermore, an additional instruction in said escrow was given by defendant W. H. Brown as follows: "Supplementing my present instructions in the above numbered escrow I hereby waive all rights, title and interest in and to that certain credit or award that will be made to Lot 2 of the Allison Barlow Trust, as per map Book 6, page 150, Records of Los Angeles County, in connection with the widening proceedings of Second Street."

However, as a basis for appellants' contention, it further appears that the condemnation proceeding that was pending at the time when the interveners sold their property to the defendants was thereafter abandoned, and that the instant condemnation proceeding was not commenced until about four years following the date of the abandonment of the first condemnation proceeding. But it will be noted that by the language of the purported assignment the defendants waived "all claims, right, title and interest * * * accruing from condemnation proceedings * * * that we may have had or might have in the future. * * *" In addition thereto, the declaration made by the defendants, contained within the original escrow instructions, was that they would "hand you a waiver covering the credit accruing from the condemnation proceedings. * * *" Furthermore, by the provision of the supplement to their escrow instructions, the defendants waived all rights "in and to that certain credit or award that will be made," etc. All such documentary evidence, together with the oral testimony given by one of the interveners, none of which being disputed or controverted in any way, leads to the conclusion that in the sale of the property affected by the condemnation proceedings the interveners reserved to themselves "the proceeds accruing from condemnation proceedings"; and consequently that the defendants never acquired any interest therein. The only possibility of any right existing in favor of the defendants must rest upon the fact

that the condemnation proceeding that was pending at the time when the sale of the property occurred was later dismissed, and that the instant demand of the interveners was interposed in a condemnation proceeding that thereafter was instituted. But it is not apparent how such a situation could defeat a vested right of the interveners so that they would be dispossessed of it in favor of the defendants, who repeatedly theretofore had waived it in favor of the interveners. By no evidence, oral or documentary, is it claimed that the interveners ever directly surrendered to the defendants the rights in the proceeds of the award which they had reserved to themselves at the time when the sale of the property was made. The language of the original "waiver" is broad enough to cover not only any award that might be made in the condemnation proceedings then pending, but as well any such proceedings which might be instituted "in the future." And the same thing is true as to the supplemental instruction given by the defendants to the escrow holder in that thereby the defendants waived "all rights * * * to that certain credit or award that will be made." From the evidence it would seem entirely improbable that the intention of the parties was that the rights which the interveners reserved in the award were restricted and made applicable solely to condemnation proceedings then pending. As appears by the amount of the award that was actually made in the instant proceedings, to wit, the sum of $4,000, it was large enough to be considered as a substantial item in the negotiations that took place between the parties to the transaction. To limit the right of the interveners to a recovery or a right to possession of such an amount of money to the proceedings then pending, and consequently to deny it to them should those proceedings be dismissed, even though new condemnation proceedings thereafter should be instituted, would require an interpretation of the agreement and the conduct of the parties that would be wholly at variance not only with the language of the several pertinent instruments and the oral testimony introduced in evidence, but as well contrary to common understanding. As an extreme example of the effect of a ruling favorable to the contention of the appellants, supposing that the condemnation proceedings that were pending at the time when the sale of the property was made had been dismissed because of some technical defect in the institution thereof, and that on the very next day thereafter a new condemnation proceeding covering the identical subject-matter of the former condemnation proceeding had been brought, would it be claimed, or even suggested, that in such circumstances the interveners had lost their rights in the premises? If so, the property rights of the interveners would or might depend solely upon the whim or caprice of the condemner in the action. After all, the determination of the rights of the respective parties depends upon the construction which should be placed upon the evidence. Evidently the trial court was of the opinion that the interveners should prevail. This court cannot discover any compelling reason for setting aside its conclusion in the premises.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

1 Cal.(2d) 211

PEOPLE v. TEDESCO.

Cr. 3738.

Supreme Court of California.

July 2, 1934.

Rehearing Denied July 2, 1934.

1. Criminal law ⇐1159(2)

Supreme Court cannot substitute its judgment on facts for that of jury, where verdict is supported by substantial evidence.

2. Criminal law ⇐1160

It is function of jury in first instance and of trial court after verdict to determine facts established by evidence, and verdict, approved by court, cannot be set aside on appeal for insufficiency of evidence to support it, unless there is clearly no substantial evidence supporting court's conclusion on any hypothesis.

3. Criminal law ⇐741(1)

Weight of evidence is for jury.

4. Criminal law ⇐1160

Findings of jury and trial judge, approving verdict on motion for new trial, are conclusive on Supreme Court, unless it can say as matter of law that there was no evidence to support them.

5. Criminal law ⇐1172(1)

Giving of instructions, correctly defining accomplice and coconspirator and stating law governing defendant's guilt if he participated in commission of crime actually accomplished by accomplice or coconspirator, *held* harmless to defendant admitting in brief that no confederation or conspiracy was charged or proven.

6. Criminal law ⇐792(1)

Court was not required to give instructions on law governing defendant's guilt if he participated in commission of crime actually accomplished by accomplice or coconspirator, where no confederation or conspiracy was proved.

7. Criminal law ⇐808½

Instructions in language of statute defining first degree murder *held* not prejudicial to defendant, where evidence disclosed willful, deliberate, and premeditated killing and jury was sufficiently instructed on presumption of innocence, reasonable doubt, circumstantial evidence, and all phases of law applicable to facts (Pen. Code, § 189).

8. Criminal law ⇐670

Prosecution's offer to bring coat into court when discussion arose as to its color after people closed case in murder trial, wherein court had held production of clothes, worn by defendant on night of homicide, unnecessary because of prosecution's stipulation that there was no blood thereon, *held* not error, where defendant's counsel said, "Let it stand as it is; I am satisfied."

9. Criminal law ⇐721(3)

District attorney's remarks to jury that state's witnesses were not afraid to take stand *held* not improper as comment on defendant's failure to testify.

10. Criminal law ⇐730(10), 1037(2)

District attorney's remarks to jury that state's witnesses were not afraid to take stand *held* not ground for reversal of conviction, where no assignment of misconduct or request for instruction to disregard remarks was made and jury was instructed not to take defendant's failure to testify as circumstance against him.

11. Witnesses ⇐274(2)

Permitting cross-examination of defendant's character witnesses in murder trial as to whether they heard or knew that defendant had struck his aged father in face *held* not error, where most of them answered in negative and one was uncertain.

12. Criminal law ⇐925½(2)

Juror's unauthorized visit to scene of crime *held* not misconduct warranting new trial after conviction of murder, in absence of showing of prejudice.

LANGDON, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Charles D. Tedesco was convicted of first degree murder, and he appeals.

Affirmed.

S. S. Hahn, of Los Angeles, Harry Polglase, of Redondo Beach, and W. O. Graf, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

WASTE, Chief Justice.

Defendant was charged, by information filed in the superior court in and for the county of Los Angeles, with the crime of murder, to wit, the killing of John W. Whitehead. He was tried before a jury, which returned a verdict of guilty of murder in the first degree, without recommendation. A motion for a new trial was made and denied, and thereafter judgment of conviction and sentence to pay the extreme penalty was pronounced. The appeal from the judgment and

from the order denying a new trial is now before the court.

The prosecution contends that a motive for the killing of the decedent is found in the fact that the defendant's home was encumbered, and that he was in need of funds which he sought to raise through insurance he succeeded in having placed on the life of the decedent, with himself as the beneficiary.

No one saw the defendant and deceased together immediately prior to the killing. The evidence connecting the defendant with the crime is entirely circumstantial. The scene of the alleged killing was on the Redondo-Wilmington boulevard, between 3 and 4 miles distant from Redondo Beach, in Los Angeles county. Defendant conducted a shoe repairing shop in the city of Redondo. Charles E. Pollard, who testified as a witness for the prosecution, had a shoe shining stand in the shop, and also performed the necessary janitor work in and about the place. Another witness for the prosecution, Larry Ford, worked for the defendant a few weeks before the killing of the decedent, and slept in the shop at night. The defendant and each of these witnesses had a key to the shoe shop. John W. Whitehead, the deceased, an elderly man, frequently visited the shop. He and others addressed the defendant by the familiar name, "Charlie." For some time prior to his death, Whitehead had been employed as a dishwasher in a restaurant located near the defendant's shop. About six weeks before Whitehead was killed, John A. Jenkins, an employee of an insurance company, met the deceased, Whitehead, in the defendant's shop, the defendant having previously told Jenkins that he had a friend who wanted some insurance. On the occasion of Jenkins' visit, the defendant introduced him to Whitehead, who thereupon made application, through Jenkins, for a $1,000 life insurance policy. The arrangement was that the defendant would pay the necessary premiums on the policy. This plan was arrived at after it had been agreed that he might be made the beneficiary under the policy. The agreement was consummated through the execution of a "rider" on the policy signed by the deceased a few days before he was killed. The execution of this insurance policy, with the defendant named as beneficiary, is regarded by the prosecution as establishing the motive which led, it is claimed, to the killing of the decedent by the defendant.

The deceased, Whitehead, on the evening of July 18, quit his work at the restaurant and left the place at about 8 o'clock, and about forty minutes later went back to get his glasses. As he left the last time, he was seen by the cashier of the restaurant to start across the street towards the defendant's shop, which was only about 30 feet distant. A little more than an hour later, the deceased was found lying about 18 feet from the Redondo-Wilmington paved highway, about 3¾ miles from the defendant's shop in Redondo Beach. His head was badly cut and lacerated, and he was rolling back and forth on the ground, moaning. He was removed to the emergency hospital, where he died that night. As he appeared to be becoming partly conscious before he passed away, he was asked what happened to him, or who hit him, and he gave a name with two syllables. His voice was so weak, however, that the witness could not get the name. The autopsy disclosed numerous cuts and lacerations on the head, a subdural hemorrhage covering the entire surface of the brain, and a compound fracture of the vault and base of the skull, which caused decedent's death. The autopsy surgeon testified that the injuries on the head of the deceased could have been caused by a blunt instrument, such as a hammer.

Between 9 and 9:30 o'clock on the night of the killing, people living on the Redondo-Wilmington boulevard near where the decedent was found heard screams "coming from the westerly direction." Witness Westonhagen got in an automobile and drove about a quarter of a mile on the highway in that direction. He saw a car on the highway with its lights out. This car started up, came toward him, and passed him, going east. He was shown a photograph of the defendant's car, and testified that it generally answered the description of the car he saw that night. He further testified that at the time he heard the screams above referred to he also heard dull thuds that sounded to him like blows. After driving about a quarter of a mile and seeing nothing of a suspicious nature, he returned to his home, when the screams started up again. He was then joined by a police officer, Bennett, and together they drove westerly on the highway, and discovered what appeared to be a "bundle of rags" by the side of the road, which, on investigation, they found to be the deceased. Not only was the head of the deceased badly cut and bleeding, but there was blood on the ground near the body and on several tree stumps nearby. At the side of the highway, almost opposite the body, they found a large pool of blood and a beer bottle "with a Golden Glow label." Nearby they also found the decedent's cap

and glasses. The decedent was in a semi-conscious condition, and frequently called, "Help—police!" About 160 feet from the highway, there was a road shack, which, on the night of the killing, was occupied by a tramp by the name of Mitchell. He testified that he went to sleep about 7 o'clock, and was awakened later by a noise, and heard a man cry out, "Don't kill me, Charlie," which he said was repeated many times.

On the morning following the killing, a deputy sheriff found a shoemaker's hammer with a broken handle, and a blood-stained handkerchief where the body of the decedent had lain. The handle of the hammer was covered with a red, sticky substance. At the trial, this hammer was identified by the witness Pollard (who was the janitor at the shop) as the hammer which the defendant kept in the rear of his shop on the bottom shelf of his showcase. He testified that he had seen three shoemaker's hammers in the shop prior to the morning of the murder, but on the morning following the killing he made an investigation, and found there were but two. Witness Pollard also testified that there were a number of bottles of beer of the brand known as "Golden Glow" in the defendant's shop on the night previous to the murder, and that on the morning thereafter there was one less bottle. At this point it may be noted that the bottle found beside the place where the body of the decedent lay bore fingerprints of the deceased, but no others were established. The automobile owned by the defendant, found at his home after the killing, was a Chevrolet sedan, highly polished. Across one front door there were a number of streaks. It appeared as though they had been caused by the door having been recently wiped off, and on various parts of the car, both inside and out, numerous spots were found. A chemical analysis of one of these spots determined that it was human blood. The witness who so testified said that by chemical analysis he determined that there was human blood on the hammer found at the scene of the crime.

There was considerable testimony concerning the movements of the defendant on the evening of the killing (July 18). It was a warm night. According to the witnesses, defendant got into his automobile, and left his shop about 7 o'clock. A police officer (Carter) saw him about 9:20 that night in his automobile and wearing a heavy overcoat. He explained to the officer that he was not feeling well. A half-hour later, the same witness met defendant in a drug store near the defendant's shop. He still had his overcoat on. He hurriedly drank two glasses of water, pushed back his hat, ran his finger across his forehead, and drops of perspiration ran off the finger. He showed the witness a note which he said he had found under the door of his shop. It was to the effect that the deceased had "gone back East." At the same time, defendant called the deceased a vile name, and added, "He owed me a few dollars." At that time he also showed the note to the witness Schultz, the druggist. At about the same time, the defendant met a confectioner (witness Stamas), whose store was located next to the shop of the defendant, and said to him, "Johnny [referring to the deceased] left Redondo," at the same time showing Stamas a note which he gave him to read. Stamas did not identify the exhibit (People's No. 24), as did the other witnesses, but, in a conversation, defendant said to him that he was sorry he gave him, the decedent, $5, and remarked he did not believe he would see him any more, but "guessed" he was going to lose his $5. He apparently sought to impress Stamas with the fact that he had been sick all day, and the witness noticed that the defendant at that time was "in perspiration and also kind of red." Later in the evening, the defendant telephoned to the witness Sheeley, the proprietor of the house in which the deceased, Whitehead, roomed, and read a note over the telephone, telling Sheeley that "Johnny had left the note on his desk in the shoe shop," the note purporting to recite that "Johnny" had been called out of town, had left in a hurry; and that he was the man who owed the defendant. About 11 o'clock that night, the defendant called Dr. Shea to his home, claiming he was ill. The doctor found nothing pathologically wrong with the defendant, and did not take his temperature. The defendant showed him the note he had previously exhibited to the policeman and others, stating at the time that Whitehead had left town owing him $5.

Testimony was introduced by the prosecution regarding the amount which the defendant at various times claimed the deceased owed him. The prosecution regards this as very material. In a statement to witness Raymond, connected with the insurance company, defendant represented that the decedent owed him approximately $700. To other witnesses, the defendant stated that decedent owed him small amounts, "either $2.90 or $3.90." The decedent had paid him at one time 50 cents. At other times, he was sorry he gave the decedent $5.

On the morning following the killing, in conversation with Chief of Police Peterson, of Redondo, and two deputy sheriffs, the defendant sat in a chair "perspiring profusely." He showed the officers the note he had shown to others (People's Exhibit No. 24). At that time he told the chief and others present that Whitehead owed him either sixty or eighty dollars. Other testimony was to the effect that about 10 o'clock on the evening in question defendant, in his Chevrolet car, was driving on the highway at a high rate of speed. He later drove into a filling station, asking for air and water, but did not wait for either. A handwriting expert (witness Sellers) testified that in his opinion the note in question (People's Exhibit No. 24), displayed by the defendant to various persons, was not all written at the same time nor under the same writing conditions. In his opinion, the paper on which the note was written had come from a pad which was found in the shop of the defendant, and the paper was in and a part of the pad when the note was written.

The prosecution contends that this evidence discloses that the defendant deliberately planned to have himself named the beneficiary under an insurance policy issued on the life of the decedent, under which, in case of accidental death, the policy would pay double indemnity; that, in order to establish an insurable interest in the life of the decedent, he represented to the company that the deceased owed him approximately $700, which, according to subsequent statements to various other persons, was manifestly a grossly exaggerated amount; that, in order to realize upon the policy he took the decedent in his automobile, drove a distance of approximately 4 miles from his shop, and there, by repeated blows of the hammer upon the head of the deceased, caused injuries which, a few hours later, resulted in the decedent's death; that defendant's subsequent actions, immediately following the beating of Whitehead, his efforts to establish that decedent had left town owing him money, and his appearance that night and before the officers on the morning following the killing, unquestionably tend to show a consciousness of guilt. The jury accepted the theory of the prosecution and returned its verdict carrying with it the extreme penalty. The defendant did not take the stand at the trial. Evidence was introduced that prior to the homicide his general reputation for peace and quiet was good.

[1-4] On the record, the prosecution contends, there is substantial evidence tending to support the verdict of the jury, and that this court cannot, as a matter of law, substitute its judgment on the facts for that of the jury. No rule of criminal law and procedure is better established in this state. It is the function of the jury, in the first instance, and of the trial court after the verdict, to determine what facts are established by the evidence and, before the verdict of the jury which has been approved by the trial court can be set aside on appeal upon the ground of the insufficiency of the evidence to support it, it must be made clearly to appear that upon no hypothesis whatever is there substantial evidence sufficient to support the conclusion of the trial court. People v. Tom Woo, 181 Cal. 315, 326, 184 P. 389. This court has uniformly held that where there is evidence tending to support a verdict we cannot disturb the verdict upon the ground that it is not sustained by the evidence; and the application of this rule is strengthened in a case where, as here, the trial court has refused a new trial. It is settled beyond controversy that the weight to be accorded the evidence is a question for the jury. People v. Ellis, 188 Cal. 682, 688, 206 P. 753. The finding of the jury in this case was approved by the trial court on motion for a new trial. The findings of the jury and the trial judge are conclusive upon this subject upon this court. It may disturb such a finding only when we can say, as a matter of law, that there was no evidence to support it. People v. Erno, 195 Cal. 272, 283, 232 P. 710. After reaching this conclusion as to the sufficiency of the evidence, it becomes necessary to carefully examine the various contentions advanced by the appellant as to alleged errors of law occurring during the trial.

[5, 6] There was testimony, already referred to, that the witnesses Pollard and Ford each had a key to the shoe repairing shop of defendant. Ford disappeared immediately after the killing of the decedent, and was not seen until he appeared for the trial. On the theory, we may conclude from the record of the cross-examination of some of the witnesses for the people, that it would be argued to the jury by the defense that an accomplice or a coconspirator might have committed the killing, the prosecution submitted, and the court gave, certain instructions which correctly defined an accomplice and coconspirator, and stated the law governing the guilt of the defendant if he participated in the commission of the crime, though actually accomplished by such accomplice or coconspirator. No complaint is made that these instructions incorrectly stated the law. In defend-

ant's brief it is admitted "that no confederation or conspiracy was charged or proven." We are therefore of the view that the giving of the instructions was harmless. Complaint is made that, after giving these instructions, the court refused to give instructions on the same subject requested by the defense. These instructions impress us as being somewhat argumentative and relating to matter sufficiently covered by the court in the other instructions. In view of the evidence and of the entire charge given to the jury, we are of the view that the court was not required to give any instructions on the subject. Those given were not prejudicial to the defendant.

[7] The giving of instructions by the trial court in the language of section 189 of the Penal Code was not prejudicial. The evidence in this case, if accepted, discloses that the killing of the decedent by defendant was willful, deliberate, and premeditated, and therefore, under the section, murder of the first degree. The jury was fully instructed on the doctrine of the presumption of innocence and of reasonable doubt, and, at the request of the defendant, sufficiently instructed on the question of circumstantial evidence and the manner in which it is to be weighed by the jury. The jury was properly instructed by the court upon all phases of the law applicable to the facts in this case. That being so, the defendant was not entitled to have instructions on like matters given in a particular phraseology.

Certain alleged errors of the court in the decision of questions of law arising at the trial are complained of. Whether or not the decedent told Mrs. Bertha Foster where he was going when he left the restaurant in the evening just prior to the killing was immaterial in view of the fact that what he told her was not testified to before the jury.

[8] A chemist, Abernathy, testified that he examined for blood spots certain clothes which he understood to be those worn by the defendant on the night of the homicide, but found no such spots. The prosecution stipulating there was no blood on the clothing, the court held that its production in court was unnecessary. Subsequently, after the people had closed their case, a discussion arose as to the color of an overcoat. The prosecution offered to bring the coat into court, and counsel for the defense said, "Let it stand as it is; I am satisfied." No error can be predicated on this incident.

[9, 10] We find no merit in the contention of appellant that the district attorney commented before the jury on the failure of the defendant to take the stand. The district attorney's remarks, in declaring that witnesses Ford and Pollard were not afraid to take the witness stand and subject themselves to cross-examination, cannot, in our estimation, be interpreted as the appellant contends. Furthermore, no assignment of misconduct was made, and no request was made by the appellant that the jury be instructed to disregard the remarks objected to. The jury was advised in the charge that, if the defendant in a criminal case does not testify, his failure to do so shall not be taken as a circumstance against him. We therefore find no error. See People v. Nakis, 184 Cal. 105, 193 P. 92.

[11, 12] Character witnesses for the defendant testified that the general reputation of the defendant for peace and quiet was good. On cross-examination, the district attorney asked them whether or not they heard or knew that the defendant had struck his sixty-two year old father in the face. Most of them answered in the negative; one was not certain. No error was committed in permitting the cross-examination. People v. Gayle, 202 Cal. 159, 165, 259 P. 750. It appeared that during the trial one of the jurors made an unauthorized visit to the scene of the crime. Such visit was an irregularity, but does not constitute misconduct warranting the granting of a new trial, unless prejudice is shown to have followed therefrom. People v. Rowell, 133 Cal. 39, 65 P. 127. No such showing is made here. Appellant admits this to be the true rule, but argues that, in view of the errors of the court complained of by him and heretofore discussed, including the alleged misconduct of the district attorney and the alleged insufficiency of the evidence, the court should have granted the motion for a new trial. In view of the conclusions reached and announced in our consideration of these matters, we are of the view that the trial court did not err in its refusal to grant the motion.

The order denying defendant's motion for a new trial and the judgment are, and each is, affirmed.

We concur: SHENK, J.; CURTIS, J.; IRA F. THOMPSON, J.

LANGDON, Justice.

I dissent. The evidence in this case was purely circumstantial, and in my opinion insufficient to justify the verdict of guilty of murder in the first degree.

1 Cal.(2d) 264

STOLTENBERG v. HARVESTON et ux.

S. F. 14799.

Supreme Court of California.

July 11, 1934.

Rehearing Denied Aug. 9, 1934.

1. Evidence ⇐445(3)

Landlord's oral agreement to accept less than rent fixed by written lease is valid to extent of lower rent tendered and accepted in full satisfaction of installments paid, but insufficient to change written contract as to future installments (Civ. Code, § 1698).

2. Time ⇐10(5)

Landlord's notice to tenant of default in payment of rent on sixth day after due date under lease prohibiting declaration of default within five days after such date was not premature, though due date fell on Sunday (Code Civ. Proc. § 13).

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by H. P. Stoltenberg against Joe Harveston and wife. Judgment for plaintiff, and defendants appeal.

Affirmed.

See, also, 26 P.(2d) 833.

M. M. Getz and George D. Collins, Jr., both of San Francisco, for appellants.

Dunn, White & Aiken and Hamilton Wright, all of Oakland, for respondent.

CURTIS, Justice.

Action for unlawful detainer by the landlord against tenants holding over after default in the payment of rent. The defense to the action was that the landlord orally reduced the rent from $675 per month to $300. This latter sum was paid monthly by the lessees from the date of the lease to and including April 1, 1932. As the rent was payable in advance, the payment on April 1, 1932, covered the whole month of April. On May 7th following, the landlord served notice on the tenants that the rent of said premises for the month of May, 1932, amounting to $675, due May 1, 1932, under the terms of the lease had not been paid, and that the tenants were required to pay the same within three days after service of notice or deliver up possession of the premises. A trial was had, and judgment was rendered for the plaintiff for possession of the premises. Defendants have appealed on the judgment roll.

The principal points made on appeal are: (1) That the written lease fixing the monthly rental at $675 was altered and modified by an oral agreement to accept $300 per month as rent of said premises and the actual acceptance of said sum; and (2) no cause of action was stated in the complaint as the allegations of the complaint show that the notice to pay rent or surrender possession of the premises was prematurely given.

[1] Taking these points up in the order of their statement, it is apparent that the first question presented is whether the written lease to pay a monthly rent of $675 per month may be modified by an oral agreement to accept the sum of $300 per month. By section 1698 of the Civil Code it is provided that "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." In so far as the payments of rent made under the oral agreement of the parties are concerned, there can be no question that, as to those payments actually made and accepted as rent in full for the period covered by them, the oral agreement reducing the rent was executed and no claim for the recovery of rent during the period covered by said payments can be maintained. Julian v. Gold, 214 Cal. 74, 3 P.(2d) 1009. As to the monthly payments of rent due under said lease and not actually paid by the lessees, a different rule governs. As to such payments the oral agreement to accept amounts less than those called for in the written lease had not been executed. In the case of Klein Norton Co. v. Cohen, 107 Cal. App. 325, 330, 290 P. 613, 616, it was held that, "an agreement, in order to be executed, must be fully performed on both sides." It is further stated in this opinion that "This principle is strictly enforced when an attempt is made to set up a modification of a written contract by an oral one under section 1698 of the Civil Code." In this present action the agreement to accept $300 as rent for the month of May, 1932, was in fact not performed by both parties to said agreement. The court found that the tenants tendered the sum of $300 to the landlord in payment of the May rent, but it was refused by the latter. Until the amount had been accepted by the landlord as rent for the month for which it was tendered, it could not be said that this oral agreement to lower the rent had been performed by the landlord, and, until it was so performed by him, he was not bound by its terms. This point was definitely decided by this court in the case of Sinnige v. Oswald, 170 Cal. 55, 57, 148

P. 203, 204, where it was held that "Concessions of the kind that were shown by the defendants, when supported by a consideration, are valid to the extent that a lower rent has been tendered and accepted as satisfaction in full of the installments thus paid. They are not sufficient to establish a change in the written contract so as to affect the amount of future installments of rent where no such change of terms has been made in writing." While it was held by this court in our opinion in Julian v. Gold, supra, that the reference in the above statement that a consideration was necessary to support such an oral agreement was purely obiter, no exception was taken to any other point decided in that case. It is in line with other decisions in this state on the same subject. (In re Estate of McDougal, 146 Cal. 196, 199, 79 P. 875; Dodge v. Chapman, 42 Cal. App. 612, 614, 183 P. 966; James Eva Estate v. Oakland B. & M. Co., 40 Cal. App. 515, 519, 181 P. 415), and we think correctly enunciates the law governing such cases.

[2] The second point relied upon by appellants arises out of the following state of facts: The written lease of said premises provides for the payment of the rent monthly in advance on the 1st day of each month. It further provides that "No default shall be declared by reason of any provision herein for failure to pay rent upon the day herein specified until five (5) days have elapsed after the same may have become due and payable, and permission is hereby granted the lessees to pay the same at any time within the five (5) days after the same may have become due and payable hereunder." No rent having been paid by the defendants herein on May 1, 1932, the day when a monthly payment of rent became "due and payable," or at any time thereafter, the plaintiff, on May 7th following, served written notice upon the defendants that said rent had not been paid, and required the defendants to pay said rent within three days after the service of said notice, or deliver up possession of the said premises within said three days. Defendants' claim that the notice of default was given prematurely rests upon the fact that May 1, 1932, was Sunday and therefore a holiday, and they therefore contend that, as the rent was due and payable on May 1st, they had under section 13 of the Code of Civil Procedure all of the next day in which to make said payment, and therefore the five-day period mentioned in the lease did not begin to run until this next day, which would be May 2d, and it would not end until May 7th, and that defendants had the whole of said last-mentioned day in which to make said payment. The notice, therefore, which was served on May 7th while defendants were not in default, they contend, was served one day too soon. The fundamental error of defendants is in their assumption that they were required under the lease to pay the rent on May 1st. While the lease provides in effect that the rent shall become due and payable on the 1st day of each month of said term, it is further provided, as we have seen under the clause of the lease above quoted, that the lessees may pay the rent at any time within five days after it becomes due and payable, which undoubtedly means within five days after the 1st of the month. We understand defendants concede this to be the meaning of this provision of the lease. This being so, the lessees (the defendants) were not required to pay the rent or to perform any other act whatever on May 1st, a holiday. Therefore, the provisions of section 13 of the Code of Civil Procedure providing that any act of a secular nature appointed by law or contract to be performed on a holiday may be performed on the following day has no application, for the reason that under the facts in this case no such act was appointed to be performed on a holiday. The first day the defendants were under any legal obligation to pay the May rent was May 6th, five days after the nominal day of payment. May 6th was not Sunday, or a holiday for any other purpose. May 6th was also the last day fixed by the lease for the payment of said rent for that month. Not having been paid on that day, the defendants, for failure to pay the same, were in default under the terms of the lease. The notice of such default given by the landlord on the day following was not premature, but in all respects conformed to the terms of the lease and the law applicable thereto. The complaint setting forth these facts therefore stated a good cause of action against the said defendants.

Other points were made by the defendants in their briefs filed herein, but they are so unsubstantial that a discussion of them would serve no useful purpose.

Judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; SHENK, J.; IRA F. THOMPSON, J.

J. R. GARRETT CO. v. STATES et al.

Sac. 4775.

Supreme Court of California.

July 17, 1934.

Rehearing Granted Aug. 16, 1934.

1. Corporations ⇐437

Delivery of deed to corporate grantee's president, authorized to receive it, as grantee's agent, was absolute, and it took effect free from conditions, imposed on president by grantor, as to delivery of cash and corporation stock to grantor (Civ. Code, § 1056).

2. Adverse possession ⇐85(1)

Corporation owning land within five years before commencing action to quiet title is presumed to have had possession, to which defendant's actual possession is deemed subordinate, in absence of proof that latter's possession was adverse to corporation's legal title for such period (Code Civ. Proc. §§ 318, 321).

3. Adverse possession ⇐93

Payment of taxes on land for five years continuously is necessary to establish title by adverse possession, and any break in continuity of such payments by adverse claimant inures to owner's benefit (Code Civ. Proc. § 325).

4. Adverse possession ⇐94

Tax collector owes no duty to accept payment of taxes from adverse claimant of land after payment of taxes thereon by owner (Code Civ. Proc. § 325).

In Bank.

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Action by the J. R. Garrett Company against S. J. States and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Fred W. Lake, of Los Angeles, for appellants.

J. A. Pardee, of Susanville, for respondent.

SHENK, Justice.

This is an appeal by the defendants from a judgment for the plaintiff in an action to quiet title to certain parcels of land in Lassen county.

The defendant S. J. States at all times involved herein was in actual possession of the property. His claim of possession initially was founded upon a patent issued to him by the United States government in 1914. In 1918 one Barcley, then president of a Nevada corporation, called Workers' Association, offered, on behalf of the corporation, to buy the property from States for the sum of $500 cash and $2,500 in stock of that corporation. States accepted the offer, and on June 28, 1918, delivered to Barcley a deed to the property, whereupon Barcley agreed to return and deliver to the defendant States the cash and stock. Barcley never returned, nor was payment ever received. The deed was recorded on July 3, 1918. On October 9, 1918, the Workers' Association mortgaged the land to Poteet, to secure a loan of $1,500. Poteet assigned to Fannie Barcley, who assigned to the plaintiff. The mortgage was foreclosed, and a commissioner's deed under foreclosure sale was delivered to the plaintiff and recorded on July 19, 1923.

The plaintiff paid the 1919 taxes on the property. The 1920, 1921, 1922, and 1923 taxes were paid by States. He attempted also to pay the 1924 taxes, but the amount tendered was refused by the tax collector because the taxes had already been paid by the plaintiff. The plaintiff paid the taxes for all the subsequent years.

The action to quiet title was commenced by the plaintiff in April, 1930. Both parties set up their respective claims. The defendants in addition pleaded, as a bar to the plaintiff's claim section 318 of the Code of Civil Procedure, and that the defendant States had title by adverse possession. The trial court found for the plaintiff and entered judgment accordingly.

[1] The defendants contend first that the placing of the deed with Barcley was not in fact a delivery of the deed, but that if it was a delivery it was a delivery in escrow only, to take effect when the condition had been complied with, that is, the cash and stock delivered.

That Barcley was the president and an officer of the Workers' Association authorized to receive the deed is not disputed. The delivery to him as agent of the grantee was therefore absolute and took effect freed from any condition imposed upon Barcley by the grantor. Civ. Code, § 1056; see 9 Cal. Jur. 165; Wipfler v. Wipfler, 153 Mich. 18, 116 N. W. 544, 16 L. R. A. (N. S.) 942; Hubbard v. Greeley, 84 Me. 340, 24 A. 799, 17 L. R. A. 511.

[2-4] The defendants make various contentions with respect to their claim of title by adverse possession. It is true that States at all times was in actual possession of the property. But the plaintiff was the owner within five years of the commencement of the action.

He is presumed to have had possession within the meaning of sections 318 and 321 of the Code of Civil Procedure, to which the possession of the defendant States is deemed to have been subordinate unless possession adverse to the plaintiff's legal title for five years before the commencement of the action has been proved. It has long been settled in this state that payment of taxes assessed against the land for a continuous period of five years is a necessary element in the establishment of title by adverse possession. Code Civ. Proc. § 325; 1 Cal. Jur. 563, and cases cited. Any break in the continuity of the payment by the adverse claimant inures to the benefit of the owner, and there is no duty on the part of the tax collector to accept payment from the adverse claimant when the taxes have already been paid by the owner. Glowner v. De Alvarez, 10 Cal. App. 194, 101 P. 432.

The claim of the defendants was not established. The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; CURTIS, J.; IRA F. THOMPSON, J.



1 Cal.(2d) 294

MAXWELL et al. v. SUPERIOR COURT IN AND FOR SAN MATEO COUNTY et al.

S. F. 15106.

Supreme Court of California.

July 17, 1934.

1. Appeal and error ⇐78(1)

Where order that vendors were entitled to specific performance of contract for sale of real property in the event they could furnish merchantable title reserved question of merchantability for investigation and determination prior to entry of final judgment, order was an "interlocutory decree" and not a "final judgment," as respects appeal.

[Ed. Note.—For other definitions of "Final Decree or Judgment" and "Interlocutory Decree or Judgment," see Words & Phrases.]

2. Appeal and error ⇐80(1), 82(1)

Order that vendors' deed was insufficient to convey merchantable title made after interlocutory decree providing that final judgment in action for specific performance would be made when merchantability of title should be determined was not "special order" made after final judgment, or the "final judgment" contemplated by the decree, as respects appeal.

[Ed. Note.—For other definitions of "Special Order," see Words & Phrases.]

3. Appeal and error ⇐452

Under provision of interlocutory decree in action for specific performance that vendors should have 120 days from filing of order that title was defective within which to perfect title, such order was an "interlocutory order" and was nonappealable, and hence appeal therefrom did not divest court of jurisdiction to make order that title was merchantable or to proceed to final judgment (Code Civ. Proc. § 963).

[Ed. Note.—For other definitions of "Interlocutory Order," see Words & Phrases.]

In Bank.

Petition for writ of mandate by T. V. Maxwell and another against the Superior Court of the State of California in and for the County of San Mateo and Honorable Maxwell McNutt, Judge thereof.

Writ issued.

Kirkbride, Wilson & Brooks, of San Mateo, for petitioners.

Carl W. Anderson, of Burlingame, and Gilbert D. Ferrell and Fred W. Comba, both of Redwood City, for respondents.

SHENK, Justice.

Petition for writ of mandate. The matter is presented on the petition, the answer thereto, and a demurrer to the answer.

Charle Hammer and Frida Hammer, his wife, brought an action in the respondent Superior Court against the petitioners herein to rescind certain agreements for the sale of real property. The plaintiffs in the action were the purchasers under said agreements, and the petitioners herein were the defendant sellers. The defendants in the action filed a cross-complaint seeking reformation and specific performance of the agreements.

On July 14, 1933, the respondent court made and entered its order termed an interlocutory decree, wherein it adjudged the defendants entitled to reformation and specific performance of the agreements. The order directed that within ten days after service of notice of entry of the interlocutory decree, the defendants deposit with the clerk of the court

a grant deed to the property involved conveying to the plaintiffs a merchantable title; that the plaintiffs should have ten days after service of notice of deposit of the deed to deposit the amount of the purchase price or to file and serve a written notice of their objections to the title. The interlocutory decree provided that the court should pass upon the objections and if it should determine that the plaintiffs would receive a merchantable title they should have ten days within which to deposit the purchase money with the clerk. If it should be determined that the title was defective, the defendants were to have 120 days within which to obtain a court decision that the title was clear and merchantable, the plaintiffs thereupon to have ten days within which to deposit the purchase price. It was provided further that upon the deposit of the purchase money a final judgment of specific performance should be entered declaring that the property had been conveyed and the purchase money paid; but that upon failure to deposit the purchase money the defendants should have judgment against the plaintiffs for the amount thereof, $6,500, with interest from January 15, 1932.

Within due time the defendants in said action, the petitioners herein, deposited with the clerk of the court their grant deed. The plaintiffs filed and served their objections to the title. A hearing on said objections was had and on October 3, 1933, the respondent court made its order that the deed was insufficient to convey a merchantable title. On November 21, 1933, the defendants filed an additional instrument and on that date noticed a second hearing for November 27, 1933, on the question of their compliance with the direction of the interlocutory decree to deposit a deed conveying a merchantable title. The judge of the respondent court was unable to hear said matter on the day noticed, and set the hearing for December 4, 1933. On December 2, 1933, the defendants perfected an appeal from the order of October 3, 1933.

On December 4, 1933, the respondent court determined that the grant deed and other instruments deposited with the clerk conveyed a merchantable and clear title. Notice of the entry of said order was served upon the plaintiffs, but the plaintiffs failed to deposit with the clerk the purchase money as provided in the interlocutory decree.

On January 2, 1934, the defendants noticed a motion to be heard on January 8, 1934, for final judgment in their favor, in accordance with the order of December 4, 1933, and the interlocutory decree of July 14, 1933. At the hearing on said motion the plaintiffs interposed an objection to the hearing and determination of the matter on the ground that, as an appeal was then pending from the order of October 3, 1933, the court had no jurisdiction to enter the order of December 4, 1933, and no jurisdiction to enter a final judgment in the action. The hearing on the objection was continued to January 15th.

On January 13th the petitioners obtained an order of dismissal of their appeal from the order of October 3, 1933. On January 15, 1934, when the petitioners' motion for final judgment in their favor was argued and submitted, the respondent court declined to act upon the motion until advised that it had jurisdiction. The petitioners thereupon brought the present proceeding to have determined the question of respondent's jurisdiction to entertain and render its decision on the petitioners' motion for final judgment.

The question presented depends for its proper answer on whether the order of December 4, 1933, that the title conveyed by the grant deed was merchantable, was a valid order. Whether it was a valid order depends on whether on that date, while the appeal taken by the petitioners from the order of October 3, 1933, was pending, the respondent court had jurisdiction to entertain and decide the motion of the petitioners for the order of December 4th.

[1-3] That the respondent court had such jurisdiction becomes apparent when the question of the appealability of the order of October 3, 1933, is considered. That order was not a final judgment in the action, nor was it a special order made after final judgment. The interlocutory decree of July 14, 1933, was not, under the facts presented, a final judgment. It declared the rights of the parties, but it also provided for further steps and proceedings to be taken for the purpose of clearing the title to the property to be conveyed, and it specifically provided for a retention of jurisdiction by the respondent court for that purpose, and that final judgment be made when the question of the merchantability of the title should be determined. Further, the interlocutory decree was not an order that the defendants were entitled to specific performance absolutely, but was an order that they were so entitled in the event that they could furnish a merchantable title, and the question of the merchantability of the title was explicitly reserved for investigation and determination prior to the entry of a final judgment in the action. Nor could the nature of the final judgment be determined until it was

first determined whether there had or had not been a compliance with the directions of the interlocutory decree by both parties. Such an order is interlocutory. Doudell v. Shoo, 159 Cal. 448, 453, 114 P. 579; Zappettini v. Buckles, 167 Cal. 27, 33, 138 P. 696; 2 Cal. Jur., pp. 139, 145. The order of October 3, 1933, therefore, was not a special order made after final judgment. Nor was it the final judgment contemplated by the interlocutory decree. Inasmuch as by the interlocutory decree the defendants had 120 days from October 3, 1933, within which to perfect their title, the order of October 3, 1933, was but another intermediary or interlocutory order in the case, and nonappealable. Section 963, Code Civ. Proc.; 2 Cal. Jur., p. 149. The purported appeal therefrom was ineffectual and did not divest the respondent court of jurisdiction to make the order of December 4, 1933, or to proceed to final judgment in the action pending before it. Krotzer v. Clark, 178 Cal. 736, 174 P. 657; 2 Cal. Jur. pp. 421, 422.

The question has been considered with respect to all of the facts alleged in the petition and the answer, and a specific ruling on the demurrer to the answer is deemed unnecessary.

It is ordered that the peremptory writ issue as prayed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; CURTIS, J.; IRA F. THOMPSON, J.

1 Cal.(2d) 284

BENDIX v. SABIN et al.

S. F. 15121.

Supreme Court of California.

July 16, 1934.

Appeal and error ⊂=356

Where trial court's order terminating proceedings for preparation of record on appeal showed that time for perfecting appeal had passed, unperfected appeal was dismissed.

In Bank.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by August Bendix against Jesse M. Sabin and others. From the judgment, plaintiff appeals. On motion to dismiss appeal.

Appeal dismissed.

R. E. Hewitt, of Oakland, for appellant.

R. A. Rogers, of San Francisco, for respondent.

PER CURIAM.

Motion to dismiss appeal.

The trial court rendered judgment against the plaintiff. After motion for new trial made and denied, plaintiff gave notice of, but has not perfected, an appeal.

From the order of the trial court terminating proceedings for the preparation of a record on appeal, it appears that the time allowed by law has long since passed.

The appeal is dismissed.

1 Cal.(2d) 276

REGOLI v. FANCHER et al.

S. F. 14808.

Supreme Court of California.

July 16, 1934.

1. Judgment ⊂=490(1)

Judgment may always be impeached by showing that in fact process upon which it is based was never served.

2. Judgment ⊂=490(1)

Default judgment directing sale of real property in bankruptcy proceedings and directing commissioner to execute conveyance *held* subject to collateral attack, where there was no proof that copy of order to show cause or petition was served upon defaulting party.

3. Bankruptcy ⊂=288(6)

Claim of third party must be merely colorable to give bankruptcy court jurisdiction in summary proceedings to require third persons to turn over bankrupt's property.

4. Bankruptcy ⊂=288(15)

Order of referee in bankruptcy in summary proceedings directing commissioner to execute deed to trustee *held* void for want of jurisdiction, where property was in possession of others under deed from third person antedating bankruptcy, and was subject to outstanding trust deed, and parties orally asserted claims and questioned court's jurisdiction.

5. Quieting title ⇐47(2)

Failure to make finding on defense raised in cross-complaint that quitclaim deed was obtained by coercion *held* error under evidence, in action to quiet title.

6. Bankruptcy ⇐268

Purchaser from trustee in bankruptcy could not claim as bona fide purchaser under deed subsequently executed to trustee, where defense was asserted in action to quiet title that subsequent deed was obtained by duress.

7. Bankruptcy ⇐268

Purchaser at sale in bankruptcy proceedings is bound to know whether on face of record bankruptcy court is proceeding within its jurisdiction in making sale.

In Bank.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Anthony Regoli against C. R. Fancher and wife and others, in which Dorothy H. Fancher, as administratrix, was substituted on death of defendant named. Judgment for defendants, and plaintiff appeals.

Reversed.

Thomas T. Califro, of San Francisco, and Frank E. McGuire, of Oakland, for appellant.

John S. De Lancey and Stanley J. Smith, both of Oakland, for respondents.

PRESTON, Justice.

This record presents reciprocal actions to quiet title to a residence lot in Oakland. Issues were joined on both complaint and cross-complaint. Defendant C. R. Fancher having died prior to trial, his widow, Dorothy H. Fancher, as administratrix of his estate, was substituted in his place as defendant and cross-complainant. Plaintiff was denied relief, and said administratrix had judgment quieting her title against plaintiff. Defendants D. H. and Kate Duncanson were declared bona fide incumbrancers of said property under the title of said defendant.

Both parties deraigned title from common grantors, Stanley N. Forsman and wife. Plaintiff's claim rests upon the following documents and proceedings, to wit:

A deed executed and delivered by said grantors to Rosie Guaragna, wife of Luigi Guaragna, dated August 12, 1925, and a deed of trust by said grantee conveying the legal title to Nonesiatina Lucchesi and Pietro Lucchesi, as trustees, to secure a note for the sum of $8,500, payable to Angelo Lucchesi; also proceedings regular on their face foreclosing said deed of trust and the sale thereunder and the purchase thereat of said property by plaintiff and the receipt by him of a trustees' deed in regular form purporting to convey said property to him. Plaintiff, in his complaint, set forth the foregoing facts in detail and joined a second count therein tendering the general issue to quiet title.

Defendants offered no oral testimony, but rested their entire case upon certain court proceedings and a certain deed. The court proceedings were of those found in the Matter of James Guaragna, Bankrupt, No. 14786, in the Southern Division of the United States District Court for the Northern District of California, Second Division. Said bankrupt is the son of the above-named Rosie and Luigi Guaragna. The deed relied upon by defendants is a quitclaim deed dated December 13, 1926, covering said property, naming J. Costello, the trustee of said bankrupt, as grantee, and the following persons as grantors: Luigi Guaragna and Rosie Guaragna, his wife, Angelo Lucchesi, Nonesiatina Lucchesi and his wife, Pietro Lucchesi, a single person, James Guaragna and his wife. The validity of the sale under said bankruptcy proceedings and the validity of said deed will be considered in the order named.

On December 21, 1925, an involuntary petition in bankruptcy was filed against the said James Guaragna and on January 6, 1926, he was duly adjudicated a bankrupt. On said December 21st, at the time of the institution of the proceedings, the said J. Costello was appointed a receiver of the bankrupt estate and on January 26, 1926, he was named trustee in bankruptcy of said estate. The pertinent documentary evidence introduced was the following:

An order to show cause and restraining order, dated February 10, 1926, made by the referee in bankruptcy, directing said Luigi Guaragna, Rosie Guaragna, Albert Russello, Angelo Lucchesi, Nonesiatina Lucchesi, Pietro Lucchesi, and James Guaragna, to show cause on the 16th day of February, 1926, why they should not turn over the possession of the real property here in suit to the trustee in bankruptcy; also why said Rosie and Luigi Guaragna should not be directed forthwith to convey the equitable title to said property to said trustee and why Angelo Lucchesi and the trustees in said deed of trust, Nonesiatina and Pietro Lucchesi, should not forthwith make a reconveyance of

the legal title thereto, and why an order quieting title of the trustee to said property should not be made against them and why certain other relief, not here material, should not be granted.

This was followed by a judgment and decree taken by default which purported to direct the said Rosie and Luigi Guaragna to convey said real property to said trustee in bankruptcy and surrender possession thereof to him. It further purported to direct said Angelo Lucchesi and Nonesiatina and Pietro Lucchesi to convey the legal title to said property, free of the incumbrance of said deed of trust, and gave further extraordinary and extensive equitable relief, such as appointing a commissioner, E. C. Street, and directing him to execute said conveyances in case said parties failed for the period of ten days to themselves so do.

Another document is entitled a commissioner's deed, purporting to be a deed executed by said commissioner appointed under said decree, conveying said real property to said trustee in bankruptcy and making a reconveyance of the property held by said trustees, as directed in said decree.

Another document is an order confirming the sale of said real property, dated December 9, 1926; the sale having been made on August 19, 1926, to Charles R. Fancher. This last-mentioned order recited that said Angelo Lucchesi and all the other above-named parties appeared through their attorney Joseph P. Lacey and objected to the confirmation of said sale, and that said objections were overruled.

Still another document is a trustee's deed, dated December 9, 1926, purporting to convey said real property, pursuant to said sale, to said Charles R. Fancher, the purchaser.

[1, 2] It will be noted that there is an entire absence in the record not only of the petition supporting said order to show cause above referred to, but also of proof that a copy of either the order to show cause or the petition was served upon any of the said parties, particularly Angelo Lucchesi. It is true that the decree recites service upon and the presence of these parties both by counsel and in person, but the uncontradicted evidence of several witnesses showed clearly that no such service was made nor was Angelo Lucchesi present, either in person or by counsel, to answer said order to show cause. In fact, the proof established that a subpœna to appear at 2 o'clock on the 15th day of January, 1926, to be examined in relation to said bankruptcy, was the only paper served upon Angelo Lucchesi or any other of the parties mentioned in said decree. We are pointed to no authority which sustains a default decree against a person in the position of Angelo Lucchesi. It is true the attack here is collateral, but this decree would seem clearly to be in no different status than a decree of a sister state or foreign country. In such cases it is always competent to impeach the judgment or decree by showing that in fact process upon which it is based was never served. In re Estate of Pusey, 177 Cal. 367, 170 P. 846; In re Estate of Pusey, 180 Cal. 368, 181 P. 648; Delanoy v. Delanoy, 216 Cal. 27, 34, 13 P.(2d) 719, 86 A. L. R. 1321. We know of no law that clothes the orders or decrees of a referee in bankruptcy with any presumption of jurisdiction over strangers to the proceeding.

[3, 4] We are also of the view that upon the recitals of the decree itself the referee never acquired jurisdiction to enter it, even though the parties voluntarily appeared in said proceeding and merely objected to the jurisdiction of the referee to proceed. The propriety of a court in bankruptcy making a decree, in a summary proceeding, binding on third persons, to turn over to the trustee of a bankrupt estate property held by them is a question that has received extended treatment by the federal courts and the gist of the rulings thereon seems to be that to authorize such a proceeding, possession of the property, either actual or constructive, must be in the bankruptcy court. For illustration, such as where it was in the physical possession of the debtor at the time of the filing of the petition in bankruptcy but not delivered to the trustee, or where delivered to the trustee, it had been taken from him by a third person or where the property is in the hands of the bankrupt's agent or bailee. A yet further element must be present, to wit: The claim of the third party must not be bona fide but merely colorable. Taubel-Scott-Kitzmiller Co. v. Fox, 264 U. S. 426, 44 S. Ct. 396, 68 L. Ed. 770; also, In re Bastanchury Corporation (C. C. A.) 62 F.(2d) 537, 542.

It is true that here the decree and the order to show cause do recite that the real estate involved was in the possession of said parties as agents of the bankrupt; still the further facts shown are that the property was in the possession of two of said parties under a deed thereto from persons other than the bankrupt, which deed antedated the proceeding in bankruptcy; also that there existed thereon a deed of trust in favor of another of the third parties, which likewise

antedated the bankruptcy proceeding; also that the parties appeared at the time mentioned in the order to show cause and asserted orally their claims to said property and questioned the jurisdiction of the court to proceed and demanded that a plenary action be initiated rather than a summary proceeding.

We are referred to no case which sustains a summary proceeding under such circumstances. We here see equitable powers of the most far-reaching character employed to secure specific performance, cancellation of instruments, appointment of a commissioner and quieting title, followed by a further provision which empowered the marshal to take possession of the property from the said parties and deliver it to the trustee. We think no authority can be found to support such action under the circumstances. A claim may be fraudulent and still be adverse and substantial. Johnston v. Spencer (C. C. A.) 195 F. 215; Mueller v. Nugent, 184 U. S. 1, 22 S. Ct. 269, 46 L. Ed. 405. Indeed, the federal District Court itself would not have jurisdiction of a plenary suit for this relief except under certain contingencies applicable to all civil actions. Bardes v. Hawarden Bank, 178 U. S. 524, 20 S. Ct. 1000, 44 L. Ed. 1175. We think that the facts of this case make applicable the doctrine of Louisville Trust Co. v. Comingor, 184 U. S. 18, 25, 22 S. Ct. 293, 46 L. Ed. 413, where it was held that only by plenary action could the trustee in bankruptcy secure property from an assignee where the assignment antedated the bankruptcy proceeding. It was there further held that an informal protest to the jurisdiction was a sufficient appearance. See, also, Crews et al. v. Folds, 160 Ga. 22, 127 S. E. 281, 6 A. B. R. (N. S.) 127, where the Georgia Supreme Court made a holding in complete accord with the views we have here expressed.

In fact, in a recent case, Wight v. Street, 63 F.(2d) 80, 81, which involved a decree presumably of this same referee, appointing this same commissioner to make a transfer of real property, in substantially the same kind of a situation, we find that the Circuit Court of Appeals of the Ninth Circuit held a plenary action was required and closed its opinion with the following language: "Our conclusion is that the bankruptcy court was without jurisdiction of the merits in a summary proceeding. As said by the court in Shea v. Lewis (C. C. A. 8) 206 F. 877, 884: 'We adhere to the wholesome rule "which assures a trial of the merits of" such claims "in a plenary suit at law or in equity under the rules of pleading, of practice, and of evidence, that wisdom and experience have found most conducive to the discovery of the truth and the administration of justice." In re Rathman, 183 F. 913, 929, 106 C. C. A. 253, 269.' This rule is especially applicable where, as here, the order directs the conveyance of the title to real property by a stranger to the bankruptcy proceeding."

[5] We next pass to consideration of the quitclaim deed executed after sale of the property and, in the same connection, the waiver of the right to seek a review of the order confirming the sale to said Charles R. Fancher. The answer to the cross-complaint herein, respecting said deed, pleads: "That the alleged deed alleged to have been executed by Luigi Guaragna (et al.) * * * to J. Costello, as trustee (etc.) * * * in the answer of the defendants herein, was at the time it was made, ever since has been and now is void and of no effect, and in this connection alleges: that on or about the 13th day of December, 1926, and prior to the alleged making of said deed, said J. Costello * * * and others acting as his agent and on his behalf, did menace and threaten to criminally prosecute said Angelo Lucchesi, Nonesiatina Lucchesi, Pietro Lucchesi, Rosie Guaragna, and Luigi Guaragna with arrest under criminal warrant, and did menace and threaten to criminally prosecute said alleged makers of said deed, for an alleged violation of the National Bankruptcy Laws, and did menace and threaten said Angelo Lucchesi, Nonziatina Lucchesi and Pietro Lucchesi with the loss of all their properties unlawfully, if (they) * * * Rosie Guaragna and Luigi Guaragna, did not sign said alleged deed * * * and thereby putting said makers of said alleged deed in fear of the loss of their liberties and properties, and thereby, and solely by reason thereof, were induced to and did sign said alleged deed. That said signing, or execution, of said alleged deed was without any consideration whatsoever. * * * That by reason of the aforesaid acts, conduct, menace, threats and duress, and lack of consideration said alleged deed is of no effect and void."

Execution of the above-mentioned waiver was part of the transaction respecting said deed. The court below made no finding at all on this issue of coercion and duress. We think the plaintiff was entitled to a finding on this defense to the cross-complaint. The evidence shows without substantial contradiction that these documents were both executed by parties under the fear of criminal prosecutions, amid tears and turbulence.

The further fact is that soon after execution of said deed, the parties whose rights are here involved were in fact indicted, prosecuted, and acquitted of the charges which were the basis of the action of the referee in making the above-considered decree. It is true that $1,000 was paid for said deed by the trustee, but the receipt for same was executed by Luigi Guaragna alone, and not by the material party here, Angelo Lucchesi, who testified that he received no part thereof.

[6, 7] The claim that respondents did not apply the coercion that forced the deed is immaterial to this inquiry, because the deed was secured subsequent to the purchase by Charles R. Fancher and subsequent also to the deed by the trustee to him. He was therefore not in the position of a bona fide purchaser relying upon this deed. Moreover, he had actual knowledge of the adverse claims of said parties at the time of his purchase and, still further, a purchaser is bound at his peril to know whether or not on the face of the record the court is proceeding within its jurisdiction in making a sale to him.

It follows from the foregoing that, upon the record as it now stands, the judgment must be reversed, and it is so ordered.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; CURTIS, J.



1 Cal.(2d) 229

KALASH v. LOS ANGELES LADDER CO. (ASSOCIATED INDEMNITY CORPORATION, Intervener).

L. A. 12725.

Supreme Court of California.

July 2, 1934.

Rehearing Denied July 30, 1934.

1. Negligence ⇐27

Common law generally protects manufacturers against claims of third persons, not direct purchasers, for personal injuries from using manufacturers' products.

2. Negligence ⇐136(18)

Whether 40-foot extension ladder having defective rung was imminently dangerous instrument *held* jury question.

3. Trial ⇐296(3, 4, 5)

In action for breaking of ladder manufactured and sold by defendant to plaintiff's employer, instructions charging defendant practically as insurer, and omitting contributory negligence and proximate cause, *held* prejudicially erroneous, notwithstanding proper definitions of "contributory negligence" and "proximate cause" elsewhere in charge.

LANGDON, CURTIS, and SEAWELL, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; W. A. Anderson, Judge.

Action by John Kalash against the Los Angeles Ladder Company, wherein the Associated Indemnity Corporation intervened. Judgment for plaintiff, and defendant appeals.

Reversed.

Prior opinion, 28 P.(2d) 29.

Dave F. Smith and Birney Donnell, both of Los Angeles, for appellant.

Haight & Trippet, Horton & Horton, Joseph K. Horton, and Guy B. Graham, all of Los Angeles, Robinson, Price & Macdonald, of Oakland, and Joseph H. Weisman, G. C. De Garmo, and W. M. Crane, all of Los Angeles, amici curiæ.

Syril S. Tipton, of Los Angeles, for intervener and respondent.

L. J. Styskal, of Los Angeles, for respondent.

Livingston & Livingston, O'Melveny, Tuller & Myers, Walter K. Tuller, and Jackson W Chance, all of Los Angeles, amici curiæ.

PRESTON, Justice.

Plaintiff, a painter by trade, acting in the course of his employment, on April 8, 1929, was standing on the next to the top rung of a forty-foot extension ladder, hanging window screens on the outside of an apartment house in Los Angeles owned by Hart Brothers Company, his employer. While so engaged, the rung of the ladder on which he was standing collapsed, due to its defective condition, and plaintiff was thereby precipitated a distance of some thirty feet to the sidewalk and sustained serious and permanent physical injuries. The Los Angeles Ladder Company, defendant and appellant here, manufactured the ladder on a date subsequent to January 1, 1929, and sold it to said employer on March 8, 1929.

Plaintiff brought this action against said defendant, charging it as manufacturer with negligence in the construction of the ladder and further charging that the ladder was such an instrumentality as to be imminently dangerous when defectively constructed or assembled. Plaintiff had verdict and judgment thereon. Defendant moved for a new trial and also for judgment notwithstanding the verdict. Both motions were denied and defendant later appealed from the judgment.

[1] We are aware that a ladder is a rather simple tool and that no contractual privity existed between plaintiff and defendant. We further realize that the common law, as a general rule, throws a strong arm of protection around the manufacturer, warding off claims of third persons, not direct purchasers, for personal injuries sustained from use of articles so manufactured and sold by him. But we are at the same time in full sympathy with the acknowledged exceptions to this general rule and also with the trend of judicial decisions which extend these exceptions to include additional classes of cases not heretofore included. The language of Mr. Justice Cardozo, while a member of the New York Court of Appeals, in the case of MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050, 1053, L. R. A. 1916F, 696, Ann. Cas. 1916C, 440, seems appropriate: "We hold, then, that the principle of Thomas v. Winchester [6 N. Y. 397, 57 Am. Dec. 455] is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. That is as far as we are required to go for the decision of this case. * * * In such circumstances, the presence of a known danger, attendant upon a known use, makes vigilance a duty. We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law."

The same learned justice, in his work entitled "The Growth of the Law," comments further upon this subject as follows (The Growth of the law, 1924 Ed., p. 77): "The development is merely a phase of the assault, now extending along the entire line, upon the ancient citadel of privity. In New York, there is a remedy in tort regardless of privity, against the negligent manufacturer, where the subject of the manufacture is likely to be dangerous to life. MacPherson v. Buick Mfg. Co., 217 N. Y. 382 [111 N. E. 1050, L. R. A. 1916F, 696, Ann. Cas. 1916C, 440]. The things classified as dangerous have been steadily extended with a corresponding extension of the application of the remedy. They began with Thomas v. Winchester, 6 N. Y. 397 [57 Am. Dec. 455], and the sale of poisons. They have been widened until they include a scaffold (Devlin v. Smith, 89 N. Y. 470 [42 Am. Rep. 311]) or an automobile (MacPherson v. Buick Mfg. Co., supra), or even pies or cakes when nails and other foreign substances have supplied ingredients not mentioned in the recipes of cook books."

This same tendency in England is noted in a recent decision by the House of Lords, styled Donoghue v. Stevenson, [1932] A. C. 562, where the subject received extensive consideration and the doctrine announced by Mr. Justice Cardozo was approved.

This court has marched in complete step with these advancing judicial pronouncements. Witness among others the recent case of Dahms v. General Elevator Co., 214 Cal. 733, 740, 7 P.(2d) 1013, 1016, where it is said: "In many jurisdictions, in recent years, there has been a marked tendency to extend the exception under discussion beyond inherently dangerous articles to those articles which are reasonably certain to place life and limb in peril if negligently prepared or constructed. (Citing cases.)" See also, to the same effect: Hall v. Barber Door Co., 218 Cal. 412, 23 P. (2d) 279, and Kolberg v. Sherwin-Williams Co., 93 Cal. App. 609, 613, 269 P. 975, and Cliff v. California Spray Chemical Co., 83 Cal. App. 424, 257 P. 99.

[2] We feel that no good purpose will be served by attempting to review at length the wide range of discussion that has attended the progressive development of the rules of law now governing causes involving this subject. Sufficeth it to say that from the principles stated we easily conclude that it was a proper question of fact for the jury as to whether or not an extension ladder of recent manufacture, when used as plaintiff was using it, became, because of defective construction or assembling, an instrument imminently dangerous to human life or limb.

But whether or not, as contended by appellant, the evidence shows, as a matter of law, freedom from actionable negligence in the construction and assembling of said ladder, presents a question not so easily resolved. In this behalf the court instructed the jury as follows: "Because they are alleged by the plaintiff to be true, and are not denied by the defendant, the following facts are deemed to be proved: That if there were any defects in material, workmanship or construction, such defects were not possible of discovery by general observation or superficial examination; that if any such defects existed, they were hidden, latent and invisible. * * *"

The effect of this instruction was practically to exonerate the plaintiff from the charge of contributory negligence, but it also had the effect of strengthening defendant's claim that it used ordinary care in the manufacture of said ladder. It practically reduced the case to one where the judgment of an expert in the texture of woods alone might have detected infirmity in the rung. Whether the standard of manufacture in the trade required the employment of such an expert does not clearly appear nor does it clearly appear that the employees of defendant were not such experts. Moreover, the experts who testified for plaintiff were so shaken and weakened upon cross-examination as to practically demonstrate the unreliability of their opinions.

The undisputed facts shown by defendant respecting manufacture of the ladder were as follows: Defendant has been engaged in the ladder manufacturing business for many years, employing competent and skilled workmen, mechanics, laborers, and foremen. It constructs annually some 200,000 ladders of the type here involved. Apparently, in constructing the ladder and finishing the rung in question, defendant pursued its customary course substantially as follows: The rung was one of many thousands included in a carload purchase from a lumber and hardwood dealer of good repute in the trade, the quality of whose wares is generally respected; when delivered it had been cut to size so that it was only necessary for defendant to fix the ends to fit into the sides of the ladder. The said carload was ordered by sample, selected from a number of samples of good material by defendant's general manager, who had had some twenty years' experience in the purchasing of ladder material. Upon arrival of the carload, the material and samples were compared by said manager and two experienced men; they were found to tally; hence, the lumber was accepted, went into stock and from it were finished the rungs of the ladder in question. Before going into stock, however, different tests were made on a set of samples taken from the lot. One or two pieces were put in a vise and struck with a ten-pound sledge for a test of strength. Another piece was taken and put between two side rails; a rope was thrown over the rung from which a platform was hung and a test of 800 pounds was put on it.

The ladder in question was made from said stock subsequent to January 1, 1929, or within a few months from the time of its purchase. In process of manufacture the ladder, and said rung, went through many hands. The rung was tenoned to fit into the ladder, that is, the ends were shaped and slightly reduced to fit the sides. In this process the rung was handled three times by the operator, the grain of wood was observed and the weight test given. Any brashness or defect, if obvious, would have been detected by the feel in the "heft" of the piece. It was customary to handle one rung at a time in process of tenoning. Thereafter the rungs went to another department to be tested and placed. As each rung was placed, it was nailed in and the sound, when it was struck with a hammer, would indicate any defect or unsoundness. After being assembled, the ladders were again inspected in the shipping and sales department. It was customary to follow each of the above-mentioned steps in the construction of the ladders and to have an experienced operator for each and every handling of each and every rung thereof. The ladders were sold unpainted, with nothing covered or concealed.

The showing of plaintiff contrary to that above set forth was: He produced two expert witnesses who in substance stated that the rung was faulty and that they could have discovered its brash substance by an inspection thereof; that had they been manufacturers they would have rejected it as unfit ladder rung material and, moreover, that an ordinary mechanic or workman would not have been able to detect its infirmity. This evidence was developed largely upon cross-examination by defendant's attorney, his theory evidently being that if it took experts in wood textures to discover the defect, then defendant could not be charged with lack of ordinary care in the premises. Both of said experts, however, were put to a practical test, on cross-examination, by exhibiting to them for their inspection and judgment, certain specimen rungs designated as Exhibits A, B

and C. Witness Rigelsberger testified that Exhibit A was a brash piece of wood and unfit for use and that Exhibits B and C were tough, strong and reliable pieces of wood. Witness Wohlman testified that Exhibit A was a good piece and that Exhibit C was brash and unfit. Exhibit A was then put to a weight test and not only stood the standard test of 800 pounds, but actually stood 936½ pounds before fracturing. Exhibits B and C also withstood the 800-pound test successfully. As already noted, neither party produced evidence setting up the standard of care obtaining among manufacturers of ladders. This standard may or may not require the submission of each finished product to the judgment of an expert, experienced in the classification of textures of woods. We are therefore hesitant to apply the rule of substantial conflict of evidence to this verdict.

[3] It is not necessary, moreover, to definitely declare as a matter of law the absence of proof of negligence for we are clearly of the view that many of the instructions of the trial court to the jury were so erroneous and confusing as to require a reversal of this judgment. For instance, plaintiff's instruction No. 11 was as follows: "It is true as a matter of law that cases may arise in which without the privity of contract, breach of duty arising as a matter of law may be imputed to the defendant. If you find from the evidence that the accident happened through the character of the ladder being imminently dangerous and plaintiff was injured because of the imminently dangerous character of the ladder without knowledge on his part of the imminently dangerous character thereof, and if you find that plaintiff himself was not guilty of contributory negligence proximately related to the accident in question, you will find a verdict in favor of the plaintiff."

This was a so-called formula instruction, but it omitted the rule of proximate cause. More than this, it did not require that negligence of defendant be shown at all, but charged it with liability practically as an insurer, it being only necessary to show that the ladder was in fact inherently dangerous and of which fact plaintiff was ignorant.

Another formula instruction requested by plaintiff and given was No. 14, as follows: "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If, to the element of danger, there is added knowledge that the thing will be used by persons other than the purchaser, and used without due test, then, irrespective of any privity of contract the manufacturer of this thing of danger is under duty to make it carefully. And if you find from the evidence that the defendant did not construct the ladder carefully, it breached a duty it owed to plaintiff and you will consequently find in favor of the plaintiff."

That instruction omitted both contributory negligence and proximate cause and predicated liability solely upon a failure to construct the ladder "carefully" without attempting to define an applicable standard of care. It assumed that the ladder was an instrument of danger, which was a question of fact for the jury.

Again, at the request of plaintiff, the court, after declaring, in instruction No. 20 and the first part of instruction No. 21, the warranty undertaken by a manufacturer with a purchaser respecting latent defects, used the following language: "If you find, however, that no contractual relationship existed between the plaintiff and defendant, and therefore, the warranty above mentioned is not applicable, I further instruct you that regardless of the warranty and regardless of contractual relationship between the parties, the defendant is liable if the article is imminently dangerous, and that fact is unknown to the plaintiff who is injured as a result of such imminently dangerous character of the article."

This instruction seems clearly to charge defendant as an absolute insurer and to emphasize the fact by contrasting this liability with that of the warranty of a manufacturer to his purchaser.

In apparent contradiction of the above, the court, at whose request it is not shown, instructed the jury as follows:

"Instruction No. 42. If you find from the evidence that defendant had no knowledge of any defect in the ladder that would render it inherently dangerous, your verdict will be for defendant."

"Instruction No. 46. If you find from the evidence that the ladder was sold to plaintiff's employer and that it was in fact defective and inherently dangerous when sold; and if you also find from the evidence that defendant believed it to be free from defects and not inherently dangerous, your verdict will be for defendant.

"Instruction No. 47. Unless you find from the evidence that defendant concealed from

plaintiff the danger arising from defects in material, workmanship or construction of the ladder, your verdict will be for defendant."

Having in mind the state of the evidence, as above noted, we think the jury should have had a clearer and more accurate statement of the law applicable to the case. We are of the view that the defendant suffered material prejudice from this failure. We say this too notwithstanding the fact that contributory negligence and proximate cause were, in other parts of the charge, properly defined.

Judgment reversed.

We concur: WASTE, C. J.; SHENK, J.; THOMPSON, J.

LANGDON, Justice (dissenting).

I dissent. The majority opinion holds that a duty of care was owed to plaintiff, and the only remaining question is whether the jury were justified in finding a violation of such duty, that is, in finding that the dangerous condition of the ladder was a result of negligence on the part of defendant. The only defect was in the rung. It was made of oak, a wood generally approved for the use to which it was put, but the particular piece was "brash" or brittle, and incapable of supporting any substantial weight. It had been purchased by defendant from a concern in Arkansas as part of a carload lot of over 100,000 rungs. The evidence shows that less than a dozen rungs out of the carload had been taken out and specially examined for defects, and that the only other testing was by the observation of the workmen who assembled the ladders. If they felt, in handling a rung, that it was too light, a sign of brashness, they would discard it. The rungs of the assembled ladders were also struck with a hammer to ascertain defects through the sound. It therefore appears that no scientific test was made of each rung, either prior to or after its insertion in the ladder, the matter being left to the ordinary observation of the workmen. Whether this constitutes negligence depends upon an answer to two questions: Could the workman accurately determine brashness in wood through observation; and could an expert discover it by some reasonable and not impracticable test? In view of the settled rule limiting the power of an appellate court to reach a conclusion on the factual question of negligence different from that reached by the jury, I am of the opinion that the evidence, coupled with legitimate inferences, makes out a case for the plaintiff. Plaintiff's witnesses, properly qualified as experts, testified that the ordinary mechanic or mill workman could not, by simple observation, determine the strength of the wood; and that an expert, by observation of the ends, as cut, could make such a determination. Whether the cross-examination of these witnesses weakened their testimony is also, of course, a question for the jury.

In the construction of an article which, when used, may if defective become highly dangerous to human life, I think the evidence shows too low a degree of care. Conceding that the jury may not arbitrarily set a standard beyond that recognized in the community, it does not follow that the customary practice of the defendant, which indicates some degree of care, sufficiently meets the standard. The danger to human life involved in the use of a defective extension ladder was such as to require a higher degree, and the jury's verdict therefore finds support in the evidence. See 20 R. C. L. sec. 18; 19 Cal. Jur. 579.

The defects in the instructions were all cured by proper qualifying instructions, and I cannot agree that the jury were in any way confused by them as to the simple issue of negligence presented by the facts.

I think the judgment should be affirmed.

We concur: CURTIS, J.; SEAWELL, J.

1 Cal.(2d) 291

In re LIND'S ESTATE.

SOULE et al. v. TAAFFE et al.

S. F. 15057.

Supreme Court of California.

July 17, 1934.

Executors and administrators ⇐454

Writ of execution may be employed to subject judgment defendant's interest in decedent's estate as legatee under will to satisfaction of judgment (Code Civ. Proc. §§ 561, 688).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Proceeding by John J. Taaffe and another, executors of the last will and testament of C. Lind, also known as Charles Lind, deceased, for settlement of their account and distribution, to which G. R. Soule and another objected. From a decree of distribution and an order denying objectors' motion to amend the decree, they appeal.

Reversed.

William Sea, Jr., of San Francisco, for appellants.

Joseph C. Haughey, of San Francisco, for respondents.

SHENK, Justice.

On February 7, 1933, Charles Lind died testate in the city and county of San Francisco. On September 2d of the same year the executors of his will filed their first and final account and petition for distribution, including a bequest of $4,333.34 in cash to William Lyons, a legatee under the will. Judgment creditors of Lyons filed their objections to the petition for distribution based on the following facts: In an action in the superior court in and for the city and county of San Francisco, A. B. Walcott in 1918 obtained a judgment against said legatee Lyons. The appellants are the owners of said judgment by assignment. On July 22, 1933, on order of court, an execution was issued on said judgment and a copy thereof, with the sheriff's notice attached, was on August 7th filed by the sheriff in the office of the county clerk in the matter of said probate proceedings. On the same day a copy of said execution with sheriff's notice was served on one of said executors. When the matter of the settlement of the account and petition for distribution came on for hearing, on September 14th, counsel for the judgment creditors presented an objection to the petition on the ground that said levy of execution on the interest of William Lyons in said estate was not mentioned in the petition, as provided in section 561 of the Code of Civil Procedure. Notwithstanding the objection, the court settled the account and ordered distribution in accordance with the prayer of the petition. The objectors then moved the court, on notice, to amend the decree of distribution by inserting therein an order directing sufficient of said cash legacy to William Lyons to be delivered to the sheriff to satisfy the amount due on said judgment. The motion was denied. The owners of said judgment, Soule and Best, have prosecuted an appeal from the decree of distribution and from the order denying their motion to amend the decree.

The pertinent part of section 561 of the Code of Civil Procedure provides: "The interest of a defendant in personal property belonging to the estate of a decedent, whether as heir, legatee or devisee, may be attached by serving the personal representative of the decedent with a copy of the writ and a notice that said interest is attached. * * * A copy of said writ of attachment and of said notice shall also be filed in the office of the clerk of the court in which said estate is being administered and the personal representative shall report such attachment to the court when any petition for distribution is filed, and in the decree made upon such petition distribution shall be ordered to such heir, legatee or devisee, but delivery of such property shall be ordered to the officer making the levy subject to the claim of such heir, legatee or devisee, or any person claiming under him. The property shall not be delivered to the officer making the levy until the decree distributing such interest has become final."

Section 688 of the Code of Civil Procedure contains the provision that money and other property, real or personal, or any interest therein, of a judgment debtor, are liable to execution, and that debts and credits and all other property, both real and personal, or any interest therein "may be levied upon or released from levy in like manner as like property may be attached or released from attachment."

No reason has been pointed out, and we perceive none, why the writ of execution may not be employed in the same manner and with the same effectiveness as the writ of attachment as provided in section 561. The writ of execution involved herein was issued and was

served and filed as provided in said section for the service and filing of the writ of attachment, and should be given like effect. It was thereupon the duty of personal representatives of the decedent to report said execution when the petition for distribution was filed. Failing in that respect, the judgment creditor properly called the attention of the court, on motion, to the omission, and the decree of distribution should have been made to provide for distribution to the legatee of the amount of the legacy, when the decree should become final, but that the delivery of the money be made to the officer making the levy, subject to the claim of the legatee or any person claiming under him.

The decree and order are reversed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; PRESTON, J.



1 Cal.(2d)288

WILSON v. JOHNSON et al.

Sac. 4880.

Supreme Court of California.

July 16, 1934.

Appeal and error ⇐480

Proceedings on judgment directing assignment to plaintiff of shares of corporate stock standing on books of company in names of defendants who had beneficial ownership therein and right of possession subject to escrow would not be stayed, where defendants did not comply with statute requiring that in order for such proceedings to be stayed, documents required to be assigned should be placed in custody of such officer or receiver as court might appoint (Code Civ. Proc. § 943).

In Bank.

Action by Alex E. Wilson against Jack Johnson and others, wherein judgment was entered directing assignment to plaintiff of certain shares of corporate stock standing on the books in the names of defendants. On application by Jack Johnson and another, for supersedeas to stay proceedings on the judgment.

Application denied.

Frank J. Fontes, of San Francisco, for appellants Jack Johnson and Patrick J. Sullivan.

Sterling Carr and Louis Glicksberg, both of San Francisco, for respondent.

PRESTON, Justice.

It is the plain duty of appellants to comply with the requirements of section 943 of the Code of Civil Procedure in order to effect a stay of proceedings on the judgment in the court below, from which they have appealed.

The judgment directs the assignment to plaintiff and respondent of certain shares of corporate stock standing on the books of the company in the respective names of the appellants. They, too, have the beneficial ownership of said certificates and the right of possession, subject only to the escrow in which they are held to await compliance with certain restrictions imposed by the commissioner of corporations. The judgment directs an assignment and delivery subject to the escrow restrictions.

The case of Baar v. Smith, 201 Cal. 87, 255 P. 827, relied upon by appellants, is not applicable, as the holding there was predicated upon both the absence of title and possession and beneficial ownership, which the court held sufficient to make applicable section 949 of the Code of Civil Procedure instead of the previous section noted above.

The application is denied.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.



1 Cal.(2d) 269

JULIAN v. SCHWARTZ et al.

L. A. 14609.

Supreme Court of California.

July 11, 1934.

1. Appeal and error ⇐448

Appeal from judgment does not divest trial court of jurisdiction to deal with ancillary receiver and funds or property held by him.

2. Appeal and error ⇐82(1)

In action to determine interests in oil wells and production proceeds, where appeal from judgment determining rights and interests of parties is pending, subsequent order discharging receiver or trustee appointed to operate wells and directing him to pay over the money or property acquired and

held by him is appealable as "special order made after final judgment" (Code Civ. Proc. § 963).

[Ed. Note.—For other definitions of "Special Order," see Words & Phrases.]

3. Appeal and error ⇐478

In action to determine interests in oil wells and production proceeds, where appeal from judgment determining rights was pending, and trial court announced intention to discharge trustee who had been appointed and direct him to pay over money or property acquired, application for writ of supersedeas in respect of the threatened order *held* premature, since order would be appealable, and, on such appeal, supersedeas could be applied for (Code Civ. Proc. § 963).

In Bank.

Action by C. O. Julian against W. A. Schwartz, who filed a cross-complaint against plaintiff, L. V. Redfield, and others, and the Barnhart-Morrow, Consolidated, the Citizens' National Trust & Savings Bank of Los Angeles, and others. From a judgment, W. A. Schwartz appeals, and L. V. Redfield and others filed a petition for writ of supersedeas to stay the proposed enforcement of the judgment.

Order to show cause discharged, and petition denied.

Olson & Olson, of Los Angeles, for petitioners Redfield et al.

Hanna & Morton and Fredericks, Hanna & Morton, all of Los Angeles, for appellant Schwartz.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for respondents.

Hunsaker & Cosgrove, of Los Angeles, for respondent Citizens' Nat. Trust & Savings Bank.

Moote & Longcroft, of Los Angeles, for respondents A. L. Jameson and Santa Fé Springs Oil Co.

WASTE, Chief Justice.

This action was brought to have the ownership of, and certain conflicting rights and interests in, certain oil wells and the proceeds of production therefrom judicially determined. At the commencement of the action, and pursuant to stipulation, receivers were appointed to take charge of and operate the wells and conserve the net proceeds. From time to time the receivers resigned and trustees were appointed, also pursuant to a stipulation, to operate the wells and impound the funds received. A "nominal" receiver was appointed to carry on litigation affecting funds due the prior receivership from persons purchasing oil from the wells. This "nominal" receivership is still in effect, and is not affected by the proposed order here sought to be restrained. At the conclusion of the trial, the court determined the rights and interests of the several parties in and to the several wells and leases involved. Petitioners, being dissatisfied with the judgment as entered, prosecuted an appeal to this court, which appeal is now pending. Subsequent to the taking of the appeal, the respondents in this proceeding moved the trial court for an order requiring the trustees to render an accounting and to disburse the impounded funds to the several parties determined to be the owners of interests in the wells and leases, and to deliver possession of the wells to the party from whose possession they had been taken when the action was commenced and who was adjudged by the trial court to be entitled thereto. After hearing upon the motions, the trial court announced its intention to grant the same, whereupon the petitioners commenced this proceeding for a writ of supersedeas to stay the proposed "enforcement" of the judgment pending disposition of the appeal on the merits. An order to show cause why a writ of supersedeas should not be granted was issued, with a temporary stay, and the matter is now before us for determination.

[1] Examination of the authorities indicates that an appeal from the judgment does not serve to divest the trial court of jurisdiction to deal with an ancillary receiver (the equivalent of which we have before us in the present case) and the funds or property held by him. Baughman v. Superior Court, 72 Cal. 572, 14 P. 207; Havemeyer v. Superior Court, 84 Cal. 327, 382, 383, 24 P. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192; Broder v. Conklin, 121 Cal. 289, 53 P. 797. The rule is generally stated in 2 California Jurisprudence, 479, § 226, as follows: "Upon an appeal from a judgment the functions of an ancillary receiver are not necessarily suspended during the appeal; neither is the power of the court to remove or suspend him superseded by the appeal."

[2, 3] However, an order such as is proposed to be here made discharging the receiver or trustee and directing him to pay over the money or property acquired and held by him is appealable as a special order

after final judgment. Section 963, Code Civ. Proc.; Broder v. Conklin, supra; Hidden v. Jordan, 1 Cal. Unrep. Cas. 216; 22 Cal. Jur. 550, § 142. This being so, the present application for a writ of supersedeas is premature. If and when the order here sought to be restrained is made, the petitioners may, if they be so advised, prosecute an appeal therefrom. Upon such appeal it will be proper for petitioners to apply for a supersedeas which this court may issue in the inherent exercise of its appellate jurisdiction, in the event it be determined that such a writ is both proper and essential to maintain the status quo pending disposition of the appeal from the judgment.

The order to show cause is therefore discharged, and the petition for a writ of supersedeas denied without prejudice.

We concur: SHENK, J.; LANGDON, J.; PRESTON, J.; CURTIS, J.



1 Cal.(2d) 289

FARRIS v. PACIFIC STATES AUXILIARY CORPORATION et al.

S. F. 14992.

Supreme Court of California.

July 17, 1934.

Appeal and error ⇐1127

On motion to affirm judgment because appeal was frivolous, respondent had burden of showing wherein record contained necessary evidence to justify directed verdict for it.

In Bank.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Fred Farris against the Pacific States Auxiliary Corporation and another. From a judgment for defendants, plaintiff appeals, and named defendant files a motion to affirm the judgment.

Motion denied.

Leon French, of San Francisco, and Fred W. Lake, of Los Angeles, for appellant.

John L. Mace, of Los Angeles, for respondents.

PER CURIAM.

Motion to dismiss appeal or affirm judgment. On the hearing we denied the motion to dismiss appeal and submitted for decision the motion to affirm the judgment.

The judgment appealed from was upon a directed verdict at the close of the entire evidence in the case. The grounds set forth in the motion of respondent Pacific States Auxiliary Corporation to affirm the judgment are that the appeal is frivolous and that the questions presented are so unsubstantial as not to need further argument. No argument was therefore presented in said respondent's points and authorities accompanying its motion to affirm judgment to refute the contention appearing in appellant's brief. The action is for the possession of an apartment house and its furnishings. The appellant, who was the plaintiff in the action, contends in his brief on appeal that at the trial he made out a prima facie case in his favor. He refers to certain evidence in the reporter's transcript which tends to support this contention. If he is correct in this contention, then the motion for a directed verdict was erroneous as the issue under such circumstances became one of fact to be decided by the jury. Possibly there is evidence in the record which will explain the evidence relied upon by the appellant and demonstrate its lack of probative value. The record with its exhibits consists of something over three hundred pages of typewritten matter. We hardly feel that it is the duty of this court to spend its time in an exhaustive examination of this record in order to ascertain whether or not it contains the necessary evidence to justify the trial court's order granting the respondent's motion for a directed verdict. This burden, we think, should be assumed by the respondent.

The motion, therefore, to affirm the judgment is denied, and the respondent is given thirty days from the date of this order in which to file its brief in reply to that of the appellant.

139 Cal.App. 584

NORDIN v. EAGLE ROCK STATE BANK et al.

Civ. 5093.

District Court of Appeal, Third District, California.

July 6, 1934.

Rehearing Denied Aug. 4, 1934.

Hearing Denied by Supreme Court Sept. 4, 1934.

1. Appeal and error ⇐110

Appeal does not lie under statute from order denying motion for new trial (Code Civ. Proc. § 963).

2. Appeal and error ⇐931(1)

Where trial court found under conflicting evidence that custom of bank authorizing officers to collect funds from customers outside of bank for deposit did not exist, reviewing court must assume such practice did not exist, and that bank did not authorize officers to collect deposits outside bank.

3. Banks and banking ⇐106

While bank is ordinarily liable to customers on principle of debtor-creditor relationship only when money is actually deposited in bank with officers authorized to accept it, bank will be responsible for deposits collected by such officers outside bank when that procedure is authorized.

4. Banks and banking ⇐118

Authorization of bank officers to receive deposits outside bank may be established by proof that such practice was followed with knowledge of bank, express or implied, and prior usage of bank in that regard may be controlling as to its liability.

5. Banks and banking ⇐106

In absence of authorization to bank officers to accept deposits outside bank, bank president became depositor's agent in accepting such a deposit, and, where money never reached bank, bank was not liable.

6. Banks and banking ⇐106

In absence of authorization to bank officers to accept deposits outside bank, officers accepting such deposits become depositor's agents to convey funds to bank, but such agency ceases when money actually reaches bank, and it then becomes duty of officers to properly credit it to account of depositor, and officers' misappropriation of funds is breach of trust for which bank is liable.

7. Banks and banking ⇐106

Bank president has authority to receive money for deposit.

8. Banks and banking ⇐106

Bank *held* liable to depositor for bank officers' misappropriation of money accepted outside bank for deposit, where money reached bank and was deposited therein, but by subsequent transaction bank president persuaded cashier to draw check on bank for money which he appropriated.

9. Banks and banking ⇐106

Check indorsed "for deposit in bank" to order of depositor was notice to bank to which it was presented by bank president that it was payable only to depositor for credit to his account, and bank became liable to depositor by paying amount of check to bank president (Civ. Code, § 3117).

Appeal from Superior Court, Los Angeles County; W. T. O'Donnell, Judge.

Action by C. O. Nordin against the Eagle Rock State Bank and Monterey Park Commercial & Savings Bank. From an adverse judgment, plaintiff appeals.

Reversed, with directions.

Holbrook, Taylor, Tarr & Horton and Joseph K. Horton, all of Los Angeles, for appellant.

Goudge, Robinson & Hughes and David A. Sondel, all of Los Angeles, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an action for money had and received. From a judgment in favor of defendants, plaintiff has appealed.

The record is voluminous and contains much immaterial matter. However, from the record we glean the following material facts:

In August, 1926, defendant Eagle Rock State Bank, hereinafter for convenience referred to as Eagle Rock Bank, and defendant Monterey Park Commercial & Savings Bank, hereinafter referred to as Monterey Park Bank, were each state banking corporations, organized under the laws of the state of California. Eagle Rock Bank was located at Eagle Rock, Los Angeles county, and Monterey Park Bank at Monterey Park in the same county. For some time prior to August, 1926 and up to about October 5, 1926, one I. Klein was the president of both said banks. Plaintiff Nordin was, prior to and during August, 1926, a depositor in Eagle Rock Bank, but was not at any time a depositor in or patron of Monterey Park Bank.

On August 10, 1926, by appointment arranged by telephone, at the instance of Nordin, I. Klein met Nordin in the city of Los Angeles, and received from Nordin checks aggregating the sum of $7,400. This amount

was made up of one check for $6,000 written by Nordin at the time on the Bank of Italy, being plaintiff's exhibit No. 6, as follows:

"No. ———

"Head office San Francisco. 16–104 Broadway Branch, Broadway at Seventh Street.

"Bank of Italy, Los Angeles, Cal.
8–10–1926

"Pay to the order of Eagle Rock State Bank $6000.00 Six thousand Dollars.

"[Signed] C. O. Nordin

"(Endorsements)

"Paid 8–11–26. Eagle Rock State Bank, By I. Klein, Pres."

And one check for $1,000, Plaintiff's Exhibit No. 9, as follows:

"16–1

"The Farmers' and Merchants' National Bank of Los Angeles, No. 177175.

"Los Angeles, Cal. Aug. 10, 1926.

"Pay to the order of: Chas. K. Atlass $1000.00 One Thousand Dollars Exactly Dollars. (Signature illegible), Cashier

"W. J. Cassin, Accountant.

"Cashiers Check

"Paid 8–12–26

"(Endorsements)

"Chas. R. Atlass. Pay to order of C. O. Nordin, C. O. Nordin.

"For deposit in Bank to order of C. O. Nordin.

"Pay to the order of Any Bank or Banker, all prior Endorsements guaranteed. Aug. 11, 1926. Monterey Park Commercial and Savings Bank. 90–1066."

The record does not show the check or checks which made up the balance of $400 included in the total amount, nor does it appear what disposition Klein made of the remaining $400 in checks. On receiving the checks from Nordin, I. Klein signed and gave him a receipt or credit statement, plaintiff's Exhibit No. 21, as follows:

"Los Angeles, 8–10–26.

"Received of C. O. Nordin for deposit in Eagle Rock State Bank checks totalling $7400.-00 Seventy-four hundred dollars. E. R. S. Bank per Pres. I. Klein."

On several occasions prior to August 10, 1926, Nordin had, after getting in touch with Klein, by telephone or otherwise, delivered to Klein outside of the bank, checks to be deposited to the credit of Nordin in the Eagle Rock Bank and received from him receipts similar to Plaintiff's Exhibit No. 21. On each of those prior transactions Klein had made the deposits in Eagle Rock Bank as per his instructions from Nordin. No part of the $7,400 delivered by Nordin to Klein on said date above mentioned was ever deposited to the credit of Nordin. The cashier of Eagle Rock Bank, one J. S. Abbott, knew that Klein on many occasions brought deposits to said bank for depositors, and that other employees of the bank also brought into the bank deposits for customers of the bank. The plaintiff testified that, prior to the time plaintiff intrusted the president of Eagle Rock State Bank with the checks for deposit in that bank to his credit, he had talked with the cashier of that bank who corroborated the practice of the bank to accept deposits outside of the bank by the officers thereof, and he had seen a sign displayed in the bank notifying its customers that, "For the convenience of the depositors we will call for your deposits."

Klein took Nordin's $6,000 check drawn on the Bank of Italy to the Bank of Italy, indorsed it "Eagle Rock State Bank, by I. Klein, President," and exchanged it for a Bank of Italy cashier's check, payable to Eagle Rock State Bank, in the sum of $6,000. The $1,000 check, when delivered to Klein by Nordin, bore the indorsement: "Pay to the order of C. O. Nordin, C. O. Nordin. For deposit in bank to order of C. O. Nordin." Klein took the $1,000 check to the Monterey Park Bank and exchanged it for $1,000 in currency. He then went to the Eagle Rock Bank and presented the $1,000 in currency and the cashier's check on the Eagle Rock Bank for $6,000 and requested a cashier's check by the Eagle Rock Bank for $7,000, payable to his wife Rebecca Klein. The president then misappropriated the $7,000 to his own use. He absconded with the money.

The plaintiff brought suit against the Eagle Rock State Bank and the Monterey Park Commercial & Savings Bank, jointly, for money had and received by those banks in the sum of $7,400, and interest thereon at the rate of 7 per cent. per annum from August 10, 1926, which is the date upon which the money was misappropriated by the president of both banks. The court adopted findings in accordance with the foregoing statement of facts, except that it was found that the Eagle Rock Bank did not authorize its officers to follow the custom of collecting money from its depositors outside of the bank. On the theory that the general rule of law requires the funds of a depositor to be actually paid into the bank to hold it liable to the owner thereof on the principle of the creation of a relationship of debtor and creditor, the court further found that the president of the

banks, in taking charge of the plaintiff's money outside of the bank, thereby became the agent of the plaintiff and thus absolved the bank of liability for the misappropriation of the funds. A judgment was accordingly rendered to the effect that the plaintiff take nothing in this action. A motion for new trial was denied. From that judgment the plaintiff has appealed. He also gave notice of appeal from the order denying plaintiff's motion for new trial.

[1] It has been repeatedly held that an appeal does not lie under the provisions of section 963 of the Code of Civil Procedure from an order denying a motion for new trial. Erreca v. Los Banos Cotton Gins, Inc., 96 Cal. App. 783, 274 P. 1041; Marston v. Pickwick Stages, Inc., 78 Cal. App. 526, 248 P. 930; Jedlicka v. Atwell Land Co., 93 Cal. App. 455, 269 P. 665, 270 P. 232. The attempt to appeal from that order is therefore ineffectual.

The by-laws of the Eagle Rock Bank authorized its president to execute contracts, sign all checks, notes, or drafts, and all other documents or instruments in the name and on behalf of the corporation.

The appellant contends that the court's finding to the effect that the Eagle Rock Bank did not establish a custom authorizing its officers to collect the funds of its depositors outside of the bank, is not supported by the evidence; that the undisputed record establishes the fact that that custom did prevail, and that the practice constituted such officers its agents for that purpose, making the Eagle Rock Bank liable to the plaintiff for the entire $7,400 and interest thereon, on account of its misappropriation by the president; that the $1,000 check which was especially indorsed "Pay to order of C. O. Nordin, C. O. Nordin. For deposit in Bank to order of C. O. Nordin," gave notice to the Monterey Park Bank, where the check was cashed by the president of that bank, that it was to be credited to the plaintiff's account, rendering that bank liable to the owner for the last-mentioned sum; that with respect to the $6,000 check, regardless of the existence of a custom of the Eagle Rock Bank authorizing its officers to collect funds for deposit outside of the bank, that check, together with the proceeds of the $1,000 check, actually did reach the bank and was mingled with the funds of that bank, after which the president of the bank became the agent and trustee of the bank in the performance of his official duty to see that it was properly credited to the account of the plaintiff, and that the irregular act of the cashier drawing a cashier's check for $7,000, payable to the wife of the president, renders the bank liable to the plaintiff for the subsequent embezzlement of the $7,000 by its president.

[2] Regarding the custom of the bank authorizing its officers to collect funds from its customers for deposit outside of the bank, while several other witnesses did testify to having paid funds to the officers of the bank outside of the bank for deposit therein and the plaintiff made several previous deposits through the president in that same manner and the plaintiff testified that the cashier, in a conversation with him, corroborated the existence of that custom, and that he personally saw the notice displayed in the bank that "For the convenience of the depositors we will call for your deposits," it is nevertheless true that the finding of the court, to the effect that the custom did not exist, is supported by the evidence of Coughlin, the teller of the bank, and by Long, a director of the bank. Since there is a conflict of evidence regarding the custom, we must therefore assume the practice did not exist, and that the bank did not authorize its officers to collect deposits outside of the bank.

[3, 4] While it is true that a bank is ordinarily liable to its customer on the principle of a relationship of debtor and creditor only when money is actually deposited in the bank with officers who are authorized to accept the deposit, there can be no doubt that the bank will be responsible for deposits which are collected by such officers outside of the bank when that procedure is duly authorized by the bank. That authorization may be established by proof that such practice was followed with knowledge of the bank, either express or implied. The prior usage of the bank in that regard may be controlling as to its liability. Carpy v. Dowdell, 115 Cal. 677, 47 P. 695. It has been held that knowledge of the usage of the bank need not necessarily be extended to all customers of the bank. Under some circumstances it may be sufficient to bind the bank if, with the knowledge of the directing officers of the bank, it had previously dealt with the particular depositor in that manner. It is said in 1 Morse on Banks and Banking (6th Ed.) page 31, § 9, that: "A course of dealing between the bank and a single person may establish obligations as to its continuance, and, if nothing is provided to the contrary, will govern subsequent transactions, of the same nature, between them."

While the record in the present case contains persuasive evidence of the practice of

the Eagle Rock Bank to collect deposits outside of the bank, still there is substantial evidence to support the finding of the court that it was not done with the knowledge or consent of the bank. Therefore, on appeal we must assume that usage did not prevail.

[5] In the absence of authorization on the part of the bank for its officers to collect funds outside of the bank for deposit therein, we must assume that the president became the agent of the plaintiff for the purpose of conveying the money to the actual custody of the bank, and that the $400 which never did reach the bank, but which was evidently misappropriated by the president before it reached the bank, is merely a personal liability of the president and not a liability of the bank. The plaintiff is therefore not entitled to judgment against the defendant banks, or either of them, for this sum of $400 which was misappropriated by the president.

[6-8] Conceding the rule of banking law relied upon by the respondents in this case to be as announced in the text of Morse on Banks and Banking (5th Ed.) page 381, to the effect that ordinarily, in the absence of a custom of the bank to the contrary, "Where money is offered for credit on a deposit account it is clear that it should not be accepted away from the bank. The bank does not contemplate any such method of receiving deposits, but has provided an entirely different system," and recognizing the justice of the further rule declared in the text of Paton's Digest, 1926, vol. 1, p. 296, par. 1778, that "Until the money [which is paid to an officer of the bank outside of the bank] is actually put in the bank's possession at the bank, the cashier is agent of the depositor and not of the bank, and the bank is not liable if the money is not in fact paid over to it," these principles are readily distinguishable from the facts of the present case with relation to the two checks of $6,000 and $1,000, the proceeds of which did actually reach the Eagle Rock Bank.

While it is true that, in the absence of authorization of a bank for its officers to collect deposits from customers outside of the bank, such officers become the agents of the depositors for the purpose of conveying the funds to the custody of the bank, nevertheless, in good conscience and reason, that agency will cease when the money actually reaches the bank and is mingled with its funds. The officers thereafter become the agents of the bank, in the fulfillment of their trust as such officers, to see that the money is properly credited to the accounts of the depositors according to their directions. As the Supreme Court says in the case of Modesto Lumber Co. v. Wylde, 217 Cal. 421, at page 425, 19 P.(2d) 238, 239: "The agency conferred upon the contractor by intrusting the check to him was merely that of a messenger." After the money actually reaches the bank, as it did in the present case, it was a breach of trust for which the bank is liable, for the president to thereafter misappropriate the funds. When the money actually reached the bank it became the duty of the president, as such, to properly credit it to the account of the plaintiff. There is no doubt the president of a bank has the authority to receive money for deposit. It is said in Magee on Banks and Banking (2d Ed.), page 287, section 176: "The president of a bank, by inherent power, has the right to receive a deposit for the bank." 2 Michie on Banks and Banking, p. 889, sec. 121 [3]. In the present case, the president actually did convey the $7,000 belonging to the plaintiff to the Eagle Rock Bank and deposited it therein. The $6,000 check was made payable to that bank. The $1,000 check had been cashed, but the proceeds were deposited with the other check. The funds represented by those two checks must therefore be deemed to have been thereby mingled with the funds of the bank, and the relationship of debtor and creditor was immediately established between the bank and the plaintiff. Thereafter, the cashier, at the request of the president, performed the irregular act of drawing the bank's check for $7,000 in favor of the wife of Mr. Klein. Klein received that cashier's check and absconded with the money of the bank. The cashier knew that transaction was irregular. He merely carried out the instructions of the president on account of his confidence in him as the chief officer of the bank. In response to the court's question, "Well did you follow your general and usual custom in the transaction of this business that you did in connection with this seven thousand dollar check?" the cashier replied, "Well, if it had been an outside party, it would have probably been different, but Mr. Klein was the president of the bank."

We are of the opinion that since the money of the plaintiff, in so far as the $7,000 is concerned, actually reached the Eagle Rock Bank and was deposited therein by the president, the requirement of the law to the effect that the money of a depositor shall actually be placed in the bank, was fulfilled, and the subsequent transaction by means of which the president persuaded the cashier to draw a check upon the bank for $7,000 of its

money, which he appropriated to his own use, was a violation of the trust of an authorized agent of the bank, which makes the bank liable to the plaintiff in a suit for money had and received. National Bank of San Mateo v. Whitney, 181 Cal. 202, 183 P. 789, 8 A. L. R. 298; Sudakovich v. Central Bank of Bingham, 62 Utah, 24, 218 P. 113.

[9] One other problem remains to be determined on this appeal. The appellant contends that the Monterey Park Commercial and Savings Bank is also liable to the plaintiff to the extent of the $1,000 check, for the reason that it wrongfully cashed that check by paying to the president of that institution the amount thereof in spite of the fact that the check was especially indorsed by the plaintiff with the restriction requiring the payment thereof to be deposited in the bank to his account. It is claimed this limited indorsement was notice to the bank that the title to the check had not passed to the holder thereof. At the time the check was presented to the Monterey Park Bank, of which Klein was then the president, it was clearly indorsed by Nordin, who was the owner thereof, "for deposit in bank." The check reads:

"16–1.

"The Farmers' and Merchants' National Bank, of Los Angeles. No. 177175.

"Los Angeles, Cal. Aug. 10, 1926.

"Pay to the order of: Chas. K. Atlass $1000.00 One Thousand Dollars Exactly Dollars. (Signature illegible), Cashier

"W. J. Cassin, Accountant

"Cashiers Check

"Paid 8–12–26

"(Endorsements)

"Chas. R. Atlass. Pay to order of C. O. Nordin, C. O. Nordin.

"For deposit in Bank to order of C. O. Nordin.

"Pay to the order of Any Bank or Banker, all prior Endorsements guaranteed. Aug. 11, 1926. Monterey Park Commercial and Savings Bank. 90–1066."

Clearly this indorsement was notice to the Monterey Park Bank, to which it was presented by the president of that bank, that it was payable only to C. O. Nordin for credit to his account. It was notice to the bank that further negotiation of the check was specifically prohibited by the owner thereof. Section 3117 of the Civil Code provides that:

"An indorsement is restrictive, which either—

"(1) Prohibits the further negotiation of the instrument; or

"(2) Constitutes the indorsee the agent of the indorser; or

"(3) Vests the title in the indorsee in trust for or to the use of some other person."

This check was not indorsed payable to Klein. Even if it had been so indorsed with the special limitation clearly implied by the language employed, that it was "for deposit in bank to order of C. O. Nordin," it would be notice to the bank that the holder or indorsee was a mere agent of the indorser for the purpose of carrying out the specific direction to deposit it in the bank to the credit of Nordin. It is said in 8 Corpus Juris, page 365, section 544: "A restrictive indorsement operates as notice to all persons that the indorser has not parted with his title to the instrument, and did not intend to transfer it or its proceeds to the indorsee [or holder], but constituted him merely his agent for collection; and any subsequent holder taking the instrument from the indorsee takes it as trustee of the real owner, and will be liable to him for the instrument or its proceeds when collected."

The cashing of this check appears to have been a clear violation of the language of the indorsement on this $1,000 check, which limited its payment to the sole purpose of depositing the proceeds thereof in the bank. We are therefore of the opinion that the Monterey Park Bank was placed on notice by the language of the special indorsement that Klein was not the owner of the check, and that that bank became liable to the plaintiff by paying that amount to the president of the bank. The evidence is uncontradicted that the money was subsequently paid to the Monterey Park Bank from the account of the drawer thereof in the Farmers' and Merchants' National Bank.

The judgment is reversed, with directions to the trial court to render judgment against the Eagle Rock State Bank for the sum of $6,000, with interest at the rate of 7 per cent. per annum from August 10, 1926, and against both the Eagle Rock State Bank and the Monterey Park Commercial & Savings Bank, jointly, for the further sum of $1,000, and interest at the rate of 7 per cent. per annum from the last-mentioned date.

We concur: PULLEN, P. J.; RANKIN, Justice pro tem.

RUCKSTELL CORPORATION, Limited, v. GREAT LAKES AIRCRAFT CORPORATION.*

Civ. 8301.

District Court of Appeal, Second District, Division 2, California.

June 26, 1934.

Hearing Granted by Supreme Court July 26, 1934.

Appeal and error ⇐832(1)

Petitioner for rehearing *held* not prejudiced because author of opinion adverse to petitioner was not present in court when order of submission was made, where petitioner submitted case without argument on briefs filed.

Appeal from Superior Court, Los Angeles County; Allan B. Campbell, Judge.

On petition for rehearing.

Petition for rehearing denied.

For prior opinion, see 33 P.(2d) 32.

O'Melveny, Tuller & Myers, Homer I. Mitchell, and Albert Parker, all of Los Angeles, for appellant.

Kaye & Johnstone, of Los Angeles, for respondent.

PER CURIAM.

Petition for rehearing denied.

We were familiar with the "evidence" petitioner asserts is in conflict with that quoted and relied on in the opinion, and, except as to the immaterial fact as to whether the witness Van Sicklen "resigned" or "was discharged," see no conflict. In our opinion, the following is a fair sample of such "evidence" petitioner says was omitted: Referring to a conversation the witness Ruckstell had with the executives of defendant corporation, he said: "I informed him [Van Sicklen] as to my arrangement with Tex Rankin; I told him what took place in Los Angeles." Instead, we set out the statements of "what took place" from the mouths of said witness and his private secretary. Petitioner complains that the correspondence on behalf of plaintiff set out in the opinion was written "for the sole purpose of clearing up an error which had been made by the shipping department of defendant in its monthly report to the government." The evidence does not show that it was an error, and the report made of sales to the Rankin Company seems to be strictly in accord with the conclusion we have been forced to reach, supported by such evidence as well as the evidence of said Ruckstell, his secretary, and the books of plaintiff corporation. No doubt the letters were written for the purpose of licensing the planes, but it is not asserted that they do not speak the truth; and no way, except by drawing inferences from other inferences directly opposed to the clear statement of facts related, are we able to arrive at an inference even suggesting that any other agreement existed than the one pointed out in the opinion.

We see no merit in the contention that petitioner was prejudiced because the author of the opinion was not present in court when the order of submission was made, inasmuch as respondent submitted the case without argument on the briefs filed.

In re GRANT'S ESTATE.

WOODWARD et al. v. GRANT.†

Civ. 1147.

District Court of Appeal, Fourth District, California.

June 23, 1934.

Hearing Granted by Supreme Court Aug. 20, 1934.

1. Executors and administrators ⇐224

That claim against estate may be contingent is no excuse for failure to present it (Probate Code, § 707).

2. Executors and administrators ⇐231

Where certain creditors of deceased collected debts by offsetting them against their debts to widow, executrix, she, not filing her claim within time limited, was not entitled to credit therefor under statute authorizing payment of debts bearing interest, whether filed or not under court order (Probate Code, § 733).

3. Executors and administrators ⇐231

As respects deceased's debts paid by offset against creditors' debts to widow, executrix, she, not filing claim, was not entitled to credit under statute authorizing payment of debts bearing interest, though not filed, where estate was insolvent, since there were not "sufficient funds properly applicable thereto" within statute (Probate Code, § 733).

Probate Code, § 733, provides that, if any debt of decedent bears interest, whether filed or presented or not, execu-

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 40 P.2d 499.

†For subsequent opinion see 43 P.2d 266.

tor may, by order of court, pay amount then accumulated, or any part thereof, at any time there are sufficient funds properly applicable thereto, whether claim is then due or not, and interest shall thereupon cease to accrue on amount paid.

4. Courts ⇐200¼

Though superior court is court of general jurisdiction, yet, when sitting in probate, it must administer statutory probate system and in doing so may exercise equity jurisdiction.

5. Courts ⇐200¼

Equity powers of superior court sitting in probate are exercised as if incidental to powers in probate matters, to extent necessary to complete administration and distribution of estate, provided nothing is done in contravention of statutes.

6. Executors and administrators ⇐231

Generally claims against estate not presented within time limited in notice to creditors or as extended by statute are barred forever (Probate Code, §§ 702, 707).

7. Executors and administrators ⇐316

Common-law right of personal representative of deceased to retain sufficient assets to pay his debts does not survive ex proprio vigore in state, but personal representative is reduced to position of complete equality with other creditors (Probate Code, § 703).

8. Executors and administrators ⇐109(1)

Right of deceased's personal representative to reimbursement for disbursements made in course of administration belongs to him because he has expended moneys after decedent's death in process of administering estate and as part of discharge of duties, and is merely right of trustee to be reimbursed for lawful expenditures (Probate Code, § 703).

9. Executors and administrators ⇐109(1)

If deceased's personal representative makes disbursements from his own funds as lawful expenditures, he is entitled to credit on accounting (Probate Code, § 929).

10. Executors and administrators ⇐506(1)

When disbursements by personal representative for which credit is sought were in payment of claims that should have been presented but were not, representative has burden to bring himself within statutory exception to general rule that only claims presented may be paid (Probate Code, §§ 703, 707, 929).

11. Executors and administrators ⇐231

Where certain creditors of deceased collected debts by offsetting them against their debts to widow, who was executrix, but she did not file claim within time limited and estate was insolvent, she was not entitled to participate in division of net residuum applicable to payment of creditors (Probate Code, §§ 703, 707, 929).

12. Executors and administrators ⇐508(1)

Provision in order settling account requiring executrix to reserve sufficient funds to discharge any inheritance tax due state would not be deleted because estate was insolvent, where record showed deceased had transferred property upon trusts in his lifetime and effect on tax claim was uncertain.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

America W. Grant, as executrix of the will of Ulysses S. Grant, Jr., sometimes known as U. S. Grant, Jr., deceased, filed her account, and, from an order settling the account, Henry T. Woodward and others, trustees of George J. Keating Medical Fund, objectors, appeal.

Order modified, and, as modified, affirmed.

Harrison G. Sloane, of San Diego, for appellants.

Wright, Monroe, Thomas & Glenn, of San Diego, for respondent.

HAINES, Justice pro tem.

Respondent, America W. Grant, is the widow of Ulysses S. Grant, Jr., and executrix of his will. The estate, as shown by her final account, is insolvent, and, by the order settling the first account of the executrix, it is determined that, after payment of such funeral expenses and expenses of administration as are entitled to priority, other than executrix' commissions and attorneys' fees, the executrix is chargeable with $2,443.11, out of which it is adjudged that she may pay herself $129.60, being three-fourths of her statutory fees; to her attorneys the sum of $129.60, being three-fourths of their statutory fees, and shall reserve for payment of the balance of such fees, the sum of $86.40; that she shall pay or reserve a sufficient fund to discharge any inheritance tax due the state of California, and shall thereupon prorate the balance upon the following demands:

S. A. Reed	$ 457.03
Trustees George J. Keating Medical Fund	3764.94
America W. Grant	7851.44

From this order the trustees of the George J. Keating Medical Fund, a charitable endow-

ment, appeal. The record shows that the said trustees had, out of said fund, loaned $7,200 to the decedent individually prior to his marriage with said America W. Grant, on his promissory note secured by a mortgage upon property which, in ordinary times, should have been sufficient in value to insure payment of the note. Respondent, America W. Grant, got no part of the proceeds of the loan but, after decedent's marriage to her, he transferred the mortgaged property to a trust of which she was one of the beneficiaries. Eventually the loan was renewed, and, though decedent alone signed the new note, Mrs. Grant joined with him in signing the mortgage which contained an agreement to make certain payments and voluntarily paid appellants $1,200 from her own moneys, as interest from time to time accruing. Default being thereafter made, appellants, as trustees of the medical fund, foreclosed the mortgage and at the foreclosure sale the mortgaged property brought only $5,000, leaving a deficiency for which judgment was docketed against decedent's estate and as to $922.41 of it against Mrs. Grant also. This $922.41 she paid from her own funds. After its payment, the remainder of the deficiency judgment docketed against the estate was $3,764.94.

On October 9, 1929, U. S. Grant Hotel Company was indebted to Mrs. Grant, but contrariwise decedent and his wife had, on September 26, 1929, the date of decedent's death, been jointly indebted to the said hotel company to the extent of $1,759.44, which indebtedness the hotel company collected by offsetting it against its debt to Mrs. Grant. Similarly Bank of Italy National Trust & Savings Association was indebted to Mrs. Grant, but decedent and Mrs. Grant were, at the date of decedent's death, jointly indebted to it in the balance of $6,092 of principal and interest on a promissory note, which indebtedness the bank collected by offsetting it against its debt to Mrs. Grant.

The trial court found that, with respect to the $922.41 which Mrs. Grant paid on the deficiency judgment in favor of the medical fund trustees and with respect to the $1,759.44 and the $6,092 which she in effect paid to the U. S. Grant Hotel Company and to the bank, respectively, she was, as between the decedent and herself, merely a guarantor for him, but that, as to the creditors, both decedent and she were jointly and severally liable.

Within the time allowed for the presentation of claims against decedent's estate, the said S. A. Reed presented his claim for $457.03, and appellants, as trustees of the medical fund, presented their claim on their mortgage note on which as we saw there has since resulted the said remaining deficiency judgment of $3,764.94, both of which claims were duly allowed and filed, but Mrs. Grant omitted to present any claim for all or any part of the moneys paid out by her or charged against her on account of the said items for which, as between decedent and herself, she was merely the guarantor.

The effect of the order now appealed from is to permit her to share in the division of the balance now adjudged to be available for prorate among the creditors of the estate on the same basis as though, within the time for presentation of claims, she had presented and there had been allowed a claim on her part to be reimbursed for the said sums charged against her by the hotel company and the bank, respectively, aggregating $7,851.44, but not to allow her any reimbursement for any of said payments theretofore made by her on the said obligation to appellants.

[1] The orderly administration of estates has been found to require the provision of some method whereby, within a time limited by statute, creditors shall normally be required to present their claims, and this subject was therefore dealt with by the enactment of what was formerly chapter 6 of title 11 of part 3 of the Code of Civil Procedure, the subject-matter of which is now transferred with various changes to article 1 of chapter 12 of division 3 of the Probate Code. Whereas, at common law, if the creditor of a decedent were made an executor of his will or administrator of his estate, such creditor became entitled as of right (24 C. J. 436) and without special formality, to retain so much of the assets in his hands as were sufficient to pay his debt in preference to all other creditors of equal degree, provision was in this state made, originally in the Probate Act, but later in section 1510 of the Code of Civil Procedure, and provision is now made in section 703 of the Probate Code, for the presentation, in due form by an executor or administrator who is also a creditor of the estate, of his own claim which, if allowed, "must be paid as other claims in due course of administration" and is thus given no priority. In the present case it is appellants' contention that Mrs. Grant, having as between herself and the decedent been the guarantor of his indebtedness to the U. S. Grant Hotel Company and the Bank of Italy National Trust & Savings Association, respectively, was contingently as to such indebtedness a creditor of his estate, and might have filed in due course

her claim as such; that once she had paid such indebtedness she became an absolute creditor of the decedent's estate and might have filed her claim as such, but that, having failed in either capacity to file any such claim, she is now barred from participating in the prorating between the claimants of the available assets. The circumstance that a claim may be contingent is no excuse for a failure to present it. Probate Code § 707. See, also, former section 1493, Code Civ. Proc.; Verdier v. Roach, 96 Cal. 467, 31 P. 554; Fratt v. Hunt, 108 Cal. 288, 292, 41 P. 12; Miller v. Miller, 171 Cal. 269, 271, 272, 152 P. 728.

Under the Probate Act it was held in Estate of Taylor, 10 Cal. 482, and reiterated in Estate of Taylor, 16 Cal. 434, by the Supreme Court speaking in each case by Mr. Justice Field, that the failure of an executor to present his claim to the judge within the time allowed for the presentation of the claims of other creditors bars the claim and that if, without presentation of such claim within such time, the executor has paid the debt due him from funds of the estate, he will not be allowed credit in his accounts therefor. Appellants also rely on In re Estate of Card, 64 Cal. App. 268, 222 P. 145, which involved these facts: A decedent dying in Oklahoma had in his lifetime conveyed his lands there situate to two minor sons and signed certain checks by use of which his adult daughter, a resident of California, after his death withdrew certain funds that he had in bank in Oklahoma with which she proceeded to pay some debts of the decedent there as well as the expense of her trip to Oklahoma and return "to conserve property of deceased" and also the fare of the minor sons to California. The deceased had left a parcel of land of small value in California, and the daughter, on her return to this state, commenced administration here on her father's estate, accounted therein for the California land and for the money that she had withdrawn from bank in Oklahoma, and, as against the assets for which she so accounted, claimed credit for her disbursements out of the Oklahoma moneys. Her account was contested by a creditor holding a California judgment against the decedent, and, the disbursements having been allowed by the superior court, its order was reversed on appeal.

[2, 3] It was provided in section 1513 of the Code of Civil Procedure, and is now provided in section 733 of the Probate Code, that: "If any debt of the decedent bears interest, whether filed or presented or not, the executor or administrator, by order of the court, may pay the amount then accumulated and unpaid, or any part thereof, at any time when there are sufficient funds properly applicable thereto, whether the claim be then due or not; and interest shall thereupon cease to accrue upon the amount so paid."

It is manifest that respondent has not brought herself within the terms of this section, for her payment of her indebtedness to the hotel company and to the bank was not made "by order of the court." Moreover, as respects these debts, since the estate was insolvent, there were not "sufficient funds properly applicable thereto." Section 1632 of the Code of Civil Procedure, however, provided and section 929 of the Probate Code now provides that: "If it appears that debts of the decedent have been paid without verified claims having been filed or presented and allowed and approved, and it shall be proven that such debts were justly due, were paid in good faith, that the amount paid was the true amount of such indebtedness over and above all payments or set-offs, and that the estate is solvent, the court, in settling the account, shall allow the sums so paid."

[4-8] Had the estate been solvent, therefore, and the executrix paid the debts to the hotel company and the bank, from its assets, it cannot be doubted that she would, under section 929, be entitled, upon the settlement of her accounts, to credit for such payments. It is respondent's claim that the purpose of the statute in thus appearing to make the solvency of the estate one of the conditions to the allowance, in the settlement of an executor's accounts, of such payments was merely to avoid any such construction of its terms as would permit credit for the payment in full of debts which, though just, were not presented as claims, while for want of sufficient assets, the debts that were presented as claims had not been so paid, and that "there is nothing * * * in the statute to indicate that it was the intention of the legislature that if the estate was insolvent no credit whatever should be allowed to the personal representative" for payments on debts not presented as claims. Respondent's contention appears to be in substance that the effect of the statutes of this state is not to abolish the common-law right of retainer but only to circumscribe and limit it; that the right of such representative was not merely to retain from the assets of the estate the amount of any debts owing absolutely to him from the decedent at the date of death, but also to reimburse himself for any payments

he might subsequently have made on account of the decedent's debts, and that section 929 of the Probate Code and the corresponding prior enactments in this state should be construed as limitations of these common-law rights rather than as creating new rights; that the provisions of the statute should be construed with the view to preserving so much of the common-law right of retainer as they do not clearly cut away, and that it ought to be held that no intention appears in the language now embodied in section 929 to further limit the right of the personal representative to reimbursement for payments made upon the decedent's debts than merely to forbid his reimbursement in full unless the estate is solvent. It seems to us, however, that these contentions are rather ingenious than sound. In general, the principle of the common law that statutes in derogation thereof are to be strictly construed is without application to our Codes which establish the law of this state respecting the subjects to which they relate. Code Civ. Proc. § 4; Civ. Code, § 4. Though a superior court is a court of general jurisdiction, yet when sitting in probate it must administer a statutory probate system. In doing so it may exercise equity jurisdiction. In re Estate of Barreiro, 125 Cal. App. 752, 764, 14 P.(2d) 786, and authorities there collected. But, as said in Verdier v. Roach, 96 Cal. 467, 478, 31 P. 554, 557, such powers are exercised by the superior courts "in connection with, and as incidental to, their powers in probate matters, to the extent necessary to a complete administration and distribution of estate; provided, of course, that nothing be done in contravention of any statutory provision." The general rule is that claims not presented within the time limited in the notice to creditors or as extended by section 702 of the Probate Code are "barred forever." Section 707, Probate Code. See former section 1493, Code Civ. Proc. The special provisions of sections 733 and 929 of the Probate Code (formerly found in sections 1513 and 1632 of the Code of Civil Procedure) above quoted, allowing in certain circumstances payments made on debts for which claims have not been presented, seem to us exceptions to the otherwise universal rule laid down in sections 700 to 703, both inclusive, and section 707 of the Probate Code and the corresponding former sections of the Code of Civil Procedure requiring the presentation of creditors' claims within the time limited, rather than merely recognitions of some survival in this state of the right of retainer as it was at common law. In our opinion the right of retainer does not survive at all ex proprio vigore in this state. On the contrary, the personal representative, if a creditor of the estate, is as to debts existent at the date of the decedent's death, reduced by our statute to a position of complete equality with other creditors; the only difference being that because of his relation to the estate a slightly different procedure is necessary for the presentation and prosecution of his claim. Moreover, we do not agree that the right of a personal representative, as such, to reimbursement for debts of the decedent that he may have paid during administration has any relation to the common-law right of retainer. The right of retainer belonged to him at common law because, being executor or administrator, he had also been a creditor of the decedent at the time of the latter's death, and it was not deemed convenient in the circumstances to place him in the same position with other creditors. The right to reimbursement, on the other hand, for disbursements made in the course of administration, belongs to him because, being executor or administrator, he has expended moneys after the decedent's death in the process of administering the estate and as a part of the discharge of the duties of his office. His right to reimbursement for expenditures so made is merely the ordinary right of any trustee to be reimbursed for expenditures made by him for the benefit of the estate intrusted to him, provided the expenditures were such as the law permitted him to make.

[9, 10] We cannot agree with appellants' counsel that any part of the test as to whether such expenditures, as made by a personal representative, ought to be allowed him on the settlement of his accounts is whether he has made them from his own funds or the funds of the estate. That distinction is beside the point. If they were disbursements that might lawfully have been made from the estate funds, but for convenience he has advanced them from his own, as is in practice often done, there is no more reason why he should not be allowed credit for the advance on his accounting than as though he had made the disbursements from estate funds in the first instance. Nevertheless, when the particular disbursements made by a personal representative, whether from his own funds or estate funds, for which credit is sought, were in payment of creditors' claims that should normally have been presented as such but were not, it is the burden of such representative, in seeking credit for the payment to bring himself within one of the statutory exceptions to the general rule that only such

claims as have been presented may be paid. To show herself to be within such an exception, respondent, America W. Grant, in the instant case has cited a variety of authorities in which disbursements by personal representatives have been allowed, such as Estate of Machado, 186 Cal. 246, 249, 199 P. 505, 506; Estate of Houston, 205 Cal. 276, 270 P. 939, 60 A. L. R. 730, allowing disbursements made in payment of just claims not presented; Burnett v. Lyford, 93 Cal. 114, 28 P. 855, allowing disbursements for the acquisition of mortgages or other outstanding claims amounting to incumbrances against estate property; Estate of Freud, 131 Cal. 667, 63 P. 1080, 82 Am. St. Rep. 407, allowing disbursements for the redemption of estate property from a mortgage foreclosure sale by payment on a mortgage lien thereon not presented as a claim, when the effect of such redemption was to prevent the loss of the property; Estate of Bottoms, 156 Cal. 129, 103 P. 849, and Estate of Fulmer, 203 Cal. 693, 265 P. 920, 58 A. L. R. 430, allowing disbursements in completing purchases of property undertaken by decedent in his lifetime; and In re Clos' Estate, 110 Cal. 494, 42 P. 971, allowing disbursements in making repairs and necessary reconstructions on property of the estate. Most of these authorities seem to us to cast little light on the case at bar. Several of them have to do merely with disbursements essential to the conservation of the assets of the estate. It is significant that in Estate of Machado, supra, which involved payment from a solvent estate of a claim found justly due but that had not at the time payment was made been yet presented, it is said: "This method of handling an estate is not to be commended, and the court should scrutinize such transactions with great care. But in this case there seems to be no doubt of the facts, and under the provisions of section 1632 of the Code of Civil Procedure the claim was properly allowed. In a thoroughly clear case the law tolerates such payments."

[11] The only California case cited, wherein disbursements from an estate which ultimately became insolvent in payment of claims not presented were allowed, is Estate of Houston, supra, and it there appeared that at the time the disbursements were made and after the time allowed for the presentation of claims had fully expired, the estate still appeared to be solvent and that its insolvency was a later development unexpectedly resulting from a judgment in a tort action brought by a party who had filed but abandoned a claim against the estate based on a contract, which tort action was not brought at all until after the time for filing claims had expired. There the court held, since the executrix, knowing that she was the sole legatee, acted in good faith in endeavoring to close the estate by clearing up all the indebtedness at a time when, to the best of her knowledge, and in fact it was solvent and apparently could not but remain so, as the period within which creditors could present their claims had expired and the claim of the party who later recovered on the tort action had been abandoned, that in these circumstances she should not be made to suffer by reason of the later insolvency, nor could said insolvency be held to retroactively invalidate said payments. The court went on to say that the holder of the tort judgment was alone at fault in having negligently allowed his rights to sleep, and hence equity would not come to his aid by disallowing the credit sought by the executrix for payment of the just but unpresented claims merely to provide a fund for the payment of the tardy tort judgment. The facts in that case were obviously distinguishable from those in the case at bar, wherein, the claim of appellant trustees having been regularly presented, a deficiency judgment on it was to be anticipated as at least possible. The only authority which respondent has been able to present that is even claimed to directly support her position with respect to the construction of section 929 of the Probate Code is In re Wiley's Estate (N. J. Prerog.) 65 A. 212, 213, which appears to have involved an asserted right of retainer and in which all that the court says is: "With reference to the right of retainer, the contention by the accountant that, although this estate is insolvent, he has the right to retain his debt in full is not supported by the law in this state, and the orphans' court correctly found that he must accept a dividend along with the other creditors of the estate." As to this decision it is enough to say that no statute seems to have been involved contemplating any presentation at all by an executor of his own claim and that the case can have little application to the construction of the statutes in this state with which we are here concerned. In fine, while we fully recognize the hardship of respondent's position, we are constrained to hold that her construction of section 929 of the Probate Code is untenable, that it is not permissible under the provisions of that section for a personal representative to pay out of an insolvent estate either all or any part of such claims as are ordinarily required to be presented unless presentation is made of the same in the manner and within the time required by law, and

therefore that respondent is not entitled to participate in the division of the net residuum applicable to the payment of creditors of the estate.

[12] Appellants further urge that the provision in the order appealed from requiring the executrix to pay or reserve a sufficient fund to discharge any inheritance tax due the state of California should be deleted for the reason that the estate is now shown to be insolvent and no share is payable to any one interested under decedent's will, as a consequence of which there can be no tax to the state. This result, however, does not necessarily follow, for the record shows that the decedent had transferred some property, at least, upon trusts in his lifetime, and we do not know what effect, if any, such transfers may have on any claim that the state of California may make for a tax.

From what has been said, it follows that the concluding paragraph of the order appealed from must be so modified as to read as follows:

"Wherefore, it is hereby ordered, adjudged and decreed that the account of said Executrix be and it is hereby settled as hereinbefore set out and such Executrix is charged with the sum of $2443.11, out of which she may pay to herself the sum of $129.60, being ¾ths of her statutory fees; to her attorneys the sum of $129.60, being ¾ths of their statutory fees, and shall reserve for payment of the balance of such fees the sum of $86.40; that she shall reserve a sufficient fund to discharge any inheritance tax due the State of California which shall be found to be payable from the moneys now found chargeable to her, and shall thereupon pro rate the balance upon the following demands:

S. A. Reed..... $ 457.03
Trustees George J. Keating Medical Fund..... $3764.94"

The order is so modified, and, as modified, is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

DODGE v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 9686.

District Court of Appeal, Second District, Division 2, California.

July 6, 1934.

Hearing Denied by Supreme Court Aug. 6, 1934.

On rehearing.

For former opinion, see 33 P.(2d) 695.

McAdoo & Neblett, of Los Angeles, for petitioner.

Everett W. Mattoon and J. F. Moroney, both of Los Angeles (S. S. Hahn, W. O. Graf, and Phi O. Clough, all of Los Angeles, of counsel), for respondent.

PER CURIAM.

Petition for rehearing denied. The opinion heretofore filed herein is amended by adding to paragraph 7 thereof, following the citation of the cases of McCormick v. Gross and Baker v. Eilers Music Co., the following: It is to be noticed that the notice of sale of said stock was dated November 15, 1932, and the date of the sale was to be January 16, 1933. The Washington suit restraining such sale was filed January 13, 1933, and necessarily the sale was postponed, taking place May 26, 1933, after the temporary restraining order was dissolved. If anything occurred after January 13, 1933, affecting the validity of said sale, it would in no way be affected by the adjudication in the Washington case, but, as to matters urged in said Washington suit as affecting the validity of said sale, it would, in our opinion, be a bar; and, while under plaintiff's complaint herein such subsequent issues, if any, would not be barred, nor would any real issue between petitioner and Scripps Newspapers, Inc., not necessarily involved in the Washington case, still in our opinion it was well within the discretion of the trial court to stay the trial until such case is finally determined.

139 Cal.App. 48

PEOPLE v. KEMP.

Cr. 2528.

District Court of Appeal, Second District, Division 2, California.

May 31, 1934.

1. Criminal law ⇐1170½(5)

In prosecution for rape and incest, exclusion of cross-examination of prosecutrix respecting physical appearance of child born to her and of question to former housekeeper whether she had seen certain young man call on prosecutrix *held* not prejudicial.

Such rulings were not prejudicial, since during lengthy examination of defendant and his witnesses he was given opportunity to fully cover all elements of defense, and there was nothing in record to indicate that excluded evidence would have affected jury's verdict even if answered in manner most favorable to defendant.

2. Criminal law ⇐670

Record *held* not to show that defendant was denied opportunity to establish his alleged impotency at time he was accused of committing rape and incest.

Record showed that defense counsel asked defendant question calling for conclusion, to which objection was sustained, and that, when counsel then started to make offer of proof, court stated it did not wish to hear any offer of proof or any argument, but added, "If you want to ask any questions go ahead, and I will rule on the objections."

3. Criminal law ⇐670

Offer of proof is not timely until proper question has been asked tending to elicit information sought and objection thereto has been sustained.

4. Criminal law ⇐1172(6)
Rape 59(9)

In prosecution for rape and incest of girl under 18, instruction authorizing conviction if sexual intercourse was accomplished with prosecutrix under 18 regardless of whether she consented *held* proper as to rape charge and as to charges of incest not prejudicial, though instruction was not intended to apply to those counts.

Instruction correctly stated law as to rape, and was not prejudicial as to charges of incest, in view of fact that relationship of uncle and niece between defendant and prosecutrix was admitted, and that other instructions were given clearly and correctly stating law as to charges of incest.

5. Criminal law ⇐823(1)

Striking out portion of instruction to effect that testimony of witness making conflicting statements or shown to be deliberately untruthful in portions of testimony should be viewed with distrust *held* not confusing, since portions deleted involved statement of proposition which every person of common sense knows or ought to know.

6. Incest ⇐13
Rape ⇐43(2)

In prosecution for rape and incest, defendant's motion to appoint doctor to examine mental and physical condition of prosecutrix presented matter which was in discretion of trial court.

7. Criminal law ⇐507(7)

Prosecutrix under age of 18 was not "accomplice" in crime of incest so as to require corroboration of her testimony.

[Ed. Note.—For other definitions of "Accomplice," see Words & Phrases.]

8. Criminal law ⇐939(2), 942(2)

Motion for new trial for newly discovered evidence was properly denied where supporting affidavit contained matters merely tending to contradict prosecutrix, and there was no showing that new witness, who was sister of defendant, could not have been produced at trial or that any effort was made to produce her.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

James Kemp was convicted of rape and incest, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

SCOTT, Justice pro tem.

Defendant was convicted of rape and incest. Four counts charged him with rape committed upon the person of a niece, and the remaining four counts charged the same acts as incest. At the time of the commission of two of the acts, the niece was sixteen years of age, and on the other two occasions she was seventeen. The jury recommended confinement in state's prison as to each count of rape. Sentence was imposed on all eight counts and was ordered to run concurrently.

In March of 1932 the complaining witness, then sixteen years old, came from her home in Tennessee to reside with her uncle, the

defendant, in California. She remained here until December of that year, when she returned to Tennessee. Four months thereafter she gave birth to a child, and in June of 1933 returned with her child to California. A few weeks later the child died, but the girl continued living with defendant until October, 1933. During the entire time she was living with defendant, and particularly on the dates charged in the information, the witness testified that repeated acts of sexual intercourse took place between them.

[1] Upon cross-examination, the prosecutrix was asked certain questions as to the physical appearance of the child born to her, and objection on the ground that it was not material was sustained. A question to a former housekeeper whether she had seen a certain young man call on the prosecutrix was similarly excluded. During the lengthy examination of defendant and of witnesses called on his behalf, an opportunity was afforded to full cover all of the elements of defendant's case upon which he relied for acquittal; and there is nothing in the record to indicate that answers to the above questions would have affected the jury's verdict even if answered in a manner most favorable to defendant. Objections were properly sustained to certain other questions asked by defense counsel which merely sought to elicit hearsay testimony.

[2, 3] Appellant contends that he was denied an opportunity to establish the alleged fact that he was physically impotent and therefore incapable of committing the acts charged. The record shows that defense counsel asked the defendant a question calling for a mere conclusion, to which objection was properly sustained. Counsel then started to "make an offer of proof," but the court stated it did not wish to hear any offer of proof or any argument, and added, "If you want to ask any questions go ahead, and I will rule on the objections." Thereupon defense counsel asked but one question: "Are you the father of Mamie's child?" to which defendant replied without objection, "I am not." The trial court did not preclude defendant from offering testimony by himself or any competent witness to establish his physical condition at the time of the acts complained of. It merely directed counsel as to the usual and proper course to be followed to establish the point in issue. An offer of proof is not timely until a proper question has been asked tending to elicit the information sought and an objection has been interposed to the question and has been sustained.

[4] The trial court gave the following instruction, among others: "The court instructs the jury that a female person under the age of eighteen years is declared by the law incapable of consenting to an act of sexual intercourse, and if you believe from the evidence in this case, beyond a reasonable doubt, that the defendant had and accomplished an act of sexual intercourse with and upon the person of the prosecutrix as charged in the information, and that the prosecutrix was, at the time said act of sexual intercourse was had and accomplished, under the age of eighteen years, and was not then the wife of the defendant, then you should find the defendant guilty, *for in such case it would be wholly immaterial whether the said prosecutrix consented to said act of sexual intercourse or not.*" Appellant urges that the italicized portion should not have been given because "complaining witness' character for chastity was put in issue and the instruction was therefore erroneous under the facts of the case." The instruction correctly stated the law as to the charges of rape and was properly given. As to the charges of incest, while the instruction was obviously not intended to apply to those counts, it was not prejudicial in view of the fact that the relationship of uncle and niece between defendant and prosecutrix was admitted. Other instructions were given which clearly and correctly stated the law as to the charges of incest.

[5] Defendant offered no instructions, but cites as error the action of the trial court in striking out a portion of an instruction, to the effect that the testimony of a witness should be viewed with distrust where such witness makes conflicting statements or is shown to be deliberately untruthful in some portions of his testimony. The instruction as given correctly stated the law and the portions deleted "involve the statement of a mere commonplace or the statement of a proposition which every person of common sense knows or ought to know." People v. Delucchi, 17 Cal. App. 96, 110, 118 P. 935, 941. Their omission cannot be said to have misled or confused the jury.

[6] Two months prior to the trial date appellant moved the court to appoint a doctor to examine the mental and physical condition of the prosecutrix and filed supporting affidavits. The motion was ordered off calendar and was not renewed. This is a matter which was in the discretion of the trial court, and there is nothing in the record to indicate that such discretion was abused, or

that the witness was not competent to testify at the trial.

[7] Appellant contends that the prosecutrix was an accomplice of defendant in the crimes of incest if the acts testified to occurred and therefore her testimony required corroboration. Being under the age of eighteen, the prosecutrix was not an accomplice, and corroboration was not required. As the court stated in People v. Stoll, 84 Cal. App. 99, 257 P. 583, 584: "If the female is the victim, and has not willfully and willingly joined in the act, she is not an accomplice, and that under our statutes, being under the age of legal consent to such an act, regardless of her actual assent thereto, she cannot be said as a matter of law to have willfully and willingly joined in the intercourse." People v. Johnson, 115 Cal. App. 704, 2 P.(2d) 216; People v. Hobday, 131 Cal. App. 626, 21 P.(2d) 1008.

[8] The motion for a new trial was properly denied. To support the motion on the ground of newly discovered evidence, an affidavit was filed containing matters which merely tended to contradict the prosecutrix, and there was no showing that this witness, sister of appellant, could not have been produced at the trial or that any effort was made to so produce her.

Judgment and order affirmed.

We concur: STEPHENS, P. J.; DESMOND, J.



139 Cal.App. 470

HORNING et al. v. GERLACH et al.

Civ. 1052.

District Court of Appeal, Fourth District, California.

June 30, 1934.

1. Automobiles ⇐181(1)

To constitute "willful misconduct" within guest statute, there must be probability or likelihood of injury resulting to guest from acts complained of; word "probable" being synonymous with "likely" (St. 1931, p. 1693, § 141¾).

"Negligence" is carelessness, whether greater or less in degree, and tends to be negative in character, while "willful misconduct" is something of a more positive nature involving the intentional doing of a wrongful act, with the intent to harm another, with an utter disregard of the consequences, or with knowledge that an injury to a guest will be a probable result, and, as used in St. 1931, p. 1693, § 141¾, may be defined as intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result.

[Ed. Note.—For other definitions of "Likely," "Negligence," "Probable" and "Willful Misconduct," see Words & Phrases.]

2. Automobiles ⇐181(7)

Motorist who, while traveling 35 or 40 miles per hour, made left turn at unobstructed intersection in place which was not in business or residential district, *held* not guilty of "willful misconduct" so as to be liable to guest who fell from automobile when door opened.

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by Grace Horning and another against Margaret Gerlach and another. Judgment for plaintiffs, and defendants appeal.

Reversed.

Stearns, Luce & Forward and Fred Kunzel, all of San Diego, for appellants.

W. K. Brown, Edgar B. Hervey, and J. Franklin Armstrong, all of San Diego, for respondents.

MARKS, Justice.

This is an appeal from a judgment rendered in an action to recover damages resulting from injuries received by Mrs. Grace Horning when she fell from an automobile driven by Mrs. Margaret Gerlach and which belonged to both defendants.

Mrs. Horning had been riding in the automobile, a sedan, as the guest of Mrs. Gerlach, for about an hour before the accident, which happened on November 25, 1931. She was sitting on the right side of the front seat next to the right front door. The automobile was being driven east of Thirtieth street in National City at a speed of between thirty-five and forty miles an hour. At L street Mrs. Gerlach made a left turn at about the same speed. The right front door opened, and

Mrs. Horning fell onto the roadway, causing the injuries for which damages were recovered.

The accident happened after the effective date of the amendment to section 141¾ of the California Vehicle Act, St. 1923, p. 517 as added by St. 1929, p. 1580 (St. 1931, p. 1693, c. 812), which eliminated the words "or gross negligence." The trial was had before the decision of any of the cases hereafter cited in which the courts attempted to define "willful misconduct" as used in the section. If the judgment before us is to be supported, it must be because of willful misconduct on the part of Mrs. Gerlach, as there is no intimation of her intoxication.

The catch on the right front door of the automobile had been giving trouble for one or two months prior to the accident. Mrs. Gerlach testified that the door had opened once while she was driving, and her husband told her it had given trouble several times while he was driving. It does not appear that it had actually opened more than the once. The lock had two positions where it would catch, and during the period above referred to the door had to be vigorously slammed shut in order to engage the second catch. If the first catch only were engaged, the door would rattle. On the one prior occasion on which this door opened Mrs. Gerlach had not noticed any rattle. On the day of the accident, after Mrs. Horning had entered the automobile Mrs. Gerlach slammed the door hard and proceeded on her journey. The door had not rattled nor had it been opened during their ride prior to the accident. There is no suggestion in the record that the place of the accident was in a business or residential district or that the intersection was an obstructed one.

An effort to define willful misconduct as used in section 141¾ of the California Vehicle Act has been made in the following cases: Howard v. Howard, 132 Cal. App. 124, 22 P.(2d) 279; Walker v. Bacon, 132 Cal. App. 625, 23 P.(2d) 520; Turner v. Standard Oil Co. (Cal. App.) 25 P.(2d) 988, 989; Olson v. Gay (Cal. App.) 27 P.(2d) 922; Forsman v. Colton (Cal. App.) 28 P.(2d) 429; Norton v. Puter (Cal. App.) 32 P.(2d) 172; Gibson v. Easley (Cal. App.) 32 P.(2d) 983; and Manica v. Smith (Cal. App.) 33 P.(2d) 418. Petitions for hearing by the Supreme Court have been denied in at least two of these cases.

In Turner v. Standard Oil Co., supra, it was said: "Respondent's right to recover is dependent upon proof of 'willful misconduct' on the part of the appellants within the meaning of section 141¾ of the California Vehicle Act, as amended in 1931 (St. 1931, p. 1693). The meaning of 'willful misconduct' has been considered in a number of cases, the reasoning of which need not be here repeated. Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A. L. R. 1327; Helme v. Great Western Milling Co., 43 Cal. App. 416, 185 P. 510; Malone v. Clemow, 111 Cal. App. 13, 295 P. 70; Howard v. Howard, 132 Cal. App. 124, 22 P.(2d) 279; Walker v. Bacon, 132 Cal. App. 625, 23 P.(2d) 520. It seems clear from the history and the wording of this statute that it was the intention of the Legislature to confine the right to recover in guest cases to instances where there appears either an intent to injure the guest or a degree of recklessness greater and beyond the gross negligence which was formerly recognized as sufficient. Negligence is carelessness, whether greater or less in degree, and tends to be negative in character while willful misconduct is something of a more positive nature involving the intentional doing of a wrongful act, with the intent to harm another, with an utter disregard of the consequences, or with knowledge that an injury to a guest will be a probable result. All of these situations include actual or implied knowedge that injury is probable. 'Willful misconduct,' within the meaning of this statute, may then be defined as intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result. * * * The burden of proof is upon a guest to establish willful misconduct within the meaning of the statute."

[1] The definition of willful misconduct has been practically uniform in all of the appellate court decisions. In Norton v. Puter, supra, a slight difference of phraseology appears where the court made the likelihood of danger instead of the probability of injury the test to be applied. Webster's Unabridged Dictionary gives "probable" as a synonym of "likely." In that case we do not understand that the court intended to weaken the rule formerly announced by the same court, and firmly adhered to in all the other cases, that there must be a probability of injury resulting to the guest from the acts complained of, to bring them within the definition of willful misconduct. In Olson v. Gay, supra, Forsman v. Colton, supra, and Manica v. Smith, supra, the same court which decided Norton

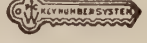
v. Puter, supra, said the probability or likelihood of injury to the passenger was the proper rule.

[2] The acts complained of in the instant case might well constitute negligence. They might possibly be held to amount to gross negligence. We cannot conclude that they constitute willful misconduct, because an act of willfulness, with the probable result of injury to Mrs. Horning, is entirely lacking and does not appear from the evidence.

Judgment reversed.

I concur: BARNARD, P. J.

JENNINGS, J., being absent, does not participate herein.



139 Cal.App. 506

MUSTO-KEENAN CO. v. CITY OF LOS ANGELES.

EAST-WEST REFINING CO. v. SAME.

Civ. 5099.

District Court of Appeal, Third District, California.

July 2, 1934.

Hearing Denied by Supreme Court Aug. 30, 1934.

1. Eminent domain ⇐79, 80

Constitutional right to compensation for taking of, or damage to, private property for public use, may be waived by failure to comply with procedural steps prescribed by act under which public improvement was constructed (Const. art. 1, § 14).

2. Municipal corporations ⇐293(2)

Ordinance of intention to make street improvement, passed by city council, when published, must reasonably afford adequate opportunity for knowledge of designed improvement by property owner in exercise of reasonable care (St. 1929, p. 1716, § 4).

3. Municipal corporations ⇐293(2)

Ordinance of intention to make street improvement, constituting only notice to property owners, should inform property owners of proposed change of grade in street without resort to conjecture or examination of technical plans and profiles (St. 1929, pp. 1713, 1716, §§ 2, 4).

4. Eminent domain ⇐79, 80

Published ordinance of intention to make street improvement, stating that work was to be done according to grade shown on special plans filed in office of city engineer, *held* insufficient notice to property owners of change in grade, and failure to file protests against improvement did not constitute waiver of right to damages from grade separation for underpass beneath railroad (St. 1929, pp. 1713, 1716, §§ 2, 4; Const. art. 1, § 14).

5. Eminent domain ⇐267

Proceedings upon which street improvement assessments are based are in invitum, and courts will not use extrinsic aids to avoid effect of uncertainty therein.

6. Appeal and error ⇐267

Procedure for street improvement that will, in effect, destroy or substantially injure protection of private property guaranteed by Constitution, may not be prescribed (Const. art. 1, § 14).

7. Evidence ⇐25(2)

Courts may take judicial knowledge of area of city and great diversity of its proprietary and governmental interests.

8. Railroads ⇐99(9)

City council of Los Angeles, and not board of public works, *held* "board" to which claim was properly presented by property owners for damages from grade separation for construction of underpass beneath railroad.

Charter of city of Los Angeles provided that every claim and demand against city, with certain exceptions, should be first presented to, and approved in writing by, board, officer, or employee authorized by charter to incur the expenditure or liability represented thereby.

[Ed. Note.—For other definitions of "Board," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Separate actions by the Musto-Keenan Company, and by the East-West Refining Company, against the City of Los Angeles, consolidated for trial. From judgments in favor of the defendant, the plaintiffs appeal.

Judgments reversed.

Holbrook, Taylor, Tarr & Horton, of Los Angeles, for appellants.

Erwin P. Werner, City Atty., Frederick von Schrader, Asst. City Atty., and Arthur Loveland, Deputy City Atty., all of Los Angeles, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is a consolidated appeal by plaintiffs

from judgments rendered in favor of defendant after general demurrers had been sustained without leave to amend. Both plaintiffs were directly affected by the street improvement hereinafter set forth; hence the consolidation.

In 1928 a proceeding for the improvement of Soto and Lugo streets in the city of Los Angeles was instituted under the Boundary Line Act of 1911 as amended (Stats. 1911, p. 1018, as amended), by the passage of an ordinance of intention by the council of the city of Los Angeles. Notice of this ordinance of intention was published and notice of public work was posted and published as required by said act; notice of the hearing of protests was then duly published as provided in the act, which directed that "any owner of property liable to be assessed for said work may make written protest against the proposed work or against the extent of the district to be assessed, or both, and may also file objections to the proposed grades. Such protests or objections must be in writing and be delivered to the Clerk of the City Council or Board, and no other protests or objections shall be considered."

Thereafter, no protests having been filed by appellants herein, the council of the city of Los Angeles ordered the work to be done as provided by said Boundary Line Act.

After the completion of the improvement, appellants filed claims for damages to their respective properties with the council of the city of Los Angeles. Thereafter actions were commenced by the respective plaintiffs, which actions were consolidated for trial. General demurrers were interposed, which demurrers were overruled and answers filed by the city of Los Angeles. Thereafter, at the trial and before the impaneling of the jury, the city renewed its demurrers, which demurrers were sustained without leave to amend, and judgments were entered in favor of the city of Los Angeles, from which judgments this appeal is prosecuted.

The complaint in the Musto-Keenan case alleges, among other things, ownership of a tract of land facing Soto street and adjacent to the Santa Fé Railway right of way, with the entrance to their marble-cutting and polishing mill on Soto street; that the floor of the plant and Soto street were on the same grade; that defendant commenced the construction of an underpass beneath the Santa Fé railroad at Soto street, and for that purpose excavated in Soto street in front of plaintiff's property to allow a clearance of 15 feet under the railroad tracks; that the excavation in front of plaintiff's property cut off ingress and egress to and from said property from any public street or alley, and undermined the foundation footings and supports of the mill by destroying the lateral support; that the construction of the underpass and its attendant excavation was commenced by defendant without giving plaintiff any notice whatsoever of its intention so to do, and without first compensating, or offering to compensate, plaintiff for the damage to its property. Then followed an allegation of damage and an averment that, within six months after the said injury to its property, plaintiff filed its claim for damage with the proper officer of the city of Los Angeles, which claim was thereafter rejected by the city council of said city. The complaint of the East-West Refining Company alleges a similar set of facts and circumstances and likewise prays for damages.

The answers filed to these complaints denied the allegations and set up two affirmative defenses, one that the change of grade with resultant damage to plaintiffs' properties was done and performed by defendant under and pursuant to the provisions of an act known as the Boundary Line Act of 1911, and that plaintiffs each failed to make or file any protest thereto as provided by section 4 of said act (St. 1911, p. 1019, § 4, as amended by St. 1929, p. 1716). As a second affirmative defense, defendant alleges that the causes of action are barred by reason of plaintiffs' alleged failure to file claims with the board of public works of the city of Los Angeles, which defendant alleged and contended was the board having authority to incur the expenditure represented by the claims upon which these actions were based.

It was stipulated by counsel that the claims referred to were filed with the city clerk of the city of Los Angeles prior to the commencement of this action, and after due consideration denied; that a certified copy of the ordinance of intention be introduced in evidence, as was a certified copy of the ordinance ordering the work together with notice of street work, the latter having been posted in compliance with the law. It was also stipulated that post card notices were sent containing the same notice that was set forth in the resolution of intention. It was also stipulated that no protests were filed by plaintiffs at the hearing provided for in the ordinance of intention.

In support of the contention of the city that the complaint in each of the above-entitled actions does not state facts sufficient to constitute a cause of action against the city of Los

Angeles, two points are presented by the demurrer, first, the complaints do not allege that plaintiffs made or filed any protest against the (a) proposed improvement, (b) the extent of the assessment district, or (c) the proposed grade, as provided by section 4 of the Boundary Line Act of 1911; and, secondly, the complaints do not allege the plaintiffs filed any claim for damages by reason of said improvement with the board of public works of the city of Los Angeles, as provided by section 363 of the charter of said city.

The first point to be considered is whether or not appellants were called upon to file any protest against the proposed grade as provided by section 4 of the act.

[1] Appellants admit they did not file claims for damages with the board of public works of the city of Los Angeles or make objections to the hearing provided in the ordinance of intention but they contend that the excavation in Soto street barring them from access to their properties constitutes, not only mere inconvenience to them, but an actual physical damage such as is contemplated by section 14 of article 1 of the state Constitution, which provides that "private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner, * * * which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law. * * *" As to that particular contention we believe appellants are in error. While it is true the Constitution provides for compensation for the taking or damage of private property for public use, nevertheless that is a constitutional right that a property owner may waive by failing to comply with such procedural step as may be prescribed by the act under which the public improvement was constructed. Bigelow v. Ballerino, 111 Cal. 559, 44 P. 307; Sala v. City of Pasadena, 162 Cal. 714, 124 P. 539, 541. Whether or not in this case plaintiffs failed to make due and timely objection will be discussed later.

[2-4] It is further contended that, no notice having been given plaintiffs of the proposed change of grade or grade separation, no waiver of damages can be predicated upon section 4 of the Boundary Line Act of 1911, and that the council of the city of Los Angeles is the only board authorized to incur liability for change of grade, and is therefore the proper body with which to file claims for damages arising therefrom.

Section 4 of the Boundary Line Act provides: "The grade to which any work shall be done or improvement made shall be such as may be shown on the plans or profiles therefor or it may be done on such a grade as may have been formally established by the city council or board. If any official grade has already been adopted or established for any of the streets, avenues, or other places or property, proposed to be improved, it shall be lawful for the resolution of intention to provide, that said work shall be done to new grades or grades different from those established or adopted, and shall refer to the plans, profiles or specifications for the description of the grade at which the work is to be done. Any property owner whose property is to be assessed * * * may * * * make objection in writing to the proposed grade or proposed modification of grade. A failure to make objection in writing * * * shall operate as a bar to any claim for damages. * * *"

In the title to the resolution of intention referring to the proposed improvement of Soto street, no reference to grade is made, but in the resolution itself it is provided: "That Soto street * * * excepting such portion of said street as is occupied by any railroad track or tracks, the space between the rails and for two feet on each side thereof, and between the tracks, if there be more than one, be improved by certain grading and rolling. * * *" "Section 2. That all the work aforesaid shall be done in accordance with and to the grade shown on special plans, profiles and detailed drawings * * * on file in the office of the City Engineer of the City of Los Angeles. Said plans, profiles, detailed drawings and specifications are hereby referred to for a full and detailed description of said proposed work or improvement and for the description of the grade to which the work is to be done, and are made a part hereof."

It will be observed that it was not provided in the resolution "that said work shall be done to new grades or grades different from those established or adopted." It was admitted that the grades of Soto street had already been established or adopted and that the new work was done to a new grade or a grade different from that already established, and it is contended by appellants that the ordinance and notice did not comply with the provisions of the act, in that it gave no notice or intimation that the work was to be done to new grades or a grade different than the existing grade.

It would appear, therefore, that plaintiffs are correct in their claim that they were given no notice of any proposed change of grade. It

was not made to appear in any of the notices that the grade to which the work was to be done would be different from the established grade. This information is essential, in that the Boundary Line Act provides that "a failure to make objection in writing at such time shall be deemed to be a waiver of all objection to the proposed grade or proposed modification or change of grade and shall operate as a bar to any claim for damages * * * on account of the performance of the work to such grade or changed grade."

The act combines notice of the proposed improvement, stating the kind or class of work, and, secondly, if the improvement is to be done to a new or different grade, the resolution shall so state. By this provision it is possible to combine the two steps in the one procedure; namely, the proposed improvement and change of grade. That being true, we believe, appellants are correct in their contention that an analysis of section 4 of the act shows the first two paragraphs of that section provide the method for the improvement, the general designation of the class or kind of work, such as grading, paving, sewering, etc., and the fixing of a day for the hearing of protests thereto; the third paragraph of section 4 refers to the grade, that is, the established line to which the street is to be constructed, the notice to the owner of the property who is to be assessed therefor, where and when he may protest the new grade, or modification of existing grade, and the penalty for failure to so object.

When it is recalled that the resolution of intention, when published, constitutes the only notice provided by law, and must be "such as may reasonably be held to afford adequate opportunity for knowledge of the designed improvement by the property owner who exercises reasonable care in the matter of his property." (Sala v. City of Pasadena, supra), it is apparent that the notice shall inform an owner of any proposed change of grade, and he shall not be compelled to resort to conjecture nor to an examination of technical plans and profiles to determine if the work is to be done to the established grade or to new grades. In other words, the notice to an interested party should be sufficiently clear to place him upon notice and not merely upon inquiry.

The act requires that, before ordering any work done, the resolution shall, among other things, briefly describe the work to be done. In the resolution in question, Soto street was to be improved "by certain grading and rolling" and "in accordance with and to the grade shown on special plans * * * on file in the office of the City Engineer * * *" and "that said plans are referred to * * * for a description of the grade to which the work is to be done. * * *"

The use of the word "grading" does not import a new "grade." "Grading" as used in its commonly accepted meaning is a physical change of the earth's structure by scraping and filling in the surface of the highway to reduce to a common level, whereas the "grade" is the established point to which the grade is to be done. It is the hypothetical line to which the work is to be constructed. The completion of the proposed work resulted in the excavation of a subway or grade separation whereby Soto street went under the tracks of the railroad with a clearance of 15 feet and the necessary gradual incline or approach on each side thereof.

That the act itself contemplated such a distinction and difference is shown by a study of section 2 of the act (St. 1911, p. 1018, § 2, as amended by St. 1929, p. 1713), wherein it is provided that, whenever the public interest and convenience may require, the legislative body of the county or municipality are empowered to order the improvement of certain rights of way by (a) "grading or regrading. * * * (b) The construction or reconstruction of * * * tunnels, subways or viaducts."

The purpose of including street improvement and change of grade was undoubtedly to permit a change of grade proceeding to be instituted jointly with the improvement of a street, in the same resolution of intention. We cannot believe a mere reference to plans and specifications are sufficient notice when the resolution itself is silent as to a contemplated change of an established grade and fails to advise the property owner of the particular work as pertains to the facts here, where a subway or grade separation was made. Such information is not conveyed to a property owner by reference to "grading" when the purpose of the work is in fact a change of grade, nor is it sufficient to merely refer to profiles, plans, and specifications for detailed information as to location of the grade when nothing is contained in the notice warning the owner of any proposed change from the established grade.

[5, 6] Proceedings upon which street assessments are based are in invitum, that is, the property of a citizen is taken or assessed without his consent, and the courts will not use extrinsic aids or other intents to avoid the effect of uncertainty therein. 19 Cal. Jur. p.

166. Neither may a procedure be prescribed that will in effect destroy or substantially injure the protection to private property guaranteed by the Constitution. Potter v. Ames, 43 Cal. 75. We are of the opinion, therefore, that appellants did not have sufficient notice of the proposed change of grade.

[7, 8] Respondent also contends that the complaint does not state a cause of action, in that it does not allege that appellants filed any claims for damages by reason of said improvement with the board of public works of the city of Los Angeles as provided by section 363 of the charter of the city of Los Angeles. Said section provides: "Every claim and demand against the city, except as provided in the preceding section, shall be first presented to and approved in writing by the board, officer, or employee authorized by this charter to incur the expenditure or liability represented thereby."

Appellants insist, and we think correctly, that the city council was the body that was authorized by the charter of the city of Los Angeles to incur the expenditure or liability of the improvement of Soto street. Respondent contends that the word "Board" as used in section 363 of the charter does not include the city council. We think, however, that this is not correct. It was the city council that inaugurated the proposed street work by adopting an ordinance of intention. It was this ordinance of intention of the council of the City of Los Angeles that ordered the improvement and directed the city engineer to make a diagram of the property affected or benefited, and it was before the city council that any and all persons having objections to the proposed work were directed to appear, and it was the city council that directed the board of public works to proceed, and it was to the council that all bids were submitted and by them considered and the lowest responsible bidder selected by the council for doing the work. In case of abandonment of the work by the council before the letting of the contract, it was the council that was authorized to order paid the incidental expenses connected therewith, and it was to the board that the assessments were returned.

By section 37 of the charter of the city of Los Angeles the council was, in connection with the improvement of streets, etc., "to make the costs and expenses thereof, including all incidental expenses and any damages to private property occasioned thereby, to be paid from the general fund of the city or from such other fund as the council may designate."

It is clear from a study of the charter itself that the city council is the legislative body of the municipality, and from the council the various boards and commissions derive their authority as well as the funds with which they operate. Section 369 of the charter provides: "No department bureau, division or office of the City Government shall make expenditures or incur liabilities in excess of the amount appropriated therefor."

Counsel has devoted a large portion of their brief to study of this phase of the question, but it would be of no particular value to engage at length in a discussion of the various provisions of the charter, and we will content ourselves by stating merely that the city council is the board to which the claim or demand of appellants was properly presented. This court may take judicial knowledge of the area of the city of Los Angeles and the great diversity of proprietary and governmental interests with which it is concerned, and it would be a great hardship and inconvenience to demand that a citizen at his peril select from the great number of boards and commissions authorized by the charter the proper subordinate with whom to file his claim.

We are therefore of the opinion that the ordinance of intention failed to notify plaintiffs or to describe that portion of the work and improvement which caused the damage of which they here complain, and they, having had no notice of the purpose of the city to construct a subway and change of grade of Soto street, cannot be said to have had an opportunity to file a protest as provided in section 4 of the Boundary Line Act of 1911.

We must also hold that in filing their claims with the council of the city of Los Angeles they properly presented the same to the only board having authority to incur the expenditure, and that they were properly presented and filed.

The judgments in the above-entitled action are therefore reversed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

1 Cal.(2d) 272

SMITH et al. v. SOUTHERN PAC. R. CO.

S. F. 14863.

Supreme Court of California.

July 16, 1934.

1. Adverse possession ⇐19

User and improvement of land as roadbed and right of way in manner usual by railroads, and payment of taxes assessed upon land as part of roadbed and right of way will, even in absence of substantial inclosure, satisfy requirements of adverse possession.

2. Adverse possession ⇐46

To interrupt adverse user, re-entry of legal title holder must be open, notorious, and under claim of right, and must equal in dignity and character that required to initiate an adverse possession.

3. Adverse possession ⇐114(1)

Evidence *held* to sustain finding that railroad had been continuous adverse user of strip involved for over 40 years, justifying judgment quieting its title thereto (Code Civ. Proc. §§ 318, 319).

Evidence disclosed that railroad had maintained fence around strip of land along its right of way since 1878; that every year it had cut and trimmed grass and weeds; that it had executed lease which as early as 1903 had come to attention of paper title holder, and that railroad's use of strip had never been challenged until 1928 when paper title holder built fence around other three sides of strip; and that railroad had paid all taxes assessed and levied against strip.

In Bank.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Arthur J. Smith and another against the Southern Pacific Railroad Company, to which defendant filed a cross-complaint. Judgment for defendant on its cross-complaint, and plaintiffs appeal.

Affirmed.

Owen D. Richardson and Donald B. Richardson, both of San Jose, for appellants.

Louis Oneal and Arthur G. Shoup, both of San Jose, and Frank Theenen, for respondent.

IRA F. THOMPSON, Justice.

The plaintiffs have appealed from a judgment quieting the title of the Southern Pacific Railroad Company to a strip of land less than an acre in area along its right of way in Santa Clara county.

The plaintiffs claim as joint tenants through a deed from one C. N. Anderson executed in 1923, and show a paper title by mesne conveyance from one C. H. Phillips, who was stipulated to be the record owner of the San Martin rancho, of which the strip of land was a part, at the time of its first conveyance as a separate parcel.

The respondent railroad company set up as a defense that the action was barred by sections 318 and 319 of the Code of Civil Procedure, and, by way of cross-complaint, asserted ownership and asked to have its title quieted. The case was tried without a jury and the court found that "the defendant and cross-complainant Southern Pacific Railroad Company is and for many years has been the owner, in possession and entitled to the exclusive possession by itself, and its lessees, of that certain standard gauge steam railroad and the right of way therefor referred to in the complaint and being commonly known as the Coast Line Railroad of Southern Pacific Railroad Company; that said railroad is now and at all times mentioned in the complaint has been in constant operation as a standard gauge steam railroad in the regular business of interstate and intrastate passenger and freight transportation; that the land described in the complaint is and at all times therein mentioned has been a part of the right of way for said railroad, protected by right of way boundary fence constructed many years ago by said defendant and cross-complainant and by it continuously maintained, separating the said railroad right of way from the state highway, formerly known as Monterey road, through said county of Santa Clara, California; that the said right of way and the said fence have been so maintained and used by said defendant and cross-complainant continuously for a period of over forty (40) years, and that said defendant and cross-complainant has paid all taxes levied and assessed thereon during said period," and rendered judgment quieting its title thereto.

Appellants contend that the respondent's occupation was occasional and insufficient to support the claim of adverse possession; that there was no substantial inclosure, nor any usual cultivation or improvement; that the evidence did not support the findings; and, finally, that the presumption of ownership is with the paper title and that clear evidence is necessary to overcome it.

We are of the opinion that the record supports the findings and judgment of the trial court. The respondent's railroad has been in its present location since 1868. It was stipulated that the Southern Pacific Railroad Company is the owner of the railroad and the Southern Pacific Company is the lessee. A map introduced in evidence shows a fenced right of way on both sides of the track for the entire portion of the track portrayed on the map, a distance of about two miles. This fence inclosed the property claimed by the plaintiffs. Employees of the respondent, including the assistant engineer, the foreman of bridges and building on the coast division, the superintendent of bridges and building, the roadmaster and the section foreman, testified that from the year 1878 to the time of the trial the fence had been maintained in approximately the same position and had been kept in repair; that every year the grass and weeds had been cut and burned off; and that until 1928, when the plaintiffs built their temporary fence around the other three sides of the strip of land in question, they had known of no claim to the property other than that of the railroad company. The section foreman and the roadmaster testified that the fence was torn down immediately and the wire and pickets, of which the fence had been built, were placed on plaintiffs' property. John Klinger, called by plaintiffs, testified that he had lived near the strip of land in question since 1902, and had known the same since that time; that in 1903 he leased land along the respondent's right of way, which included the land here in dispute. In 1903 he plowed the strip claimed by plaintiffs, and one Linden (the then holder of the paper title) told him it was his land. Klinger did not plant this strip again until 1912, when he paid one Dethlefsen, who had taken title from Linden, $3 a year for the privilege of using it, and thereafter he planted this strip for six or seven years, when Dethlefsen told him he had sold the land, and Klinger did not touch the strip again.

The plaintiffs produced the following evidence of user from 1919 (which was probably the last year Klinger took hay from the strip, according to his testimony): From 1919 to 1923 the plaintiffs saw one Mulch, an employee of plaintiffs' immediate grantor, cut hay from the strip; from the fall of 1923 to 1925 the plaintiffs planted the strip and cut the hay thereon; in 1926 he gave the volunteer crop thereon to one Roll; and in 1928 they had Roll put the fence up. Witness Broughelli, who owned property near plaintiffs', testified that in 1923 Anderson leased the land to him and that he plowed the strip and sowed and harvested oats thereon, but he also testified that he thought it was railroad property, although he contradicted this last statement on his redirect examination.

With regard to the payment of taxes, it is conceded that, unless taxes on this strip were included in the assessment and taxation of the operative property of the railroad under "rights of way in Santa Clara County" no taxes were assessed on it as a separate piece until 1927, in which year it was assessed separately at plaintiffs' request. Plaintiffs have paid the taxes since the separate assessment. The respondent introduced records of its tax on operative property as including rights of way in Santa Clara county for the years 1923 to 1927, inclusive.

[1] It has been held that user and improvement of land as a roadbed and right of way "in the manner usual by railroads" and the payment of taxes assessed upon the land as a part of the roadbed and right of way will, even in the absence of a substantial inclosure, satisfy the requirements of adverse possession. Daniels v. Gualala Mill Co., 77 Cal. 300, 19 P. 519. The user of the respondent has met this test.

[2, 3] The evidence supports the finding of the trial court that this user was continuous for over forty years. To interrupt the adverse user the re-entry of the legal title holder must be open, notorious, and under claim of right, and must equal in dignity and character that required to initiate an adverse possession. Armstrong v. Payne, 188 Cal. 585, 597, 206 P. 638. In the case at bar the respondent had openly fenced the land and assumed possession and control over it as a part of its right of way, and had executed a lease therefor which, as early as 1903, came to the attention of the plaintiffs' predecessor in interest. There is no indication in the record that the title of the respondent was disputed at the time, and from 1912 for a period of six or seven years the respondent's lessee, under the same lease, but having in the meantime leased from the record owner also, cut hay from the strip in question. Thereafter the hay was cut, and in some years the land was plowed and sown by various persons, who entered by a temporary gate in the right of way fence. It is testified by plaintiff Smith himself that this fence was always nailed up again every year, and it is also in evidence that some of those who used this land were questioned as to their

right to do so by the section foreman, who understood such use to be permissive and arranged "by the office" of the respondent. It is only in the building of the fence in 1928, long after the prescriptive period had run, that we find an act of the paper title holder which in any way challenges the right of the respondent to control the use of this strip of land.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; CURTIS, J.; LANGDON, J.



1 Cal.(2d) 285

RILEY, Controller, v. ROBBINS et al.

L. A. 13207.

Supreme Court of California.

July 16, 1934.

Rehearing Denied Aug. 13, 1934.

1. Taxation ⇐895(7)

Expenses of wife's funeral and last illness *held* deductible from market value of wife's estate in determining inheritance tax, though such expenses were paid by husband, and he was not entitled to reimbursement from estate (St. 1925, p. 473, § 2).

2. Statutes ⇐190

Where meaning of statute is plain, there is no room for judicial interpretation, and only function of court is application of enactment to facts at bar.

In Bank.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Proceeding on the petition of Ray L. Riley, as Controller of the state of California, for determination of the inheritance tax due on property left by Hortense L. Robbins, deceased. Objections by Albert C. Robbins and others to the report and appraisement of an inheritance tax appraiser appointed by the court were sustained and judgment entered allowing a deduction for expenses of funeral and last illness, and petitioner appeals.

Affirmed.

Prior opinion, 25 P.(2d) 539.

Rehearing denied: TYLER, J., dissenting.

David Tannenbaum and Charles M. Cassin, both of Los Angeles (W. H. H. Gentry, of Sacramento, of counsel), for appellant.

Dempsey & Mackay and Howard W. Reynolds, all of Los Angeles, for respondents.

PER CURIAM.

These proceedings were commenced by the petition of Ray L. Riley, state controller, for determination of the inheritance tax due on property left by Hortense L. Robbins, who died intestate on or about August 12, 1929. The court appointed an inheritance tax appraiser, who reported that the personal property left by the decedent was, at the time of her death, of the total market value of $436,310.19; that allowable deductions amounted to $9,952.41; that "the clear market value subject to tax" was $434,319.71; that the property passed share and share alike to the respondents (surviving husband and adult son and daughter); and that each share was subject to an inheritance tax of $5,784.13, the total tax being $17,353.39. The respondents objected to the report and appraisement on the ground that expenses of the decedent's funeral and last illness were not allowed as deductions from the market value of the taxable property. Hearing was had, the respondents' objections were sustained, and judgment was entered allowing the deduction of $11,595.15, the stipulated amount of funeral and last illness expenses, from the figure shown by the appraiser as the clear market value subject to tax, thus reducing the tax to $16,540.71; the share of each respondent becoming $5,513.57. From this judgment allowing the deduction the petitioner has appealed. It was stipulated that the expenses of the funeral and past illness were paid by the decedent's husband, and that he was financially well able to pay them.

The appellant contends that, inasmuch as the husband is obligated to pay these expenses without being entitled to be reimbursed from the estate of the wife (which is conceded by the respondents), these items were improperly allowed as deductions.

Prior to amendment on August 14, 1929 (St. 1929, p. 1835, § 2), section 2 of the Inheritance Tax Act (Stats. 1921, p. 1500, as amended in 1925 and 1927, Codes and Gen. Laws, Deering Consol. Supp. 1925–1927, p. 2027, St. 1925, p. 473), provided:

Section 2. "A tax shall be and is hereby imposed upon the transfer of any property, real, personal or mixed, or of any interest therein or income therefrom, in trust or oth-

erwise, to persons, institutions or corporations not hereinafter exempted, to be paid to the treasurer of the proper county, as hereinafter directed, for the use of the state, *said taxes to be upon the market value of such property* at the rates hereinafter prescribed *and only upon the excess over the exemptions hereinafter granted, in the following cases:*

"(1) When the transfer is by will or by the intestate or homestead laws of this state. * * *

"(10) Deductions from appraised value. In determining the market value of the property transferred, *the following deductions* and no others *shall be made from the appraised value* thereof: * * *

"(b) Expenses of funeral and last illness."

[1, 2] It is the theory of appellant that subdivision (10) is a limitation on the actual expenses or charges on the estate which may be allowed in computing the tax and not an arbitrary establishment of deductions which shall be allowed regardless of whether the property transferred has been lessened thereby. We are asked to construe subdivision (10) and paragraph (b) thereof in the light of the act as a whole, and its allegedly manifest intent to tax the net beneficial interest passing to the transferee, and to hold that subdivision (10) of section 2 means, when it says "the following deductions and no others shall be made," that the enumerated deductions shall be made only when they are an actual charge on the estate of the decedent and allowable as such in probate and administration proceedings.

We cannot so disregard the plain mandate of the statute. The direction to make the deduction is clear and unambiguous on its face, nor does any conflict or uncertainty arise when read in the light of the other deductions allowed, as appellant has contended. The most that can be said is that apparently the Legislature was prompted by other and different considerations when including this deduction in its enumeration. Where the meaning of the statute is plain, there is no room or justification for judicial interpretation, and the only function of the court is the application of the enactment to the facts at bar. Sandelin v. Collins (Cal. Sup.) 33 P.(2d) 1009. We are satisfied that to give effect to the construction urged by the appellant would be an invasion of the province of the Legislature.

The judgment appealed from is affirmed.

1 Cal.(2d) 250

ALASKA PACKERS' ASS'N v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

S. F. 14950.

Supreme Court of California.

July 5, 1934.

Rehearing Denied Aug. 2, 1934.

1. Master and servant ⇐369

California Industrial Accident Commission cannot apply and administer Alaska Workmen's Compensation Act (Laws Alaska 1929, c. 25, § 25).

2. Constitutional law ⇐245, 301
Master and servant ⇐347

Section of Workmen's Compensation Act, giving Industrial Accident Commission jurisdiction over controversies arising from injuries suffered outside state by employees hired in state *held* not unconstitutional as invading federal government's exclusive jurisdiction to regulate employment in territory or denying due process and equal protection of law (St. 1917, p. 870, § 58; Const. U. S. Amend. 14).

3. Master and servant ⇐369

Generally, state Workmen's Compensation Act is territorial, not personal, and does not create rights and duties because of acts occurring beyond state's geographical confines.

4. Master and servant ⇐368

Duty to pay compensation to injured employee being compulsory under state Workmen's Compensation Act, extraterritorial effect thereof cannot be upheld on ground that contract of hire was made therein; right to and liability for compensation thereunder being statutory and incident to employer-employee relationship (St. 1917, p. 870, § 58; St. 1931, p. 1950, § 27 (a).

5. Master and servant ⇐368

Creation of status of employer and employee under state law *held* sufficient jurisdictional basis for regulation of such relationship within state by Workmen's Compensation Act, though entered into for purposes connected solely with rendition of services in another state (St. 1917, p. 870, § 58).

6. Master and servant ⇐346

Policy of Workmen's Compensation Act is to charge to industry losses it should rightfully bear and provide for injured employee certain and prompt recovery commensurate with his loss, thereby lessening society's burden of caring for those deprived by industry of ability to care for themselves.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

7. Master and servant ⇐346

State, having social interest in existence of employer-employee relationship within its borders, may impose reasonable regulations on creation thereof under police power, as in workmen's compensation legislation.

8. Master and servant ⇐347

Provision of Workmen's Compensation Act, declaring it applicable to injuries received outside state by employee hired in state, *held* reasonable regulation directly related to protection of public, especially where employment commences and terminates in state (St. 1917, p. 870, § 58).

9. Master and servant ⇐368

Jurisdiction of both Alaska and California over proceeding for compensation to employee hired in California and injured in Alaska may be sustained on basis of control of employer-employee status at either time of injury or inception of status (St. 1917, p. 870, § 58; Laws Alaska 1923, c. 98, as amended).

10. Master and servant ⇐368

Attempted selection of Alaska Workmen's Compensation Act as governing law in employment contract executed in California *held* not available to employer seeking review of award of compensation under California statute for injuries to employee in Alaska; contract attempting to avoid liability imposed by California act being invalid (St. 1917, p. 870, § 58; St. 1931, p. 1950, § 27 (a).

11. Master and servant ⇐368

Injured workman can recover compensation under Workmen's Compensation Act of state wherein he was hired, though injury was suffered in another state, unless act specifically applies or is interpreted as applying only to injuries occurring within state (St. 1917, p. 870, § 58).

12. Master and servant ⇐368

Employment agreement, pursuant to which employee boarded vessel in California and went to Alaska for seasonal work, after which he was to be returned to state, *held* "definitive" contract, vesting in California Industrial Accident Commission jurisdiction of proceeding to recover compensation for injuries sustained by him in Alaska (St. 1917, p. 870, § 58).

13. Courts ⇐8

Refusal to apply law of another jurisdiction on principles of conflict of laws is not ordinarily denial of full faith and credit, especially if such law, by its own terms, cannot be administered by forum in which pleaded.

14. Master and servant ⇐405(4)

Physician's testimony that in his opinion, based on reports of physician attending workman's compensation claimant, latter's condition was of traumatic origin, *held* sufficient to sustain Industrial Accident Commission's finding that claimant's injury arose out of his employment, though employer's physician testified that disability was due to natural causes.

In Bank.

Proceeding by the Alaska Packers' Association to review an award of compensation by the Industrial Accident Commission to Juan Palma, employee, against petitioner, employer.

Award affirmed.

Pillsbury, Madison & Sutro, of San Francisco (F. D. Madison and Francis Gill, both of San Francisco, of counsel), for petitioner.

Arthur I. Townsend and Everett A. Corten, both of San Francisco, for respondent Commission.

Elmer P. Delany, of San Francisco, for respondent Juan Palma.

PER CURIAM.

This is a proceeding to review an award of compensation made by the Industrial Accident Commission in favor of Juan Palma against the Alaska Packers' Association, his employer.

On May 13, 1932, Juan Palma, a nonresident alien, entered into a contract of employment on board the steamer Chirikof in the harbor of San Francisco, with the Quong Ham Wah Company, agent for the petitioner, the Alaska Packers' Association, by which he agreed to work for the petitioner during the salmon canning season at or about Kvichak in the territory of Alaska. The Alaska Packers' Association agreed to transport Palma to Alaska and back to San Francisco at the close of the season. He was to be paid on his return to San Francisco, at a monthly rate, less any advances made. Section 11 of the contract, signed by Palma, and some fifty other workers, on board the Chirikof, reads as follows: "Section 11. As the only labor contemplated by this contract is to be performed in the Territory of Alaska, and as the Contractor has elected to be bound by the provisions of the Alaska Workmen's Compensation Act, chapter 25 of the Laws of Alaska, 1929, pages 46 to 79 and amendments thereto, the parties of the second part hereby agree, as an incident of this contract of employment, to accept and be bound by the provisions of

the said Workmen's Compensation Act of Alaska for any and all injuries arising out of and in the course of their employment, and further agree to accept as their exclusive remedy for any and all industrial injuries, the provisions of the said Workmen's Compensation Act of Alaska."

Palma was treated on two occasions and was finally operated on in petitioner's hospital in Kvichak, having left work on June 3, 1932. He presented no claim for compensation in Alaska, but received his regular wages until August 11. Upon his return to San Francisco, and on August 18, 1932, he made application to the California Industrial Accident Commission for an adjustment of his claim on the ground that his disability had resulted from an injury arising out of and in the course of the employment and had been caused by an empty box falling against his stomach.

Petitioner filed an answer to the application, admitting the employment, but denying that the applicant sustained an injury arising out of the employment and setting up that both the applicant and the petitioner were subject, at the time of the alleged injury, to the Workmen's Compensation Act of Alaska, chapter 98 of the Session Laws of Alaska 1923, and chapter 25 of the Session Laws of Alaska 1929, and acts amendatory thereof; and further that petitioner was qualified to do business in Alaska, had filed in the office of the clerk of the district court, third judicial division, at Valdez, Alaska, its articles of incorporation and other papers qualifying it to do business in Alaska, and that it maintained, as required by law, its resident agent for the purpose of receiving service of papers in the third judicial division; that the district court in that division was the only proper tribunal for the settlement of Palma's claim by reason of the Alaska act and the contract of employment, section 11 of which is set out above; and that the California Commission was without jurisdiction. These allegations are supported by an affidavit of the United States commissioner of the Kaknek-Kvichak precinct that neither the applicant nor the Alaska Packers' Association had filed a notice of rejection of the terms of the Alaska Workmen's Compensation Act in accordance with the provisions thereof and that on May 26, 1932, and ever since the Alaska Packers' Association and all their employees had been subject thereto, and by an affidavit of the clerk of the district court of the third judicial division that the Alaska Packers' Association had qualified to do business in the territory of Alaska by filing the necessary papers and maintained a resident agent for service in that division.

While the petitioner questions the sufficiency of the evidence to support the finding that the injury arose out of the employment, the main attack is directed toward the jurisdiction of the Industrial Accident Commission to entertain this proceeding for compensation under the California Workmen's Compensation Act. The respondent commission cites in support of its claim of jurisdiction section 27(a) and 58 of the California act (St. 1917, p. 855, § 27(a), as amended by St. 1931, p. 1950; St. 1917, p. 870, § 58), which provide as follows:

Section 27(a). "No contract, rule or regulation shall exempt the employer from liability for the compensation fixed by this act. * * *"

Section 58. "The commission shall have jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this state in those cases where the injured employee is a resident of this state at the time of the injury and the contract of hire was made in this state, and any such employee or his dependents shall be entitled to the compensation or death benefits provided by this act."

[1, 2] Petitioner urges that this injury is within the exclusive territorial jurisdiction of Alaska and hence not within the territorial jurisdiction of California; and, second, that section 58 of the California act, above quoted, is unconstitutional for the reason that it denies full faith and credit to the Alaska statute, trespasses upon the exclusive power of Congress to make laws regulating the employer-employee relationship in the territory of Alaska, and constitutes a denial of due process and equal protection of the law under Amendment Fourteen of the Federal Constitution, inasmuch as it is an unreasonable regulation of the right to make private contracts of employment and an attempt to regulate a relation or status existing beyond the territorial limits of the state. The problem can be narrowed to some extent. In the first place, the California Commission cannot apply and administer the Alaska act. Section 25 of chapter 25 of the Session Laws of Alaska 1929, provides that: "No action for the recovery of compensation hereunder shall be brought in any court holden outside of the judicial division in which the injury occurred, out of which the right to compensation arises, except in cases where service cannot be had on the employer in

the judicial division where the injury occurred. No action for the recovery of compensation hereunder shall in any case be brought outside of the Territory of Alaska, except in cases where it is not possible to obtain service of summons upon the defendant in said Territory, and in all such cases the plaintiff must plead and prove his inability to obtain service of summons upon the defendant within the Territory of Alaska." In the second place, if California has not attempted an extraterritorial regulation of the incidents of employment, petitioner's argument relative to invasion of the exclusive jurisdiction of the federal government to regulate employment in Alaska must fail; nor is there any denial of due process and equal protection by reason of extraterritoriality.

[3] It is fundamental and has been well said that: "In general our law is territorial and not personal. This does not mean that rights and duties can be enforced only in the territory of the jurisdiction which created them; it does mean that such law does not ordinarily purport to create rights and impose duties by reason of acts, to which legal consequences may be annexed, occurring beyond the geographical confines of its territory." See Angell, Recovery Under Workmen's Compensation Acts for Injury Abroad, 31 Harv. L. Rev. 619. However, the California act does purport to establish compensation for injuries received abroad in a certain class of cases where (the other general requirements of compensation of course being present): (1) The injured employee is a resident of this state at the time of injury, and (2) the contract of hire was made in this state. The first condition has been nullified by the decision in Quong Ham Wah Co. v. Industrial Accident Commission, 184 Cal. 26, 192 P. 1021, 1025, 12 A. L. R. 1190, certiorari denied by the United States Supreme Court, 255 U. S. 445, 41 S. Ct. 373, 65 L. Ed. 723, which held that the Federal Constitution extended the benefits of the act to nonresidents also. The second condition remains and squarely presents the question whether the making of the contract of employment in this state is a satisfactory and sufficient basis for the creation by the California Legislature of the right of compensation for an injury received beyond its borders, even though the services contracted for were to be performed wholly outside the state, a consideration apparently not urged upon the court in the Quong Ham Wah Co. Case.

[4] Where the duty to pay compensation is contractual, as under the optional acts, the rights of the injured party, wherever the injury is received, may, according to recognized principles, be controlled by the law of the place of contract. However, the California act is compulsory and it is now settled that the right to, and the liability for, compensation established by it are not founded upon contract but are statutory rights and duties arising from the employer-employee relationship and are imposed by the law as incidents to that status. North Alaska Salmon Co. v. Pillsbury, 174 Cal. 1, 162 P. 93, L. R. A. 1917E, 642; Quong Ham Wah Co. v. Industrial Accident Com., supra; 31 Harv. L. Rev. 619. Consequently a decision upholding the so-called extraterritorial effect of our act cannot be placed upon this ground.

In Post v. Burger & Gohlke, 216 N. Y. 544, 111 N. E. 351, 352, Ann. Cas. 1916B, 158, this extraterritorial effect was given the New York act on the basis of the fiction of a "constructive contract," on the theory that the Legislature had the power "to compel a contract between employer and employee that is extraterritorial in effect." This case is cited in Quong Ham Wah Co. v. Industrial Accident Com., supra, which described the liability as not the mere regulation of a status or imposition of a tort liability but as "quasi ex contractu," and sustained an award under section 58 of the act for an injury received outside the state on the ground that the statute assumed to extend its effect "only to those cases where the contract of hire was made in this state," and that consequently it is "not an attempt to create an obligation merely as an incident to a status but is, in form and substance, a genuine regulation of contracts subject to the sovereignty of the state." The court further said: "The contract creates a relationship under the sanction of the law and the same law attaches as an incident thereto an obligation to compensate for injuries sustained abroad, amounting to a sort of compulsory insurance. The Legislature may lawfully impose that right and duty upon those operating under a contract subject to the legislative power, and no principle of law is defeated by attaching to such contracts the same duties and rights as incidents to acts abroad that are lawfully imposed as incidents to the same acts occurring within the geographical limits of the state."

[5-8] While there is much apparent conflict on this question in the various jurisdictions of the country, most of the cases turn upon the construction of the particular statute involved and the legislative intent as

shown by its provisions. Though not controlling, in view of the Legislature's express declaration that our statute shall apply to injuries received abroad where the contract of hire is made within the state, these cases are instructive of the social policy behind such declaration and of the principles upon which it may be sustained. Where the statute is elective the contractual theory has been applied and, where the statute is compulsory, as well as in some cases where the elective feature of the optional act has not been particularly relied upon, the basis of the power to impose such an incident upon the employer-employee relationship seems to be jurisdiction of that status at the time of its creation. Although there are many cases holding that particular compensation statutes were not intended to cover injuries received abroad, none has been cited or discovered which holds an express legislative declaration of that policy to be ineffective. See note, 3 A. L. R. 1351 (collecting and discussing cases) and supplemental notes in 18 A. L. R. 292; 28 A. L. R. 1345; 35 A. L. R. 1414; 45 A. L. R. 1234; 59 A. L. R. 735; 82 A. L. R. 709; also 31 Harv. L. Rev. 619, supra, and 37 Harv. L. Rev. 375. We are of the opinion that the creation of the status under the laws of this state is a sufficient jurisdictional basis for the regulation of that relationship within this state and the creation of incidents thereto which will be recognized within this state, even though the relation was entered into for purposes connected solely with the rendition of services in another state. If this were not so there could be no compensation for an injury arising out of and in course of the employment but occurring before the jurisdiction in which the services were to be performed had been entered, or where that jurisdiction had no compensation statute. This would seriously interfere with the policy of the act, which is to charge to the industry those losses which it should rightfully bear, and to provide for the employee injured in the advancement of the interests of that industry, a certain and prompt recovery commensurate with his loss and, in so doing, lessen the burden of society to care for those whom industry has deprived, either temporarily or permanently, of the ability to care for themselves. Having a social interest in the existence within its borders of the employer-employee relationship, the state may, under its police power, impose reasonable regulations upon its creation in the state. That the imposition of such conditions is in line with the present-day policy in compensation legislation cannot be doubted. Similar provisions have been upheld and enforced in Falvey v. Sprague Meter Co., 111 Conn. 693, 151 A. 182; Roberts v. I. X. L. Glass Corp., 259 Mich. 644, 244 N. W. 188; Pederzoli's Case, 269 Mass. 550, 169 N. E. 427; McLaughlin's Case, 274 Mass. 217, 174 N. E. 338, and Migue's Case, 281 Mass. 373, 183 N. E. 847, even though the services were to be performed entirely in another state. It is true that these acts have elective features, but in the Massachusetts cases the decisions were not placed upon that ground but upon the legislative intent to cover such situations, the constitutionality of the provision not being discussed although the question was raised. We consider this a reasonable regulation having a direct relation to the protection of the public, especially under the facts of the present case, since the employment was to both commence and terminate in this state. Palma was, under the contract of employment, to be transported from San Francisco to Alaska and back, and was to be paid off on his return to San Francisco.

[9] Additional points made by the petitioner are that on conflict of laws principles, the Alaska act should govern the determination of Palma's claim, and that the failure of the commission to recognize the Alaska act, when pleaded as a defense to this application, was a denial of the full faith and credit to which it was entitled under the Federal Constitution.

It should, first, be observed that in Quong Ham Wah Co. v. Ind. Acc. Comm., supra, the court was primarily concerned in determining the validity of section 58 with reference to article 4, § 2, of the Federal Constitution, and the first clause of section 58, which extended the benefits of the act in connection with injuries abroad only to residents of this state. The consideration of the nature of the "extra-territorial" effect to be given the act and the language quoted above was in answer to the argument that the obligation placed on the employer was one which could only be imposed by the law of the place of injury or of the place of the servant's domicile, and hence that the qualification of residence was a jurisdictional limitation and not discriminatory. It does not appear that the law of the place of injury was set up as a defense or that the questions thus presented were urged upon the court in that case.

This phase of the problem is essentially one in conflict of laws. The jurisdiction of both Alaska and California may be sustained, the one upon the basis of control of the status at the time of the injury, the other upon the basis of control at its inception. See Ameri-

can Law Institute, Restatement, Confl. of Laws (Proposed Final Draft No. 4) §§ 434 and 436. We have been referred to many decisions of state courts, principally later New York decisions modifying Post v. Burger & Gohlke, supra, which apply the rule that where the contract is for services to be performed exclusively abroad and the injury is received there, the law of the place of injury will be applied. Cameron v. Ellis Const. Co., 252 N. Y. 394, 169 N. E. 622. See, also, MacKesson Fuller-Morrison Co. v. Ind. Comm., 212 Wis. 507, 250 N. W. 396, and discussion of cases in the notes above cited. But for the most part these cases, as already indicated, deal with the construction of various acts as intending or not intending a recovery of compensation for injury received abroad where the contract, made in the state of the forum, contemplated an exclusively foreign employment. In American Mut. Liability Ins. Co. v. McCaffrey (C. C. A.) 37 F.(2d) 870, the court applied the rule that a contract made in one state, to be wholly performed in another, is governed by the law of the state where the performance is to be had. In Ford, Bacon & Davis v. Volentine (C. C. A.) 64 F.(2d) 800, 801, which did not decide the question, the problem is stated with regard to optional laws: "Under elective laws the obligation to make compensation exists because the parties to the employment have expressly or impliedly agreed to it, surrendering their rights to other adjustment for injuries. Where, as in this case, the entire performance of the employment is to be in another state, a serious question may exist whether the parties did not really contract with reference to the law of that other state, which ought accordingly to enter into the contract rather than the law of the place of its making. * * * Many courts, however, disregarding the place where the services are to be rendered, have considered that an elective compensation act of the place of contract follows the employee wherever he renders service under the contract, and is to be enforced in suits for injuries in other states unless that compensation act itself provides against its applying beyond its own state or unless the public policy of the forum or a lack of necessary machinery prevents its enforcement."

[10] Our act being compulsory, neither line of reasoning can be applied. The parties cannot be said to have contracted with reference to the law of either jurisdiction other than as the laws of this state enter into and are a part of every contract made here, and, as by going into another jurisdiction to perform services under a contract of hire, they submit themselves to its laws. The attempted selection of the Alaska act as the governing law in section 11 of the contract is not available to the petitioner. A contract attempting to avoid the liability imposed by the California act is invalid. Section 27[a] of the Workmen's Compensation, Insurance and Safety Act of 1917; San Francisco-Oakland Terminal Rys. v. Indus. Acc. Comm., 180 Cal. 121, 127, 179 P. 386; Hines v. Indus. Acc. Comm., 182 Cal. 359, 188 P. 277.

[11] Petitioner cites as particularly applicable the following comment following section 434 of the Proposed Final Draft No. 3 of the Restatement of Conflict of Laws, American Law Institute: "The case of employment through an employment agency in one state where the entire business is carried on in another state, and the applicant is merely sent to the principal office to report, is specially treated. In such a case the relation is regarded as established not by the action of the agency, but by the workman reporting for work at the principal office of the business, the transaction at the employment office not being regarded as definitive hiring. In that case the compensation act of the state where the workman reported for duty governs liability for injuries." The Restatement on Conflict of Laws has not reached its final form. The foregoing comment on section 434 does not reflect the general rule, but rather an exception to or modification of the general rule announced or suggested for approval by the institute in section 434 of the latest Proposed Draft No. 4, published March 22, 1934, as follows:

"Compensation Under Act of State of Employment.

"A workman who enters into a contract of employment in a state in which a Workmen's Compensation Act is in force can recover compensation under the Act in that state for bodily harm arising out of and in the course of employment, although the harm was suffered in another state, unless the Act provides in specific words or is so interpreted as to apply only to bodily harm occurring within the state."

Section 58 of the California act is in accord with the foregoing proposed final draft, and, whether it be in the exact form to be finally adopted, undoubtedly it reflects the final trend of the law on the subject. If the proposed final draft should have any bearing on the present case, the general rule as suggested, and not a comment noting an exception or modification of the general rule, would be the more persuasive.

[12] Furthermore, in the light of the foregoing "comment" we regard the employment agreement pursuant to which the applicant went aboard the Chirikof and was transported to Alaska, as "definitive." The parties both signed the contract. It apparently contained all the important conditions of the employment. The transportation and the payment of wages, which were both important incidents of the contract of hire, were not to be performed in Alaska. Moreover, whatever may be the correct rule in conflict of laws to be applied in the ordinary case of a contract of employment made in this state, to be performed exclusively in another jurisdiction, such contracts as the present one, which hire itinerant labor in large groups to be transported out of the state for seasonal work and returned to this state at the end of the season, constitute a special class of employment contracts in which the state of hiring has an interest at least as substantial as that of the state in which the temporary and seasonal work is to be performed. The laborer injured in the course of such employment is, by the terms of his contract of hire, to be returned to that state to become a charge upon it if he cannot obtain compensation or take care of himself. To leave the applicant to his remedy in Alaska in such a case would create a great hardship. In this class of employment the employer exercises great control over the presence of the applicant in either jurisdiction. Should he stay to prosecute his claim in the jurisdiction of the injury it is quite likely that he would lose his return transportation.

[13] We come now to the question of the recognition to be accorded the Alaska act. The United States Supreme Court has held in a case where the contract of employment was made in Vermont, the principal employment was located there and the Vermont statute was elective and clearly exclusive (i. e., precluded, without the necessity of construction, any recovery under the law of another state): that it was a denial of full faith and credit for the New Hampshire court to refuse to allow the Vermont act to be set up as a defense to an action in New Hampshire, where the employee was working temporarily at the time of his injury. Bradford Electric Light Co. v. Clapper, 286 U. S. 145, 52 S. Ct. 571, 76 L. Ed. 1026, 82 A. L. R. 696. In Ohio v. Chattanooga Boiler & Tank Co., 289 U. S. 439, 53 S. Ct. 663, 77 L. Ed. 1307, it was held that it was not a denial of full faith and credit to apply the compulsory law of the state of injury where the contract, made in Tennessee, provided that the workmen should also serve in other states and the Tennessee act had been interpreted by the Tennessee courts as not precluding recovery in another state. The conclusion reached herein is not inconsistent with those cases, which have left open the question of what law is applicable where the state of injury is the state where the major incidents of the employment are located although the contract is made elsewhere. Nor do we here attempt to decide that question except in the special class of cases now before us. In addition, we may add that it is not ordinarily a denial of full faith and credit to refuse to apply the law of another jurisdiction on conflicts principles. See note 46, Harv. L. Rev. 291. A fortiori if it cannot by its own terms be administered by the forum in which it is pleaded.

[14] Since we have concluded it was not error for the California Industrial Accident Commission to entertain this proceeding, it becomes necessary to consider the claim that there is not sufficient evidence to sustain the findings of the commission that the injury arose out of the employment. The company doctor, who was the only one to examine the applicant before the operation, or to make a thorough examination at any time, testified that in his opinion the disability was not caused by an injury but was due to natural causes. Doctor Quinn, on the basis of whose testimony the award was made, examined the patient upon his return to San Francisco and gave his opinion, basing his conclusion "on the reports rendered by the attending physicians," that the condition was of traumatic origin. The rule invoked by petitioner is that of Winthrop v. Ind. Acc. Comm., 213 Cal. 351, 2 P. (2d) 142, and Nielsen v. Ind. Acc. Comm., 125 Cal. App. 210, 13 P.(2d) 517, 518, to the effect that "there was no true conflict in the evidence where that on one side consisted of opinions based upon a state of facts not shown by the record to exist while that on the other side was based upon facts actually shown to exist or rested upon the testimony of physicians who had actually treated and examined the patient." In the Nielsen Case the discredited evidence "rested solely in the opinions of physicians who had not treated, examined, or seen the patient but who based their opinions upon a statement of the case which in numerous particulars was not a full and complete statement."

Doctor Quinn's opinion is introduced by the following words: "Discussion of the case: Owing to this man's ignorance it is impossible to obtain any accurate idea of the condition for which he was operated upon, and it is necessary for me to base my conclu-

sion on the reports rendered by the attending physicians." This brings the case within the rule of McNamara v. Ind. Acc. Comm., 130 Cal. App. 284, 289, 20 P.(2d) 53, 55: "The conclusions of the latter witness were based on the facts testified to by Dr. Tiffany and on an extended history of the case. It thus appears that the two experts took into consideration the same facts, but reached different conclusions."

On the second appeal of the Nielsen Case it was said by this court, speaking of the Winthrop Case: "There was no intent to hold, and it was not decided, that the opinion of experts who had no personal knowledge of the facts may not raise a conflict with the testimony and opinion of those whose conclusions are drawn from a personal examination of the injured employee. The opinion of experts based on hypothetical statements of the facts in the record is competent evidence. The weight of such evidence is for the commission's determination." Nielsen v. Ind. Acc. Comm. (Cal. Sup.) 29 P.(2d) 852, 854.

The award is affirmed.

139 Cal.App. 722

PEOPLE v. MURPHY.

Cr. 2543.

District Court of Appeal, Second District, Division 1, California.

July 16, 1934.

Hearing Denied by Supreme Court Aug. 13, 1934.

1. Criminal law ⇐304(17)

Court will take judicial notice that under laws of Montana warden of state prison is legal custodian of its records (Code Civ. Proc. § 1875, subd. 3; Rev. Codes Mont. 1921, § 12440).

2. Criminal law ⇐1202(3)

Evidence of prior conviction of felony *held* not insufficient because certificate of warden attached to copy of commitment to state penitentiary of foreign state failed to certify that warden was official custodian of such records, where certificate stated that in warden's legal custody as such officer were original files and records and that attached documents were copies of original records (Pen. Code § 969b; Rev. Codes Mont. 1921, § 12440).

Appeal from Superior Court, Los Angeles County; William T. Aggeler, Judge.

Dan J. Murphy was convicted of petty theft with prior conviction of a felony, and he appeals.

Affirmed.

Alexander L. Oster, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen. and John D. Richer, Deputy Atty. Gen., for the People.

CONREY, Presiding Justice.

Under an information charging the defendant with the crime of petty theft with prior conviction of a felony, to wit, robbery, the evidence proved that defendant committed the crime of petty theft in the county of Los Angeles, and that theretofore, in a court of competent jurisdiction in the state of Montana, he had been convicted of the crime of robbery and had served a term of imprisonment therefor in a penal institution.

[1, 2] The sole ground of appeal upon which defendant relies is found in his claim that the evidence is insufficient to support the verdict in this, that the evidence produced to establish the fact that he served a term of imprisonment pursuant to his conviction of robbery in Montana was insufficient to prove that fact. The particular detail of alleged insufficiency of the evidence is presented in the form of a claim by appellant that the certificate of the warden attached to the copy of commitment to the state penitentiary of Montana, which was received in evidence at the trial of this action, failed to certify that said warden was the official custodian of such record. Section 969b, Pen. Code. The document as certified by the warden stated that in his legal custody, as such officer, are the original files and records of persons heretofore committed to said penal institution; that the attached documents are copies of the original records of Dan Murphy No. 7977, "a person heretofore committed to said penal institution, and who served a term of imprisonment therein; that I have compared the foregoing and attached copies with their respective originals now on file in my office and each thereof contains, and is, a full, true and correct transcript and copy from its said original." In accordance with our own statute (Code Civ. Proc. § 1875, subd.

3), we take judicial notice of the fact that under the laws of Montana (Rev. Codes Mont. 1921, § 12440), the warden of the state prison is the legal custodian of its records.

It appears to us that the appeal is frivolous and wholly without merit. The judgment and the order denying motion for new trial are, and each of them is, affirmed.

We concur: HOUSER, J.; YORK, J.



NORTH et al. v. CECIL B. DE MILLE PRODUCTIONS, Inc.*

Civ. 9309.

District Court of Appeal, First District, Division 2, California.
June 13, 1934.

As Modified on Denial of Rehearing July 13, 1934.

Hearing Granted by Supreme Court Aug. 9, 1934.

1. Usury ⇐110

Receivers appointed for corporation by federal court are "personal representatives" of corporation within Usury Law, and as such can maintain action for violation of such law (Usury Law, § 3 [St. 1919, p. lxxxiii]).

2. Appeal and error ⇐877(3)

Whether corporation for which federal court had appointed receivers was necessary party to receivers' action charging violation of Usury Law, and whether there was misjoinder of parties plaintiff because of joinder of receivers and corporation as plaintiffs, was not before appellate court, where corporation was not party to receivers' appeal from judgment dismissing action after sustaining demurrers to complaint (Usury Law, § 3 [St. 1919, p. lxxxiii]).

3. Judgment ⇐237(4)

Where complaint states clear right of action as to some of plaintiffs, judgment should not be rendered for defendant even though proper objection to misjoinder is made, but action should be dismissed as to party improperly joined (Code Civ. Proc. § 578).

4. Usury ⇐109

Cause of action for violation of Usury Law *held* barred by limitations, where complaint was filed over year after payment or delivery of alleged usury (Usury Law, § 3 [St. 1919, p. lxxxiii]).

5. Action ⇐35

Where a statute creates a right that did not exist prior to its enactment and also prescribes a remedy, procedure for such remedy is exclusive.

6. Pleading ⇐68

In action by federal court receivers to recover for violations of Usury Law, it was proper for receivers to make allegations on information and belief, where each cause of action showed that facts alleged were not within actual knowledge of receivers, but were based on statements made to them by others (Usury Law, § 3 [St. 1919, p. lxxxiii]).

7. Pleading ⇐68

Pleader may allege on information and belief matters peculiarly within knowledge of other parties and which he can learn only by statements made to him by others.

8. Usury ⇐111(1)

Causes of action in complaint of corporation's receivers charging violations of Usury Law *held* not demurrable for failure to allege corrupt intent to evade provisions of such act (Usury Law, § 3 [St. 1919, p. lxxxiii]).

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Richard L. North and another, as receivers of the Elmer Company, Limited, and another, against Cecil B. De Mille Productions, Incorporated. From an adverse judgment, the receivers appeal.

Affirmed in part, and reversed in part with instructions.

Walter J. Little and W. Eugene Craven, both of Los Angeles, for appellants.

Neil S. McCarthy, Earl L. Banta, and Howard P. Hall, all of Los Angeles, for respondent.

SCHMIDT, Justice pro tem.

In the lower court appellants, as receivers for the Elmer Company, Limited, joined with the Elmer Company, Limited, as plaintiffs in a complaint against respondent corporation setting forth four separate and distinct causes of action for alleged violations of the Usury Law. To that complaint respondent filed an amended demurrer claiming misjoinder of parties plaintiff, and a general demurrer to each of said four causes of action. The demurrer was sustained. Respondent having

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 39 P.2d 199.

failed to amend within the ten days allowed, judgment was entered dismissing the action as against the appellant receivers, from which judgment this appeal is taken.

[1] The questions presented in this appeal are: Is a receiver for a corporation appointed by a federal court the "personal representative" of such corporation within the meaning of section 3 of the Usury Law (Stats. 1919, p. lxxxiii); was there a misjoinder of parties plaintiff, in that the receivers were joined as plaintiffs with the corporation; and do the respective counts in the complaint each state a cause of action?

1. The first question is answered in the affirmative by our Supreme Court in Scott v. Hollingsworth, 215 Cal. 314, 9 P.(2d) 836, 82 A. L. R. 995, a case decided after judgment in this case in the lower court. It was there held that for the purpose of enforcing any debt or penalty arising out of the provisions of the Usury Law general receivers appointed for a corporation by a federal court were the "personal representatives" of the corporation within the meaning of the said Usury Law and as such were entitled to maintain the action.

[2, 3] 2. Whether there was a misjoinder of parties plaintiff, namely, whether the corporation as such was a necessary party to this action, is not before us. The Elmer Company, Limited, is not a party to this appeal. The receivers, being the "personal representatives" of the corporation within the meaning of the Usury Law, were entitled to maintain the action. Scott v. Hollingsworth, supra. The trial court should not have required the receivers to file an amended complaint nor should judgment have been entered against them unless the complaint failed to state a cause of action. Section 578, Code of Civil Procedure, provides: "Judgment may be given for or against one or more of several plaintiffs * * * and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves." Our Supreme Court has construed the meaning of this section in Gillespie v. Gouly, 152 Cal. 643, 93 P. 856, holding that where a clear right of action is stated in some of the plaintiffs it would seem that judgment should not be rendered for the defendant even though proper objection to the misjoinder is made but the action should be dismissed as to the party improperly joined.

[4, 5] 3. As to the first cause of action set forth in the complaint, we find that the contract alleged to be usurious was entered into on the 25th day of January, 1930, and that on that same day the claimed usury was paid or delivered to respondent, and we further find that the complaint was filed on March 7, 1931, more than a year after the payment or delivery of the alleged usury. Section 3 of the Usury Law (St. 1919, p. lxxxiii) provides that an action thereunder for such usury "shall be brought within one year after such payment or delivery." Therefore, the demurrer to the first cause of action was properly sustained.

Where a statute creates a right that did not exist prior to its enactment and also prescribes a remedy, the procedure for such remedy is exclusive. People v. Craycroft, 2 Cal. 243, 56 Am. Dec. 331; Roberts v. Landecker, 9 Cal. 262; County of Monterey v. Abbott, 77 Cal. 541, 18 P. 113, 20 P. 73; Russell v. Pacific Railway Co., 113 Cal. 258, 45 P. 323, 34 L. R. A. 747; In re Estate of Ward, 127 Cal. App. 347, 15 P.(2d) 901.

[6, 7] The other three counts in the complaint are substantially stated in like language except as to dates and the particular transaction. The main contention of appellants is that some of the allegations of these respective causes of action are set forth upon "information and belief." Each cause of action shows that the facts alleged were not within the actual knowledge of the receivers and must have been based upon statements made to them by others. Therefore, it was proper for the receivers to make the allegations upon information and belief. A pleader may allege upon information and belief "matters which are peculiarly within the knowledge of the other party, or which he can learn only by statements made to him by others," and it was so stated in the syllabus in Campbell-Kawannanakoa v. Campbell, 152 Cal. 201, 92 P. 184.

[8] Respondent further claims that these causes of action are defective in that it is not alleged as to any one of the causes of action that there was a corrupt intent to evade the provisions of the usury act. This contention is answered by the very case relied upon by respondent, namely, Martin v. Kuchler, 212 Cal. 536, at page 539, 299 P. 52, 53: "The usury law as interpreted by this court * * * forbids the making and entering into such a transaction, declaring the same to be usurious, and imposes the penalty provided in said statute for the collection of interest according to the terms and conditions of such a transaction. This being so, the intent of both or either of the parties engaged in such a transaction is immaterial for the reason, if for none other, that it is a conclusive presumption under subdivision 1 of section 1962 of the

Code of Civil Procedure that a malicious and guilty intent is presumed from the deliberate commission of an unlawful act."

The judgment of the lower court in so far as it sustained the general demurrer to the first cause of action is affirmed, and in so far as it sustained the demurrer against appellants for the misjoinder of parties plaintiff, and sustained the general demurrer as against appellants to counts 2, 3, and 4, is reversed with instructions to the lower court as to counts 2, 3, and 4, to enter its order overruling the demurrers.

We concur: NOURSE, P. J.; STURTEVANT, J.



PEOPLE ex rel. DAVIDSON v. MERTZ.*

Civ. 9423.

District Court of Appeal, Second District, Division 1, California.

July 2, 1934.

Hearing Granted by Supreme Court Aug. 30, 1934.

Municipal corporations ⇐211

One not resident of city of Los Angeles for two years was not qualified to act as member of city board of education, though he resided within Los Angeles school district, since such election was election to office "under this charter" within provision of city charter providing qualifications (St. 1925, pp. 1039, 1105, 1106, §§ 5, 255, 260; School Code, §§ 2.110, 2.114; St. 1933, p. 2741, § 307; Const. art. 9, § 14, and art. 11, §§ 8, 8½).

HOUSER, J., dissenting.

Appeal from Superior Court, Los Angeles County; Lester William Roth, Judge.

Action by the People, on the relation of Kenneth C. Davidson, against Stewart O. Mertz, also known as S. O. Mertz. From an adverse judgment, defendant appeals.

Affirmed.

Otto A. Gerth and Roy A. Linn, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Leon French, Deputy Atty. Gen., and John J. Beck and David R. Faries, both of Los Angeles, for respondents.

CONREY, Presiding Justice.

By this action, "in the nature of quo warranto," plaintiffs asserted the disqualification of defendant to act as a member of the board of education of the city of Los Angeles under authority of his certificate of election, and prayed that the office be declared vacant. The defendant having filed his amended answer to the complaint, the case came before the court on motion of the plaintiff for judgment on the pleadings upon the ground that the amended answer admits the material allegations of the complaint and states no defense thereto. The motion was granted, and judgment entered in accordance with the prayer of the complaint. From this judgment the defendant appeals.

The judgment rests upon the fact that appellant was not a resident of the city of Los Angeles for the full period of two years next preceding his election to the office, although his place of residence was "within the territorial limits of the Los Angeles School District." Section 307 of the charter of the city of Los Angeles (St. 1925, p. 1124, as amended in 1933), reads as follows (St. 1933, p. 2741): "No person shall be eligible to nomination or election to any office under this charter who at the time of his nomination and election is not a qualified elector of this city, and shall not have been a resident of the city for at least two years next preceding his nomination or election, and to be eligible to nomination or election to the office of member of the council, the person nominated or elected must have been a resident of the district from which he is nominated or elected for at least two years next preceding his nomination or election."

Section 5 of the charter (St. 1925, p. 1039) provides that "the officers of the city shall be" certain designated officers, including "the Members of the Board of Education." Section 255. "The government of the School Department of the City of Los Angeles shall be vested in a Board of Education, to consist of seven members, to be elected as in this charter provided, and to be called Members of the Board of Education." Section 260. "The Board of Education shall have power: * * * (5) To have and exercise entire control and management of the public schools of the city in accordance with the Constitution and general laws of the state and the provisions of this charter, and said board is hereby vested with all the powers and charged with all the duties provided by this charter, and also by the

general laws of the state for City Boards of Education."

Article 9 of the state Constitution, under the general title "Education," provides as follows for school districts: "Sec. 14. The Legislature shall have power, by general law, to provide for the incorporation and organization of school districts, high school districts, and junior college districts, of every kind and class, and may classify such districts." Under the general laws of the state (School Code, § 2.110): "Every city or incorporated town, except cities and towns of the sixth class, unless subdivided by the legislative authority thereof, shall constitute a separate school district, which shall be governed by the board of education or board of school trustees of such city or incorporated town." Other sections of the Code allow the annexation to a city school district of "outside territory." School Code, § 2.114, provides that "the outside territory shall be deemed to be a part of said city or incorporated town for all matters connected with the school department thereof. * * *" The charter itself does not recognize such outside territory as being in any way included within the boundaries of the city.

If the election of a member of the board of education of the city of Los Angeles is an election to an office "under this charter," within the meaning of that phrase as used in section 307 of the charter, and if as to this particular subject the charter provisions have authority superior to the authority of the School Code where the two are in conflict, we shall have to decide that appellant was not eligible to be elected to the office.

A grant of self-governing power to cities in California is contained in article 11 of the state Constitution. The right to frame and adopt, subject to legislative approval, a city charter, is declared by section 8 of said article 11. This is followed by section 8½, wherein, among other things, it is provided that, in charters framed under the authority given by section 8, it shall be competent to provide: "2. For the manner in which, the times at which, and the terms for which the members of boards of education shall be elected or appointed, for their qualifications, compensation and removal, and for the number which shall constitute any one of such boards."

When we compare the foregoing quotation from section 8½ of article 11 with section 14 of article 9 of the Constitution, we discover that a city is given, specifically, power to define by its charter the qualifications of eligibility for election to membership in the board of education. The Legislature, on the other hand, is given authority to provide by general law for the "incorporation and organization" of school districts. Such incorporation and organization, unless by some other provision excluded, would include the right to prescribe the qualifications of school district officers. It therefore becomes necessary, as between the general law contained in the School Code, and the charter law contained in section 307 of the charter of the city of Los Angeles, to determine which law controls in the instant case.

In section 8 of article 11 of the Constitution we find this: "It shall be competent in any charter framed under the authority of this section to provide that the municipality governed thereunder may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to general laws." On the assumption that the words here quoted are the sole and only foundation of the authority claimed by the city under section 307 of its charter, appellant directs attention to the fact that the school system of the state is an affair of the commonwealth and is not to be classified as a "municipal affair." But the assumption that there is no other foundation for such authority is itself contrary to fact, because the authority of the city to prescribe the qualifications of members of its board of education has another and more sure foundation, in the grant of power which, as we have shown, is contained in the paragraph numbered 2 of section 8½ of article 11 of the Constitution. This direct and complete authorization is independent of the "municipal affairs" limitation.

Appellant contends, however, that the election of a member of the board of education is not an "election to any office under this charter," within the meaning of the provisions of section 307 of the charter. We have referred to sections of the charter which directly recognize the members of the board of education as city officers "to be elected as in this charter provided." Yet it must be admitted that several school districts which constitute the school department of the city are separate from the city and from each other. In a recent case relating to the school department of the city of Long Beach, we said that the districts had a separate existence, but were treated as a part of the municipal life, and so were placed under the control of

a board of education "authorized to care for the administration of the schools in both of the districts." McKee v. Edgar (Cal. App.) 30 P.(2d) 999, 1001. In Ward v. San Diego School District, 203 Cal. 712, 265 P. 821, 822, referring to the board of education of the city of San Diego, it was said "that the election of the several members of the board of education is merely a preliminary means of inducting such members into their respective offices, and that, when seated therein they become, and thenceforward are, officers of a political subdivision of the state, separate and distinct from the municipality within the boundaries of which the school district is located." In the Ward Case it was held (pages 716, 717 of 203 Cal., 265 P. 821, 822) that the officers of the San Diego school district were not "other city officers," within the meaning of a charter provision making it the duty of the city attorney to give advice, whenever required by certain named city officers, "or other city officers." But the decision, like some others, assumes, without any indication of doubt, that the creation of a board of education by election of its members is a proper function of the city, resulting from the relation which exists between the city and the school districts. In Hancock v. Board of Education of City of Santa Barbara, 140 Cal. 554, 74 P. 44, 46, the court said: "The function of the city under the charter is simply to furnish the officers who compose the governing body of the district. * * *" The provisions of the Constitution of California, to which we have referred, are completely in harmony with the principle thus announced in the decisions.

In view of the legal relationship of the city to the school districts which constitute the "school department of the city of Los Angeles," and in view of the foregoing decisions which recognize the right and duty of the city to provide a board of education for government of the school districts, it seems to us clear and plain that the provisions of section 307 of the charter, relating to the eligibility of persons "to nomination or election to any office under this charter," include the office of member of the board of education. The fact that, when a person has been elected as member of the board of education, he becomes a trustee of the several school districts, is entirely consistent with the fact that in the process of election he was elected to an office "under this charter."

For the foregoing reasons, the judgment is affirmed.

I concur: YORK, J.

HOUSER, Justice.

I dissent. It is unquestioned that by constitutional provision of this state the city of Los Angeles was granted authority to provide in its charter for the qualifications of members of its board of education; and that, in pursuance of such authority, by the terms of the charter provision to which in the prevailing opinion herein attention has been directed, such special qualifications were required that thereby appellant was rendered ineligible to hold the office of member of the board of education of said city. It also is unquestionable that by separate constitutional provision the Legislature of this state likewise was granted authority to enact laws of nature and effect similar to the said provision expressed in the charter of the city of Los Angeles; and that in the exercise of such authority the Legislature did enact several statutes, the effect of which was to make certain that one situated as was appellant herein was fully qualified to hold the office of member of the board of education of the city of Los Angeles. In such circumstances, as I read the pertinent authorities bearing upon the question thus presented, they are overwhelmingly to the effect that the provisions of the statutes thus enacted by the Legislature must prevail.

ROSENBERG v. BULLARD. *

Civ. 5107.

District Court of Appeal, Third District, California.

July 9, 1934.

Rehearing Granted Aug. 8, 1934.

1. Appeal and error ⇐442

Generally, an appeal stays every action in lower court except incidental or collateral matters not affecting vital questions.

2. Appeal and error ⇐452

Appeal from judgment dissolving attachment and vacating judgment of default did not operate as stay to prevent superior court from trying case on the merits, where appeal was not upon merits, and involved a moot question, in that judgment dissolving attachment and vacating default had been affirmed.

3. Exchange of property ⇐8(1)

Whether representations of value in exchange of property were matter of opinion or of material fact *held* for jury.

4. New trial ⇐102(3)

New trial on ground of newly discovered evidence *held* properly refused where record disclosed that there were account books at place 140 miles from place of trial, from which witness might have secured dates to prove he was not present at certain place as was testified to by plaintiff, but no application was made for continuance, and all facts stated were known or could have been known to witness, and could with reasonable diligence have been discovered and produced at trial (Code Civ. Proc. § 657).

5. Evidence ⇐546

In action for fraud in exchange of property, disallowing witness to testify as to values on ground that he was not qualified to testify *held* not abuse of discretion.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by Jennie Rosenberg against Kate A. Bullard. Judgment for plaintiff, and defendant appeals.

Affirmed.

See, also, 127 Cal. App. 315, 15 P.(2d) 870.

William Ellis Lady and Guy Knupp, both of Los Angeles, for appellant.

Goldman & Lieberman, of Los Angeles, for respondent.

GANS, Justice pro tem, delivered the opinion of the court.

Plaintiff owned an apartment house in Los Angeles. Defendant owned twenty-five acres of orchard land in Tulare county and sixteen unimproved lots in Lindsay in said county. An exchange of properties was effected between these parties through agents. Plaintiff claims that she was defrauded in the value of the property received by her to her damage.

This suit was begun in 1929, an attachment having been had on certain real property, the defendant being out of the state. Upon the trial the defendant defaulted, and plaintiff took default judgment for $65,350. This judgment by default was set aside and defendant permitted to answer. The order setting aside the default also dissolved the attachment. The plaintiff filed her notice of appeal from the two orders, that is, the one vacating the default and the one dissolving the judgment. Thereafter, and while this appeal was then pending, the defendant filed her motion supported by affidavits making demand that the case be set down for trial, stating, among other things, that she would suffer irreparable injury if it were not disposed of since her title was clouded, etc. The case was then set down and tried, and plaintiff had judgment for $14,300. From this judgment she has appealed, and it is this last appeal now before the court. In the meantime the first appeal mentioned has been decided, and the judgment affirmed. In that appeal it was decided that, the attachment being properly dissolved, the judgment of default should have been set aside, and was properly vacated. The validity of the attachment was the real point at issue therein.

The real ground of appeal is the question as to a representation made that the property was worth $30,000, although some other points are presented.

The first point made in the briefs is that the appeal above mentioned operated as a stay to prevent the superior court from trying the case. It is peculiar that the trial was caused by the defendant herself, who now takes this appeal and makes this point; she, having insisted that the case be set for trial or she would be greatly damaged, now insists with equal vehemence that it should not and could not have taken place.

[1, 2] It is true the general rule is that an appeal stays every action in the lower court unless it be some incidental or collateral matters not affecting the vital questions in the case. In the case of Rosenberg v. Bullard, 127 Cal. App. 315, 15 P.(2d) 870, where the appeal is claimed to operate as a stay, it is

readily seen that the appeal was upon the question of the validity of the attachment, and, it having been found invalid, the motion to set aside and vacate the judgment was properly made. Counsel for defendant insists, however, that, whatever may be said as to her having the case set for trial, no party may waive objection to jurisdiction nor confer it by consent, waiver, or estoppel. There are authorities to this effect; but there was no stay in this case because the appeal was not upon the merits of the case, and further it is now a moot question, the former appeal having been finally decided as is shown by the above. Rosenberg v. Bullard, supra. All objections that might have existed are now without merit, and there is nothing here presented to cause a reversal of the judgment.

[3] The question as to whether the representations of value were merely matter of opinion or of material fact presents a matter of conflict of evidence. The jury, after a hearing, found for plaintiff, and specifically decided, by special interrogation, that the representations were of a fact. We do not feel justified in reversing that finding. Although plaintiff inspected the property, she testified that she did so very inadequately and because it was late and she was not informed as to values; that she placed herself in the hands of the agents of the adverse party who were informed as to the property and conditions present, and relied upon them.

[4] It is claimed that the court erred in not granting a new trial on the ground of newly discovered evidence. The record discloses that there were some account books at Tulare some 140 miles from the place of trial, from which a witness might have secured dates to prove he was not present at a certain place as was testified to by plaintiff. No application was made for a continuance. All the facts stated were known, or could have been known, to witness. He knew the case was coming up, and could with reasonable diligence have discovered this evidence and produced it at the trial or had an application for time to get it. It existed, and its existence, and not its materiality, must be the subject of discovery. A claim such as this is not favored. 20 Cal. Jur. 80; Spiegelman v. Eastman, 95 Cal. App. 205, 272 P. 761; Easom v. Gen. Mortg. Co., 101 Cal. App. 186, 281 P. 514; Fuller v. Harwell, 117 Cal. App. 280, 3 P.(2d) 592; Snodgrass v. Snodgrass, 81 Cal. App. 360, 253 P. 755; section 657, Code Civ. Proc.

[5] The point is further made that the court erred in not admitting the evidence of witness Bullard as to values. The court held he was not qualified to testify. No abuse of discretion is shown.

The instructions given and refused have been considered, and we think the jury was correctly and sufficiently instructed and no error as to instructions can be found.

The judgment should be, and is hereby, affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



139 Cal.App. 89

CITIZENS' NAT. TRUST & SAVINGS BANK OF LOS ANGELES v. MESERVE et al. (two cases).

Civ. 9698, 9648.

District Court of Appeal, Second District, Division 2, California.

July 2, 1934.

Hearing Denied by Supreme Court Aug. 2, 1934.

1. Trial ⇐393(1)

Code section requiring service of findings of fact and conclusions of law *held* directory, not mandatory (Code Civ. Proc. § 634).

Motion by defendants, under section 652, Code of Civil Procedure, to correct bill of exceptions so as to show that findings of fact and conclusions of law were not served on them.

On petitions for rehearing.

Petitions denied, and prior opinion [33 P. (2d) 73] amended.

Hiram E. Casey, of Los Angeles, for petitioner Marguerite Maloney Mayo in Civil No. 9698.

G. C. De Garmo, in pro. per., and W. M. Crane, both of Los Angeles, for petitioner G. C. De Garmo in Civil No. 9648.

PER CURIAM.

The petitions for rehearing are denied. The opinion is amended by striking the second paragraph thereof and adding in place thereof the following:

The petitions are denied for the reason that section 634 of the Code of Civil Procedure, requiring the service of findings of fact and conclusions of law, is directory. Hammond Lumber Company v. Henry, 87 Cal. App. 231, 261 P. 1027; Manfre v. Sharp, 210 Cal. 479, 292 P. 465; Lorraine v. McComb (Cal. Sup.) 32 P. (2d) 960.



139 Cal.App. 577

STARK v. PIONEER CASUALTY CO. et al.

Civ. 8409.

District Court of Appeal, Second District, Division 2, California.

July 6, 1934.

Hearing Denied by Supreme Court Sept. 4, 1934.

1. **Insurance** ⇐130(4)

Insurance company, having solicited and obtained applications for insurance, and having received payment of premiums, is bound either to furnish indemnity state has authorized it to furnish or decline within reasonable time.

2. **Insurance** ⇐130(4)

Insurer's delay in passing on application cannot be construed as acceptance which will support action ex contractu, but applicant will not be charged with same degree of diligence as insurer, and insurer may be held liable for actual damage not exceeding amount of insurance purchased if it delays notice of rejection, and may not complain of inexcusable delay because of its agent's dilatory conduct or inefficiency.

3. **Limitation of actions** ⇐28(2)

Applicant's action against insurer for damages predicated on negligence of insurance agent in withholding application and premium solicited by him to insure plaintiff against injury in automobile, until after plaintiff was injured, *held* not barred by one-year statute but falls within two-year period of limitation (Code Civ. Proc. §§ 339, 340, subd. 3).

4. **Appeal and error** ⇐1010(1)

Where any substantial evidence tends to support finding, its sufficiency is for trial court.

5. **Insurance** ⇐130(4)

In applicant's action against insurer for agent's negligence in withholding application and premium solicited by him insuring plaintiff against injury in automobile evidence *held* to support finding that plaintiff's injury was accidental, though some evidence indicated it was intentionally inflicted by third party.

Appeal from Superior Court, Los Angeles County; H. Parker Wood, Judge.

Action by Grace Stark against the Pioneer Casualty Company and another. Judgment for plaintiff, and named defendant appeals.

Affirmed.

Hearing denied by Supreme Court; SHENK, J., dissenting.

Gibson, Dunn & Crutcher, of Los Angeles (Philip C. Sterry, of Los Angeles, of counsel), for appellant.

M. C. Spicer and W. O. Graf, both of Los Angeles, for respondent.

CRAIG, Justice.

In an action for damages by an applicant for insurance, judgment was rendered against the casualty company and its agent, from which the company appealed.

The action was predicated upon negligence of the agent of the defendant company in withholding the application and premium delivered to him for transmission to his principal. That the agent solicited and obtained the same, to insure against injury through accidental means while driving or riding in an automobile, and that they were not forwarded, nor a policy issued, the parties agree. The applicant learned such fact only after demand was made for the insurance following an accident.

[1, 2] The first ground assigned for reversal arises from rulings adversely to the defendants upon demurrer to the amended complaint and objections to the evidence. It is contended that, since the agent's authority was limited to soliciting and receiving the application and premium, and such application being merely an offer from which no contract could be implied until accepted, and a policy had been issued and delivered, no liability could arise. We think from the nature of the case that any issue as to a contractual relation was excluded by failure to furnish insurance to one permitted and entitled to rely thereon, without notice of rejection or of failure to perform the duty for which a consideration had been received by the agent. There was undisputed evidence of the applicant's desire for insurance, of agency, the solicitation therefor, representations upon which the applicant was led to rely, and that she was thus precluded from obtaining in-

surance elsewhere. Authorities are cited wherein applicants for insurance were held not entitled to recover upon contract. National Union Fire Ins. Co. v. School District, 122 Ark. 179, 182 S. W. 547, L. R. A. 1916D, 238. No language tending to inform the applicant that she was not insured when the premium was paid is to be found in the receipt given her. It stated: "Received of Grace Stark an application for a Pioneer Automobile Accident Policy and the sum of Fifteen Dollars in payment of the annual premium. Should the application be declined, I agree to refund the above amount to applicant. Please notify the Pioneer Casualty Company, Home Office, 1310 Detweiler Building, Los Angeles, California, should the policy not be received within twenty (20) days from date hereof. (Signed) Edward E. W. Shiels, Agent." It is established by cases wherein the rule was applicable as here that: "Insurance companies are held, in law, to a broader legal responsibility than are parties to purely private contracts or transactions. This is based upon the fact that those companies act under franchise from the state, and the policy of the state in granting such franchises proceeds upon the theory that it is in the interest of the public to the end that indemnity upon specific contingencies should be provided those who are eligible and desire it, and for their protection the state regulates, inspects, and supervises their business. An insurance company having solicited and obtained applications for insurance and having received payment of the fees or premiums exacted, they are bound either to furnish the indemnity the state has authorized them to furnish or decline so to do within such reasonable time as will enable them to act intelligently and advisedly thereon." Columbian Nat. L. Ins. Co. v. Lemmons, 96 Okl. 228, 222 P. 255, 259; Dyer v. Missouri L. Ins. Co., 132 Wash. 378, 232 P. 346; Security Ins. Co. v. Cameron, 85 Okl. 171, 205 P. 151, 27 A. L. R. 444. It has been said that, an applicant having paid the premium to an agent, and the company having received its share thereof and assumed the duty of returning the same on rejection of the application, the applicant did all required of him, and, having received no notice of adverse action on his application, he might assume after several months that it had been accepted. Great Southern Life Ins. Co. v. Dolan (Tex. Civ. App.) 239 S. W. 236. Since the agent herein received the application and premium, it must be assumed, and is not denied, that respondent relied upon its delivery to the insurer, appellant herein, and the parties stipulated that, had said application been presented, a policy would have been issued in about five days. Fraud cannot be presumed, and was eliminated by the trial court upon the evidence before it. Mere delay in passing upon an application cannot be construed as an acceptance which will support an action ex contractu; but the applicant will not be charged with the same degree of diligence as an insurer organized for profit; and the latter may be held liable for actual damage not exceeding the amount of insurance purchased if it be shown to have delayed notice of rejection, and may not complain of inexcusable delay because of its agent's dilatory conduct or inefficiency. Massachusetts Bonding & Ins. Co. v. R. E. Parsons Elec. Co. (C. C. A.) 61 F.(2d) 264; Columbian Nat. Life Ins. Co. v. Lemmons, supra; Security Ins. Co. v. Cameron, 85 Okl. 171, 205 P. 151, 27 A. L. R. 444; Dyer v. Missouri L. Ins. Co., supra. The authority last cited is fortified by many cases from various jurisdictions.

It is contended that National Union Fire Ins. Co. v. School District, supra, must be held decisive here, for the reason that the application contained language equivalent to that embraced in respondent's application to the effect that no insurance contract should exist until delivered. But, as stated, an action ex contractu is not of aid in a case wherein contractual relations are admittedly not in issue, and when the facts give rise to an action for damages. Northwestern Mutual L. Ins. Co. v. Neafus, 145 Ky. 563, 140 S. W. 1026, 36 L. R. A. (N. S.) 1211, relied upon by appellant, revealed neither the existence of a contract nor of negligence, though the action was founded upon alleged contract; and, like cases to the same effect, is not in point. Duffie v. Bankers' Life Ass'n of Des Moines, 160 Iowa, 19, 139 N. W. 1087, 1089, 46 L. R. A. (N. S.) 25, stated the rule upon analogous conditions, that a life insurance company is chargeable with the negligence of its agent in failing for an unreasonable time to forward an application for acceptance. "The association was bound by the acts of its agents and chargeable with any consequences that resulted from the failure of Rogers to promptly forward the application. * * * In other words, if the association was under a duty to promptly act on the application and notify Duffy, as we think it was, it cannot shield itself from the responsibility by the fact that the application and medical report had not been received by it and therefore it could not act. See Northwestern Mut. L. Ins. Co. v. Neafus, 145 Ky. 563, 140 S. W. 1026, 36 L. R. A. (N. S.) 1211. The possession of these by its agent had the same effect as if they were in the possession

of the association at its home office. Assuming then that the application and medical report had been promptly forwarded by the agent, and that the application was not accepted or rejected within the time intervening prior to his death, it seems manifest that whether this was an unreasonable delay was for the jury to determine, and we so hold." Duffie v. Bankers' L. Ass'n of Des Moines, supra. To the same effect, see Johnson v. Farmers' Ins. Co., 184 Iowa, 630, 168 N. W. 264.

[3] Appellant views the cause of action as barred after the expiration of one year by section 340 of the Code of Civil Procedure, subdivision 3, and relies upon the reasoning in an action by a man for loss of services of his wife through negligence of another. Basler v. Sacramento, etc., R. Co., 166 Cal. 33, 134 P. 993, 994, wherein it was said "that the word 'for' means 'by reason of,' 'because of,' and 'on account of,' and that a statute prescribing a limitation on 'actions for injury to the person * * * caused by negligence' should be interpreted to mean 'actions "by reason of," or "because of," or "on account of" injuries to the person caused by negligence,' " is cited. But this action is not for such loss from the tort of another. It is for a loss incurred through neglect of an insurer and its agent, of insurance on which an applicant was permitted to rely in the event of a third person's tort. In short, negligence of the appellant became the procuring and proximate cause of loss of security, whereas liability upon contract or upon the contingency for which the nonexistent but intended security was agreed would have been actionable only within one year. The intervening cause falling within the two-year period of limitation may be found in actions for derelictions of banking institutions, relations of attorney and client, and similar transactions. Hays v. Ewing, 70 Cal. 127, 11 P. 602; Boyer v. Barrows, 166 Cal. 757, 138 P. 354; Smith's Cash Store v. First National Bank, 149 Cal. 32, 84 P. 663, 5 L. R. A. (N. S.) 870; Jensen v. Sprigg, 84 Cal. App. 519, 258 P. 683. In Smith's Cash Store v. First National Bank, supra, a patron of the bank had deposited funds upon which deposit he gave checks to creditors, which checks were not honored by the bank. Following litigation by the creditors, attachment and loss of the depositor's property, it was held that the bank, intervening cause thereof, was liable in damages to its depositor upon an obligation not founded upon an instrument in writing, within the meaning of section 339 of the Code of Civil Procedure until the expiration of two years. The respondent, Stark, did not seek redress for her accident from the direct tort-feasor, but damages from the intervening party but for whose negligence she would have been indemnified.

[4, 5] It is contended that the evidence was not sufficient to support a finding made by the trial court to the effect that the injury was occasioned wholly by accident and independent of all other causes. It appeared that respondent and one Llewellyn had informed an officer of differences between the respondent and one Kennard; thereafter, and on the date of the casualty, said officer, while driving toward the intersection of two streets, saw Kennard standing on the northwesterly corner thereof; when the officer had left his car and approached within about four feet of Kennard, the latter shot him. The respondent and her companion had theretofore driven to a point on the easterly side and about 100 feet southerly from said corner. Llewellyn got out of their car and preceded the officer to the corner, and, when the latter was shot, Llewellyn returned, to find respondent's car against the curbing. One witness testified that after shooting the officer Kennard ran toward the respondent and shot her. Such was the evidence upon which the appellant based its contention. But it was a question of fact for the trial court to determine as to whether or not the plaintiff was intentionally injured by Kennard. There was other evidence that he was shooting "nearly due east," and the plaintiff testified that while riding in her car a bullet struck her and that she had been blind since the occurrence, but that she did not see Kennard approach. From the appearance of the witnesses upon the stand, their demeanor and manner of testifying, and from all the circumstances before the court, it concluded that the plaintiff's injury was not intentionally inflicted by Kennard but was accidental. When there is any substantial evidence tending to support a finding, it is for the trial court to determine whether the same is sufficient. Dreyer v. Cole, 210 Cal. 339, 292 P. 123; Reilly v. Filben, 107 Cal. App. 722, 291 P. 454; Quatacker v. Hutton, 108 Cal. App. 606, 292 P. 140.

The judgment is affirmed.

We concur: DESMOND, J.; ARCHBALD, Justice pro tem.

139 Cal.App. 625

ROTHSCHILD v. FOURTH AND MARKET STREET REALTY CO.

Civ. 8889.

District Court of Appeal, First District, Division 1, California.

July 10, 1934.

Rehearing Denied Aug. 9, 1934.

Hearing Denied by Supreme Court Sept. 7, 1934.

1. **Negligence** ⊂⊃32(1)

Building owner is obligated to exercise ordinary care for safety of invitees on premises.

2. **Negligence** ⊂⊃136(16)

Whether condition causing injury to invitee on another's premises had existed so long as to be discoverable by owner within reasonable time is for jury.

3. **Negligence** ⊂⊃125

Testimony as to conditions before invitee slipped and fell on floor, causing injuries for which she sued building owner, by persons who had also slipped thereon, was evidence of notice to owner of dangerous condition.

4. **Negligence** ⊂⊃136(16)

Whether floor, on which building owner's invitee slipped and fell, was unsafe because of wax polish for such time before accident that owner must have known such fact, *held* for jury.

5. **Appeal and error** ⊂⊃996

That different inferences as to cause of injury sued for might be drawn from evidence is no ground for holding that jury's conclusion is unsupported.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Esther Rothschild against the Fourth and Market Street Realty Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

W. G. McKeen and George M. Naus, both of San Francisco, for appellant.

Ford & Johnson, of San Francisco, for respondent.

PER CURIAM.

An appeal by defendant corporation from a judgment in favor of the plaintiff entered upon the verdict of a jury.

The defendant owned and operated a building in San Francisco. On August 21, 1929, plaintiff entered the building as an invitee to purchase merchandise. She alleged that while walking along one of the hallways she slipped and fell by reason of the negligence of the defendant.

The testimony shows that the hallway was covered with linoleum. Plaintiff testified that the same was polished and slippery and that at the place she fell water had collected. She noticed the water after the accident; but whether the fall was due to this or the fact that the floor had been waxed is not clear from the testimony. Either inference might reasonably be drawn therefrom. She was corroborated by other witnesses as to the general condition of the linoleum. The floor was "like glass" according to one of them, who testified that she had often slipped thereon, but in each instance had saved herself from falling. Another testified that the wax used to polish the linoleum, which was applied frequently, caused this condition. While none of the witnesses had reported the facts to which they testified to the defendant, it is clear that the slippery condition of the floor had continued for several months. No evidence was offered by the defendant.

[1-5] Defendant was under an obligation to exercise ordinary care for the safety of invitees upon its premises (19 Cal. Jur. "Negligence," § 55, p. 621); but it has been held that the mere fact that one slips and falls is insufficient to establish a prima facie case against the defendant (Mautino v. Sutter Hospital Ass'n, 211 Cal. 556, 296 P. 76; Wegener v. Foster, 120 Cal. App. 260, 8 P.(2d) 154; Graham v. F. W. Woolworth Co. [Tex. Civ. App.] 277 S. W. 223; Parker v. Great Atlantic & Pacific Tea Co., 201 N. C. 691, 161 S. E. 209; Tenbrink v. F. W. Woolworth Co. [R. I.] 153 A. 245; Chilberg v. Standard Furniture Co., 63 Wash. 414, 115 P. 837, 34 L. R. A. (N. S.) 1079; Bowden v. S. H. Kress & Co., 198 N. C. 559, 152 S. E. 625; Spickernagle v. Woolworth, 236 Pa. 496, 84 A. 909, Ann. Cas. 1914A, 132). However, the question whether the condition which caused the injury had existed so long as to be discoverable by the defendant within a reasonable time is one for the jury [Bowden v. S. H. Kress & Co., supra; Headington v. Central Building Co., 137 Kan. 350, 20 P.(2d) 816; Robinson v. F. W. Woolworth Co., 80 Mont. 431, 261 P. 253; Great Atlantic & Pacific Co. v. Weber (C. C. A.) 51 F.(2d) 1051; De Velin v. Swanson (R. I.) 72 A. 388; Brown v. Holzwasser, Inc., 108 Cal. App. 483, 291 P. 661; Rea v. Southern Pacific Co., 105 Cal. App. 559, 288 P. 151]; and, where there

is testimony as to the conditions previous to the accident by persons who had also slipped on the same floor, such testimony is evidence tending to show notice to the defendant of the dangerous condition [Judson v. Am. Ry. Express Co., 242 Mass. 269, 136 N. E. 103; S. H. Kress & Co. v. Dyer (Tex. Civ. App.) 49 S.W. (2d) 986; John Gerber Co. v. Smith, 150 Tenn. 255, 263 S. W. 974]. While the accident may have been caused by water on the floor of which defendant had no knowledge, nevertheless the jury might reasonably have found from the evidence that the floor, due to the wax polish, was unsafe, and that this condition had existed for such a length of time that defendant must have known the fact. That different inferences as to the cause of the injury might be drawn from the evidence is no ground for holding that the conclusion of the jury is unsupported. 2 Cal. Jur. "Appeal and Error," § 949, p. 934.

The judgment is affirmed.



139 Cal.App. 532

G. W. WILLIAMS CO., Limited, v. KLASSEN et ux.

Civ. 8887.

District Court of Appeal, First District, Division 1, California.

July 3, 1934.

1. Appeal and error ⇐994(3), 1012(1)

Credibility of witnesses and weight to be given testimony are questions for trial court (Code Civ. Proc. § 1847).

2. Compromise and settlement ⇐23(3)

In action on account for labor and materials furnished under construction contract, findings that plaintiff did not accept less than amount due in full settlement *held* supported by evidence.

Appeal from Superior Court, San Mateo County; C. W. Miller, Judge.

Action by the G. W. Williams Company, Limited, against Robert A. Klassen and wife. From a judgment in favor of the plaintiff, the defendants appeal.

Judgment affirmed.

Pardini & Scampini, of San Francisco (Floyd B. Cerini, of San Francisco, of counsel), for appellants.

Fred A. Watkins, of Long Beach, for respondent.

PER CURIAM.

An action for the balance of an account for labor and materials furnished at defendants' request.

The defendants alleged that plaintiff's claim is based upon a contract for the erection of certain buildings; that it filed a lien for a balance declared to be unpaid thereunder of $11,318; that subsequently upon the payment of $10,818 plaintiff agreed to and did release said lien and accepted said sum in full settlement of its claim. It was further alleged by way of cross-complaint that certain of the work done failed to conform to the plans and specifications, due to which defendants suffered damage.

The court found against the defendants, and entered judgment for plaintiff in the amount prayed.

[1, 2] Defendants, who have appealed, make no complaint as respects the denial of relief under their cross-complaint, but contend that the findings against the alleged settlement are unsupported.

It appears that, although there were numerous claimants for work and materials furnished in the erection of defendants' building, the plaintiff alone filed a lien upon the property. It is admitted that the smaller claimants accepted a 10 per cent. deduction from their claims and that plaintiff released its lien. Whether it also agreed to a deduction as claimed by defendants was an issue in the case. Plaintiff's president testified that there was no such agreement, and that its lien was released merely to enable defendants to borrow money on the property. In this connection the court's finding was as follows: "That it is true that in the course of negotiations between plaintiff and defendants defendants submitted to the plaintiff and the other claimants a proposal to pay them 90 per cent of their several demands in full settlement of such demands, but that they would not borrow the money which it was necessary for them to borrow at an interest rate of 12 per cent per annum in order to pay such sums unless their proposal should be accepted, and that if their proposal was not accepted they would place every obstacle furnished by law in their way to prevent collection; that all

of the claimants except plaintiff accepted said proposal, but plaintiff in response to said proposal stated to defendants that it would upon payment to it of a sum $500.00 less than what was due it release its lien, which was filed in volume 547 of Official Records of San Mateo county, page 103, and which lien it did release, but that it would not consent to a reduction of 10 per cent in its demand."

The testimony on this question was conflicting, but the trial court found in accordance with plaintiff's version of the transaction. The credibility of witnesses and the weight to be given their testimony were questions for that court (Code Civ. Proc. § 1847), and we cannot say that its findings are unsupported.

There is no merit in the contention that the findings are insufficient or the conclusions of law erroneous.

The judgment is affirmed.



139 Cal.App. 615

FIDELITY & CASUALTY CO. OF NEW YORK v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 9437.

District Court of Appeal, First District, Division 2, California.

July 9, 1934.

Appeal and error ⊂=1234(4)

Where bond on appeal did not provide that surety was bound in double amount named in judgment, or that surety would pay amount directed to be paid by judgment, as affirmed, as statute required, but only provided for damages and costs, judgment against surety for full penalty was void (Code Civ. Proc. § 942).

Writ of review from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Petition for writ of review by the Fidelity & Casualty Company of New York against the Superior Court, in and for the City and County of San Francisco and others.

Writ annulling and canceling judgment against petitioner issued.

Hadsell, Sweet, Ingalls & Lamb, of San Francisco, for petitioner.

Roy G. Hudson and Young, Hudson & Rabinowitz, all of San Francisco, for respondents.

SCHMIDT, Justice pro tem.

This matter comes before the court on a petition for writ of review upon the following facts: That on the 22d day of November, 1929, the superior court in and for the city and county of San Francisco, in its action No. 201509 civil, rendered and entered its judgment in favor of Philip G. Herrlein, plaintiff, as follows:

"1. That defendant Fred A. Tocchini is indebted to plaintiff Philip G. Herrlein in the sum of $45,657.50. * * *

"2. That defendant Lilienthal, Bremer & Co. be and it is hereby ordered to pay over to plaintiff Philip G. Herrlein the sum of $12,000.00 now on deposit with said defendant Lilienthal, Bremer & Co., which sum of $12,000.00 was deposited with said defendant by or on behalf of defendant Fred A. Tocchini, said $12,000.00 to be applied on account of the judgment in paragraph I hereof specified.

"3. That defendant Lilienthal, Bremer & Co. be and it is hereby ordered to pay over to plaintiff Philip G. Herrlein all cash dividends received by it or received by either of the plaintiffs and paid to the said defendant, which said cash dividends amount to the sum of $1,139.08, and which said sum is to be applied on account of payment of the judgment in paragraph 1 hereof specified.

"4. That defendant Lilienthal, Bremer & Co. be and it is hereby ordered to sell all of the shares of stock hereinbefore on page 2 hereof set forth (saving and excepting * * *), or so much thereof as may be necessary to pay the balance of the judgment herein rendered in favor of plaintiff Philip G. Herrlein after applying thereto the sum of $12,000.00 and the cash dividends hereinabove referred to and to pay the net proceeds of such sale, or sales, to said plaintiff Philip G. Herrlein. * * *

"6. It is further ordered, adjudged and decreed that in the event the said sum of $12,000.00 ordered to be paid plaintiff Philip G. Herrlein by defendant Lilienthal, Bremer & Co., together with the cash dividends now in the possession of Lilienthal, Bremer & Co., in the sum of $1,139.08, together with the net

proceeds of the stock ordered to be sold by defendant Lilienthal, Bremer & Co., shall not be sufficient to pay the plaintiff Philip G. Herrlein the said sum of $45,657.50, with interest from July 16, 1928, at seven per cent per annum, together with plaintiff's costs of suit, that in that event plaintiff Philip G. Herrlein have judgment against defendant Fred A. Tocchini for any deficiency remaining due to plaintiff Philip G. Herrlein after such sale and application as hereinabove provided, and defendant Lilienthal, Bremer & Co. is hereby ordered and directed after making such sale, or sales, of stock to make and file a return herein specifying the results thereof.

"7. That plaintiff Philip G. Herrlein have judgment for his costs of suit herein incurred, to-wit, $65.75."

The judgment also provided for the disposition of any shares of stock remaining in the hands of defendant Lilienthal, Bremer & Co. after sale and satisfaction of judgment.

From this judgment the defendants Tocchini appealed. Thereafter, on application of said appealing defendants, the superior court made its "Order Fixing Stay Bond on Appeal from Judgment," wherein it was recited:

"Whereas, in fixing the amount of the bond hereinafter determined the court has taken into consideration that there is now in the possession of the defendant Lilienthal, Bremer & Co., and available for the satisfaction of the judgment herein rendered, the sum of Thirteen Thousand One Hundred Thirty-nine Dollars and eight cents ($13,139.08) in cash and the following enumerated shares of stock. * * * Now, therefore, it is ordered * * * that the amount of said bond and undertaking be, and the same is hereby fixed in the sum of $25,000.00

"It is further ordered * * * that pending a final determination of the appeal herein the shares of stock and the cash hereinabove specified be held in possession of defendant Lilienthal, Bremer & Co., subject to any final judgment that may be entered herein."

Pursuant to this order fixing undertaking on appeal, a bond of the Fidelity & Casualty Company of New York (petitioner herein) in the sum of $25,000 was presented, which undertaking, after reciting the fact of a money judgment for $45,656.50 and $65.75 costs, further provided: "In consideration of the premises and of such appeal, the undersigned * * * does hereby undertake and promise on the part of the Appellants that said Appellants will pay all damages and costs which may be awarded against Fred A. Tocchini and H. J. Tocchini on the appeal, or on a dismissal thereof, not exceeding twenty-five thousand and 00/100 dollars, to which amount it acknowledges itself bound."

In due course the judgment of the superior court, except for an item of interest, was affirmed [Herrlein v. Tocchini, 128 Cal. App. 612, 18 P.(2d) 73], and hearing in the Supreme Court was denied.

After the filing of the remittitur in the lower court and more than thirty days thereafter, the Anglo California National Bank of San Francisco, assignee of the judgment plaintiff, served upon the petitioner herein, the Fidelity & Casualty Company of New York, its notice of motion for an order for entry of judgment against said petitioner in the sum of $25,000, and pursuant thereto the trial court granted the motion and entered its order for judgment against petitioner and in favor of said Anglo California National Bank. The petition herein is to review said order granting said motion and the judgment made and entered pursuant thereof.

The contention of appellant is that the judgment, pursuant to the court's order granting the motion of the Anglo Bank, was void, for the reason that the bond, as approved and filed, failed to comply with that portion of section 942, Code of Civil Procedure, providing that a written undertaking be executed to the effect that the surety is bound in double the amount named in the judgment, and, if the judgment appealed from be affirmed, will pay the amount directed to be paid by the judgment. We agree with this contention, for an examination of the wording of the bond shows that it did not contain such a provision, and only provided for damages and costs. Section 942 specifically provides that the bond shall contain three matters: (a) Payment of the amount directed to be paid by the judgment as affirmed; (b) all damages; (c) costs which may be awarded against the appellant upon the appeal.

The latest expression of our Supreme Court on this question is found in De Garmo v. Superior Court, 33 P.(2d) 411, 412, quoting from Mohn v. Superior Court, 53 Cal. App. 425, 428, 200 P. 360: "A stay of execution upon a judgment on appeal therefrom is a matter of statutory regulation, and can only be had upon a substantial compliance with the provisions of the Code."

Inasmuch as the undertaking under consideration neither contained a provision that the surety would be bound "in double the

amount named in the judgment" nor a provision that the surety "will pay the amount directed to be paid by the judgment" as affirmed, it necessarily follows that the writ prayed for must be granted.

It is ordered that a writ issue annulling and canceling said judgment, petitioner to recover its costs herein.

We concur: NOURSE, P. J.; STURTEVANT, J.



139 Cal.App. 621

PEERLESS MOTOR CO. v. STERLING FINANCE CORPORATION et al.

Civ. 5108.

District Court of Appeal, Third District, California.

July 9, 1934.

1. Sales ⇐480(4)

Evidence sustained finding that factory distributor was owner and entitled to possession of automobile as against assignee of conditional sales contract between dealer and buyers, where dealer, having given distributor dishonored check, unauthorizedly removed automobile from distributor's warehouse.

2. Sales ⇐475

Assignee of conditional sales contract between automobile dealer and buyers *held* charged with notice that dealer did not own automobile which dealer unauthorizedly removed from factory distributor's warehouse after giving distributor dishonored check, where distributor executed no indicia of title.

3. Sales ⇐199

Whether title to personalty passes by delivery depends on parties' intention determined by circumstances.

4. Sales ⇐219(2)

Seller's accepting buyer's check for personalty subject to payment thereof does not pass title where check is subsequently dishonored.

5. Sales ⇐219(2)

Factory distributor accepting dealer's dishonored check, but not delivering automobile or executing indicia of title, *held* not estopped from asserting title to automobile which dealer unauthorizedly removed from warehouse and conditionally sold.

6. Estoppel ⇐115

Defendant, having suitable opportunity, must plead and prove facts constituting alleged estoppel.

Appeal from Superior Court, Los Angeles County; Allan B. Campbell, Judge.

Suit by the Peerless Motor Company against the Sterling Finance Corporation, which filed a cross-complaint, and others. Judgment for plaintiff, and defendant named appeals.

Affirmed.

Sparling & Teel, of Los Angeles, for appellant.

Root, Bettin & Painter, Conant Wait, and L. Kenneth Rhodes, all of Los Angeles, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendant Sterling Finance Corporation has appealed from a judgment quieting title in the respondent to one Peerless sedan automobile. It is claimed the respondent is estopped from asserting title thereto. Judgment was also rendered against the other defendants by default. They have not appealed.

The respondent Peerless Motor Company, a corporation, is a factory distributor of Peerless automobiles, authorized to do business in California, with its principal place of business at Los Angeles. The appellant is a financing corporation of the same city. The defendant Arthur Bowe is an independent dealer in automobiles, doing business under the name of Wilshire Center Motors, with its place of business also in Los Angeles. He was engaged in buying and selling motor vehicles. He was not an agent of the respondent. Prior to September 11, 1929, Bowe had secured the prospect of selling a Peerless machine to Mr. and Mrs. P. J. Brady. On the last-mentioned date, Bowe exhibited to them the automobile which is involved in this action at the warehouse of the respondent in Los Angeles. Two days later, which was Friday the 13th, Bowe agreed with W. F. Fowler, the representative of the respondent company, to purchase the Peerless machine for a cash consideration of $2,094.90. Thereupon Bowe drew and delivered to Fowler his personal check for that sum on the Seaboard National Bank of Los Angeles, in favor of Peerless Motor Company, saying, "This check is all right." No receipt for this check or the money which it

represented was delivered. No bill of sale or other evidence of transfer of title to the machine was executed. The title to the machine was not intended to pass until the check was honored and paid. Mr. Fowler testified in that regard: "It (the check) was supposed to be cleared before the car was delivered." The delivery of the machine was not authorized by the respondent. Mr. Fowler further testified regarding the delivery:

"Q. The car was not delivered at that time but was held for future delivery? A. Yes.

"Q. At no time did you deliver the car to Mr. Bowe? A. No."

On Saturday, the 14th day of September, the cross-defendants P. J. Brady and wife, executed a conditional contract to purchase the car from Bowe for the sum of $3,200, which was immediately assigned to the appellant, Sterling Finance Corporation. In the afternoon of that same day, Bowe went to the respondent's warehouse and took possession of the automobile, which he delivered to Mr. and Mrs. Brady. In compliance with the terms of their contract of purchase with Bowe, the initial payment on the Peerless car was satisfied by turning over to Bowe their old Gardner machine. Upon an application therefor, signed by Arthur Bowe, without the authorization of the respondent company, the division of motor vehicles, on September 16th, issued to Jeannette M. Brady, as the purchaser of a "new Peerless" automobile, a certificate of ownership. The appellant merely credited the net allowance for the assigned agreement for purchase of the Peerless car to a debt which Bowe owed it. The check which Bowe gave to the respondent was not paid. He had no funds in the bank with which to pay it when it was drawn or thereafter. On Monday the 16th the respondent hunted up Brady, the purchaser of the car, and informed him the check was dishonored and that the title to the car had not passed. Brady voluntarily returned the Peerless machine to the respondent.

Suit to quiet title to the automobile was instituted. The answer merely controverts the material issues of the complaint. Estoppel was not pleaded. In the trial of the case it was not suggested that estoppel was an issue to be determined. The defendants Mr. and Mrs. Brady and Mr. Bowe defaulted. The court adopted findings favorable to the respondent, and rendered judgment accordingly. The Sterling Finance Corporation, only, has appealed.

The appellant contends that the evidence fails to show that title to the automobile remained in the respondent, and that it is estopped from asserting title to the machine because of its conduct in the transaction.

[1, 2] The finding of the court that the plaintiff was the owner and entitled to the possession of the Peerless sedan automobile is adequately supported by the evidence. It appears that the title to the machine did not pass to Bowe. He was not the agent of the respondent. The machine was never actually delivered to him. The appellant is charged with notice that Bowe was not the owner of the machine. It is apparent the sale to Bowe was intended to be for cash, subject to the payment of his check which was dishonored for lack of funds. The certificate of ownership was issued to Jeannette M. Brady by the motor vehicle department of California without the knowledge or consent of the respondent. No indicia of title was executed or delivered by the respondent.

[3, 4] The question as to whether title to personal property passes to a proposed purchaser by the mere delivery thereof depends upon the intention of the parties, which is to be determined by the circumstances of the transaction. The mere acceptance of a check in payment for personal property, subject to the payment of the check, does not pass title when the check is subsequently dishonored and is not paid. South S. F. Pkg., etc., Co. v. Jacobsen, 183 Cal. 131, 190 P. 628; Towey v. Esser, 133 Cal. App. 669, 24 P.(2d) 853.

[5, 6] The appellant contends that the conduct of the respondent estops it from questioning the title to the Peerless sedan machine. We are of the opinion the record discloses nothing in the conduct of respondent with relation to the transaction which estops it from asserting title thereto. Moreover, the appellant failed to plead estoppel in its answer or cross-complaint, and the defense of estoppel does not appear to have been an issue in the trial of the case. It is a well-established rule of law in California that one who relies on the doctrine of estoppel as a defense to an action and who has the opportunity to do so must plead and prove the facts constituting the alleged estoppel. Carpenter v. Markham, 172 Cal. 112, 155 P. 644, 645; Chapman v. Hughes, 134 Cal. 641, 58 P. 298, 60 P. 974, 66 P. 982; 21 C. J. 1241, §§ 248–250; Ripley Imp. Co. v. Hellman, etc., Sav. Bank, 90 Cal. App. 83, 92, 265 P. 835; 8 Standard Ency. of Proc. pp. 683 and 691. Certainly the appellant had the opportunity to ascertain and plead the facts which it contends consti-

tute an estoppel in this case. In the Carpenter Case, supra, it is said that the question as to whether certain instruments "raise an estoppel against plaintiff, in either case to be availed of the facts constituting the accord and satisfaction or the facts constituting the estoppel must have been pleaded." In 8 Standard Encyclopedia of Procedure, at page 683, it is said: "The rule is now well settled that all estoppels must be pleaded where there is an opportunity to do so, or else they will be set at large, regardless of whether the proceedings be at law or in equity."

On page 691 of the last-mentioned text-book it is said: "In the great majority of the states the rule is firmly established that the defense of estoppel in pais must be pleaded where there is an opportunity to plead it, especially in view of code requirement that new matter invoked as a defense must be set out."

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



139 Cal.App. 658

THATCHER v. VAN BEVER et al.

Civ. 8982.

District Court of Appeal, First District, Division 1, California.

July 13, 1934.

1. Homestead ⇐161

Temporary absence from homestead does not constitute abandonment of homestead, since homestead can be abandoned only by declaration of abandonment or by grant thereof executed and acknowledged (Civ. Code, § 1243).

2. Homestead ⇐103

Where husband and wife recorded valid declaration of homestead prior to rendition of judgment against husband, lien of judgment did not attach to property covered by homestead (Civ. Code, § 1241).

3. Homestead ⇐70

Where two adjacent lots declared homestead were used by husband and wife as home, dwelling being situated on one lot and garage and barn on another, both lots formed part of homestead.

4. Homestead ⇐57(3)

Where declaration of husband and wife that lots occupied by them as home were homestead was recorded prior to rendition of judgment against husband, and husband and wife did not abandon premises, finding that lots were homestead *held* proper (Civ. Code, §§ 1241, 1243).

Appeal from Superior Court, Santa Barbara County; A. B. Bigler, Judge.

Action by Edna L. Thatcher against Emile V. Van Bever and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

Coleman E. Stewart, of Santa Barbara, for appellant.

Butcher & Haines, of Santa Barbara, for respondents.

JAMISON, Justice pro tem.

The sole question involved on this appeal is whether or not the land in controversy was and is a valid homestead. The trial court so found, and rendered judgment for defendants. From this judgment plaintiff has appealed.

On September 25, 1923, appellant recovered judgment against defendant Emile V. Van Bever in the sum of $385 for rent of premises upon which respondents, husband and wife, were living. Thereafter, on October 23, 1929, appellant commenced an action to revive the lien of said judgment, and same was revived in the sum of $547.79, together with interest and costs of suit. Execution was issued on said last-named judgment and same was returned unsatisfied.

[1] In February and March, 1923, respondent Emile V. Van Bever deeded the land in controversy, being two adjacent lots, to his wife, Rosa L. Van Bever. On August 28, 1923, while occupying said property as a home, respondents joined in a declaration of homestead on the premises and duly recorded the same. They have since continuously occupied the premises as a home, except during temporary absences therefrom. Temporary absence from the homestead does not constitute an abandonment of same, for a homestead can be abandoned only by a declaration of abandonment or a grant thereof executed and acknowledged. Civ. Code, § 1243; Waggle v. Worthy, 74 Cal. 266, 15 P. 831, 5 Am. St. Rep. 440.

[2] The record discloses, and the court found, that a valid and sufficient declaration

of homestead had been recorded by respondents prior to the rendition of appellant's judgment against Emile V. Van Bever. Therefore the lien of the judgment did not attach to the property covered by the homestead. Civ. Code, § 1241; Graham v. Hunt, 119 Cal. App. 586, 7 P.(2d) 186; 13 Cal. Jur. 482.

Appellant contends that the conveyance from Emile V. Van Bever to his wife was in fraud of creditors. This contention is without merit. Schmidt v. Denning, 117 Cal. App. 36, 3 P.(2d) 322; Fitzell v. Leaky, 72 Cal. 477, 14 P. 198; Beaton v. Reid, 111 Cal. 484, 487, 44 P. 167.

[3] In the case under consideration the homestead is composed of two adjoining lots, upon one of which, lot 64, the dwelling is situated; upon the other, a garage and barn, the whole of said premises being inclosed with a fence. The evidence clearly showed that both of said lots were used and occupied by respondents as their home. Such being the case, they both entered into and formed a part of the homestead. 13 Cal. Jur. 464; Davis v. Lockwood, 110 Cal. App. 114, 293 P. 631.

[4] We are of the opinion, inasmuch as the declaration of homestead was made and recorded prior to the date of appellant's judgment, and the lots were then occupied as a home by respondents and have never since been abandoned, that the finding of the trial court that the same constituted a valid homestead is amply supported by the evidence. The judgment is therefore affirmed.

We concur: TYLER, P. J.; KNIGHT, J.



139 Cal.App. 543

PEOPLE v. HUDSON.

Cr. 1805.

District Court of Appeal, First District, Division 1, California.

July 5, 1934.

1. Criminal law ⇐517(4)

Corpus delicti of offense must be proven by evidence outside declarations and admissions of accused.

2. Criminal law ⇐517(4)

As basis for admission of extrajudicial confession, prosecution need not establish corpus delicti by proof as clear and convincing as is required to establish guilt.

3. Criminal law ⇐517(4)

As basis for admission of extrajudicial confession, slight or prima facie proof of corpus delicti is all that is necessary.

4. Criminal law ⇐517(4)

As basis for admission of extrajudicial confession, direct or positive evidence establishing corpus delicti is not essential, and evidence need not connect accused with perpetration of offense.

5. Criminal law ⇐517(4)

As basis for admission of extrajudicial confession, proof of corpus delicti may consist of testimony of accused himself.

6. Criminal law ⇐680(2)

Generally, it is proper practice to establish corpus delicti as early in proceedings of trial as may be practicable, but order of proof is discretionary with trial court.

7. Criminal law ⇐680(2)

Where corpus delicti is finally established, mere variation in order of proof is not prejudicial.

8. Criminal law ⇐517(4)

In prosecution for petty theft, evidence *held* to sufficiently establish corpus delicti as basis for admission of alleged confession made shortly after arrest.

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

Jack Hudson was convicted of petty theft, and he appeals.

Judgment and order denying motion for new trial affirmed.

N. J. Menard, of San Jose, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

KNIGHT, Justice.

Appellant was charged with having committed petty theft and with having been three times previously convicted of petty theft. He admitted the prior convictions, pleaded not guilty to the main charge, and upon trial before a jury was found guilty. Part of the evidence introduced against him consisted of a confession which the prosecution claimed was made by him shortly after his arrest; and as grounds for reversal it is contended that the corpus delicti was not proved, and that therefore evidence of the confession was erroneously admitted.

[1-7] It is well settled, as appellant contends, that the corpus delicti must be proved by evidence outside of the declarations and admissions of the defendant; but it is equally well settled that, to authorize the reception and consideration by the jury of evidence of extrajudicial confessions or admissions of a defendant, the prosecution is not required to establish the corpus delicti by proof as clear and convincing as is required to establish the fact of guilt. Slight or prima facie proof is all that is necessary. People v. Bollinger, 196 Cal. 191, 237 P. 25; People v. Selby, 198 Cal. 426, 245 P. 526; People v. McWilliams, 117 Cal. App. 732, 4 P.(2d) 601; People v. Black, 111 Cal. App. 90, 295 P. 87; People v. Bonilla, 114 Cal. App. 219, 299 P. 784; People v. Wilcoxin, 69 Cal. App. 267, 231 P. 377; People v. Alba, 52 Cal. App. 603, 199 P. 894; People v. Vertrees, 169 Cal. 404, 146 P. 890. It may be proved by circumstances shown in evidence or by inferences drawn from facts shown. People v. Vicunia, 105 Cal. App. 145, 286 P. 1061; People v. Ford, 85 Cal. App. 258, 258 P. 1111. Direct or positive evidence is not essential (People v. Wilkins, 158 Cal. 530, 111 P. 612), nor is it necessary that such evidence in itself connect the defendant with the perpetration of the offense (People v. Jones, 123 Cal. 65, 55 P. 698). The decisions hold also that such proof may consist of the testimony of the defendant himself when he voluntarily becomes a witness in the case and testifies to facts which tend to prove the corpus delicti. People v. Kelly, 70 Cal. App. 519, 234 P. 110. Furthermore, as said in People v. Clark, 70 Cal. App. 531, 233 P. 980, and in the other cases hereinafter cited, while ordinarily it is the proper practice to establish the corpus delicti as early in the proceedings of the trial as may be practicable, the order of proof is discretionary with the court, and, where the corpus delicti is finally established, a mere variation in the order of proof cannot be said to result in any prejudice to the defendant's rights. People v. Besold, 154 Cal. 363, 97 P. 871; People v. Wilkins, supra; People v. Watters, 202 Cal. 154, 259 P. 442; People v. Bollinger, supra; People v. Hinshaw, 40 Cal. App. 672, 182 P. 59; People v. Hatfield, 77 Cal. App. 212, 246 P. 95.

[8] Here the prosecution charged appellant with having stolen two steel measuring tapes from the Farmers' Union Store in San Jose on or about February 1, 1934; and the essential features of the evidence adduced in support of the charge were as follows: Shortly after 1 o'clock on the afternoon of February 1st appellant attempted to sell two steel measuring tapes of the type and make alleged to have been stolen, in a pawnshop in San Jose conducted by one Passovoy. He wanted $4.50 for them. Passovoy countered with an offer of $2.50, which appellant refused to take, and he left, taking the tapes with him. In about fifteen minutes he returned and accepted the offer of $2.50; whereupon he gave Passovoy a bill of sale for the tapes, to which he signed the fictitious name "James Mason." While the transaction was being consummated, the police entered, arrested appellant, and he was taken to the police station, where, according to the testimony given by the arresting officer and the chief of police, appellant confessed that he had stolen the tapes from the Farmers' Union Store in San Jose. In order to verify the confession, the chief of police immediately made inquiries at the store, and it was then discovered by the store management that two such tapes had been taken from the store. In this connection a salesman from the hardware department testified that the store carried tapes of the type and special manufacture in question, and that, so far as he was aware, no other store in San Jose carried the same kind; that they were kept on display in the store on an open sample board, hanging on hooks; that he observed the sample board very frequently because it was close to the cash register; that there had been practically no call for that particular kind of a tape; and, while he could not say just when the tapes disappeared from the board, it was about February 1st; that he knew he had seen them on the board as late as January 20th; and that, if they had been missing for any considerable time prior to February 1st, he was quite sure he would have noticed it. Furthermore, he testified positively that within a day or two before February 1st he had seen appellant walking about the store in the hardware department; and that a check of the store records showed the tapes had not been sold in the regular course of business.

As a witness in his own behalf, appellant denied having confessed that he stole the tapes, or having visited said store for several weeks prior to the alleged theft. He admitted having attempted to sell the tapes to Passovoy at the time mentioned, but claimed he obtained them from a stranger known as "Blackie," with whom he had stayed at a certain hotel a day or two before he was arrested. In contradiction of his statement, however, it was shown that nobody answering the description of "Blackie" ever stayed at said

hotel, nor was his identity known elsewhere in the regions of San Jose. Furthermore, he denied having given a fictitious name to the pawnbroker or having signed any bill of sale.

We are of the opinion that it may be reasonably inferred from the circumstances above narrated, independent of the evidence relating to the confession, that the tapes appellant attempted to sell to Passovoy were stolen from the Farmers' Union Store, as claimed by the prosecution, and that therefore, under the law of the cases cited, the action of the trial court in admitting evidence of the confession was not error. No other points being raised by the appeal, the judgment of conviction and the order denying the motion for new trial are affirmed.

We concur: TYLER, P. J.; CASHIN, J.



139 Cal.App. 647

ANDREWS et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 9725.

District Court of Appeal, Second District, Division 2, California.

July 11, 1934.

1. Master and servant ⇐375(1)

Employee who was killed in accident while riding in employer's automobile and who had no authority to travel in employer's automobiles and was not making business trip, but was going to visit friend for a week, did not sustain injury "arising out of and in course of employment."

[Ed. Note.—For other definitions of "Arising out of Employment" and "Course of Employment," see Words & Phrases.]

2. Master and servant ⇐417(7)

Where sufficiency of evidence was only ground upon which annulment of order in compensation proceeding was sought, credibility of witnesses and weight to be given to their testimony would not be reviewed.

Proceedings under the Workmen's Compensation Act by C. C. Andrews and another for an employee's death, opposed by William Carpenter, employer, and another. To review an order of the Industrial Accident Commission denying an award, C. C. Andrews and another petition for writ of review.

Affirmed.

Bernard B. Laven, of Los Angeles, for petitioners.

Everett A. Corten, of San Francisco, for respondent Industrial Accident Commission.

CRAIG, Justice.

An employee of Wm. L. Carpenter, doing business as the Argonne Van & Storage Company, and insured by the Travelers' Insurance Company, having received fatal injuries while riding as a passenger in an automobile of the employer, a petition was filed by the parents against said employer and the insurer for adjustment of their claim. After hearing, findings and an order were made that the evidence failed to establish that the employee had sustained injury in the course of employment and that the applicants take nothing by their claim. A rehearing was denied. They petitioned for a review of the proceedings before said commission upon the one question as to whether or not the employee sustained an injury arising out of and in the course of employment.

For some time previously to the occasion in question the employee Martha Andrews had been a branch manager of the storage company at San Francisco and in full charge of its office and departments and operations, including automobiles there in use. The main office and principal place of business were situated in the city of Los Angeles. On September 16, 1933, the decedent and an employee named Stafford left San Francisco in a company automobile, intending to drive to Los Angeles, but, when near Turlock, the car met with an accident out of which the instant proceedings arose.

[1, 2] The evidence upon which petitioners base their exceptions to the findings and decision of the Industrial Accident Commission was at most conflicting with many indisputable facts which were before it. The principal issues contested were as to whether or not a company car was allowed outside the northern territory of the company, and whether the decedent and Stafford were making the trip on business of their employer or for pleasure. It is insisted that the evidence positively showed without contradiction that decedent directed Stafford

to drive her to Los Angeles "to see Mr. Carpenter on business"; that any rule that no car should be driven there for any purpose applied only to salesmen and truck drivers; that decedent had authority to use a machine; and that her major purpose was the performance of duties of her employment.

All of the witnesses were in accord that Miss Andrews stated that she was going to Los Angeles, that she intended to visit a Miss McCubbin there, and intended to return the following week. An employee by the name of McArron testified that "she told me she was going to Los Angeles on Saturday afternoon, and she wanted me to take care of the business while she was gone, and she was going to Los Angeles to see a Miss McCubbin, and they were going on a picnic. She was going to stop and see Mr. Carpenter before she came back"; that the cars could not be driven to Los Angeles "without Mr. Carpenter's specific permission"; that decedent had previously endeavored to secure a car to drive from Los Angeles to San Francisco, but it had been refused. Stafford testified that the decedent knew that he wanted to go to Los Angeles to see his family, and, "when she told me she wanted me to drive her down, I told her I would"; that she "had written and made arrangements with a friend, Miss McCubbin, and that they were going on a hike I believe * * * those were the only things she mentioned to me"; and that she did not state that she had business with Mr. Carpenter. The latter testified positively that decedent had no authority to travel to Los Angeles in one of his cars; that there was no business pertaining to the company's affairs to his knowledge which would call her there; he had talked with her on the telephone just the night before. He swore that he had "given her explicit instructions to always put her business down in letters or call on the telephone if she wanted something"; he had always had a policy that automobiles should not be operated between the two cities, "and she has always known about it." A paper found among her effects was admitted to be a copy of some report, but she had previously forwarded all that it pretended to convey and had fully advised her employer as to current business matters.

The foregoing and much other evidence strongly tends to support the findings and decision of the commission to such extent that it cannot be said as a matter of law that they were unfounded. Since its sufficiency was the only ground upon which annulment of the order was sought, the petitioners herein cannot prevail. In such a case the credibility of witnesses and the weight to be given to their testimony are not subject to review. McDonald v. Industrial Accident Comm., 213 Cal. 156, 1 P.(2d) 979; Ruff v. Industrial Accident Comm., 123 Cal. App. 168, 11 P.(2d) 17.

The order denying an award is affirmed.

We concur: STEPHENS, P. J.; SCOTT, Justice pro tem.



139 Cal.App. 564

RIEDMAN et al. v. BARKWILL et al.

Civ. 8955.

District Court of Appeal, First District, Division 1, California.

July 6, 1934.

Rehearing Denied Aug. 4, 1934.

1. Mines and minerals ⇐78(1)

Whether cost of drilling and equipping well is to be added to cost of operation in determining whether oil or gas is found in paying quantities within lease depends on particular right or obligation of lease in connection with which phrase "in paying quantities" is used.

2. Mines and minerals ⇐78(1)

Where lessee is obligated to drill to specified depth unless oil or gas is found in paying quantities at lesser depth, term "in paying quantities" means in sufficient quantities to pay reasonable profit on cost of drilling, equipment, and operation of well.

[Ed. Note.—For other definitions of "Paying Quantities," see Words & Phrases.]

3. Quieting title ⇐3

Where lessee has forfeited lease by failure to comply with covenants or conditions, lessor may maintain action to quiet his title.

4. Quieting title ⇐44(1)

In action by lessor to quiet title, lessor establishes prima facie case by proof of his title, whereupon lessee is required to prove his interest under lease, followed by proof by lessor of matters in avoidance of lease.

5. Landlord and tenant ⇐39

Condition subsequent permitting forfeiture of lease is to be strictly interpreted against lessor (Civ. Code, § 1442).

6. Landlord and tenant ⇐112½

Lessor has burden of proving facts creating forfeiture of lease by clear and satisfactory evidence to justify decree of reversion of conveyance (Civ. Code, § 1442).

7. Mines and minerals ⇐78(7)

Evidence showing income and cost of operation of oil well, but failing to show cost of drilling, equipping, and maintaining well, *held* insufficient to show that oil or gas was found in paying quantities so as to avoid forfeiture of lease for failure to drill to specified depth if oil or gas were not found in paying quantities.

8. Abandonment ⇐3

Nonuser alone, without any intention to abandon, does not constitute abandonment.

9. Abandonment ⇐3

Intention to abandon is determined from acts and conduct of party alleged to have abandoned property.

10. Mines and minerals ⇐77

Evidence that, though oil lease provided for forfeiture if lessee did not drill to depth of 7,200 feet, unless gas or oil was found in paying quantities at lesser depth, lessee drilled to depth of 4,278 feet and discontinued all operations and conveyed personal property on lease to third party when well was flooded with water, sustained finding that lessee had abandoned lease.

11. Estoppel ⇐70(2)

In action by lessee who abandoned oil lease to quiet title to casing in oil well, lessee, who, though knowing of negotiations between oil company and lessor for new lease, made no claim to leasehold right and casing, was estopped to claim title to casing and leasehold interest.

12. Quieting title ⇐10(2)

Where oil lease provided that lessee should leave casing in abandoned oil well on payment of 50 per cent. of original cost of casing, lessee, who abandoned lease and left casing in well, and claimed only compensation therefor under lease, could not maintain action to quiet title to casing as against new lessee, since title to casing was in lessor.

13. Appeal and error ⇐728(1)

Assignments of error in admission or exclusion of evidence which merely referred to portion of transcript where ruling occurred, stating ruling was erroneous on specified grounds, and wherein evidence upon which question was asked was not set out in an intelligent manner, or argument or citation of authority made, need not be considered.

Appeal from Superior Court, Los Angeles County; Wilbur F. Downs, Judge.

Action by F. C. Riedman and others against F. M. Barkwill and others, in which the defendants filed a cross-complaint against the Chiksan Oil Company, Limited. From an adverse judgment, defendants appeal.

Affirmed.

E. V. Knauf, of Los Angeles, and Seiler & Seiler, of Long Beach, for appellants.

Fred M. Riedman, James L. Hansen, and Archie G. Cope, all of Long Beach, for respondents.

Elliott & Aberle, of Los Angeles, for cross-defendant and respondent.

GRAY, Justice pro tem.

Plaintiffs, by their complaint containing the allegations usual for such purpose, sought to quiet their title to lands in Signal Hill, Long Beach. In their answer, defendants pleaded the execution and delivery of an oil and gas lease by plaintiffs, and its assignment to defendants, and alleged its full performance by them. The defendants also cross-complained against cross-defendant, a subsequent lessee, to quiet title to their leasehold and to oil well casing. In answer thereto, cross-defendant alleged that defendants had breached their lease, had abandoned it and the casing, and were estopped by their conduct from asserting any interest in the lands or casing. Three determinative issues were tried, to wit: The termination of the lease, its abandonment, and defendants' estoppel. From a judgment following findings on these issues, adverse to them, defendants appeal, asserting that the evidence does not support such findings.

[1, 2] The lease provided that "this lease shall terminate as to all rights and obligations contained hereunder unless the Lessee shall on or before 45 days from date hereof commence actual drilling of a well for oil or gas on the above described land, and prosecute the drilling thereof with due diligence and dispatch until a depth of 7200 feet has been reached, *unless oil or gas is found in paying quantities at a lesser depth.* * * *" (Italics ours.) The court found "that the oil well drilled on said premises was drilled to a depth of approximately 4278 feet and no further and it is true that *oil or gas was never found in paying quantities*". (Italics ours.) There is no dispute as to the correctness of the first part of the finding, but the parties seriously differ as to whether the italicized part is warranted by the evidence. This difference is mainly due to

the correct answer to the legal question whether the cost of drilling and equipping the well is to be added to its cost of operation in determining if oil or gas is found in paying quantities. Whether both costs or only the second are to be considered depends upon the particular right or obligation of the lease, in connection with which the phrase "in paying quantities" is used. Notes, 48 A. L. R. 887; 84 A. L. R. 761; Mills and Willingham "Law of Oil and Gas," p. 122, Summers "Oil and Gas," p. 317. Where the lessee is obligated to drill to a specified depth unless oil or gas is found in paying quantities at a lesser depth, the exception means in sufficient quantities to pay a reasonable profit on the necessary sum required to be expended, including the cost of drilling, equipment, and operation of well. Ardizonne v. Archer, 72 Okl. 70, 178 P. 263; Keechi Oil & Gas Co. v. Smith, 81 Okl. 266, 198 P. 588. See, also, Stephenson v. Little (Tex. Com. App.) 12 S.W.(2d) 196.

[3-6] The lessor may maintain an action to quiet his title, if the lessee has forfeited his rights under the law by failure to comply with its covenants or conditions. Andrews v. Russell, 85 Cal. App. 149, 259 P. 113. In such an action, the lessor, as plaintiff, establishes a prima facie case by proof of his title, if denied. The lessee, as defendant, is then required to prove his interest, which is done by the introduction of the lease. Thereupon the plaintiff may prove matters in avoidance of the lease. Cuddy v. O'Brien, 55 Cal. App. 469, 204 P. 37. A condition subsequent, which permits a forfeiture by the lessor, is, under section 1442 of the Civil Code, to be strictly interpreted against him. Jameson v. Chanslor-Canfield M. Oil Co., 176 Cal. 1, 167 P. 369; Taylor v. Hamilton, 194 Cal. 768, 230 P. 656. The burden of proving the facts creating the forfeiture rests upon the lessor. Reclamation District v. Van Loben Sels, 145 Cal. 181, 78 P. 638. The evidence of violation of the condition must be clear and satisfactory to justify a court in decreeing a reversion of the conveyance. Whitaker v. Regents of University, 39 Cal. App. 111, 178 P. 308.

[7] On the issue of the termination of the lease, the evidence discloses the following facts: On October 9, 1929, which is the date of defendants' assignment of the lease, the depth of the well was about 800 feet. Between that date and January 11, 1930, defendants drilled the well to a depth of 4,278 feet. From January 11 to February 13 and from March 20 to May 22, the well produced gas, which sold for $432.48. From January 11 to February 13 and from March 20 to April 29, oil was produced, which sold for $5,881.32. Between February 13 and March 20, production was interrupted by attempts to fish out part of the casing which had been lost in its removal. The well was cemented twice. The well was wet from the start, and the percentage of water increased until finally production was stopped by water breaking into the well. The cost of operation was $500 per month, but for what period is not stated. There is no evidence as to cost of drilling, cost of cementing the well, or the cost of equipping it. Therefore the evidence was insufficient to determine whether or not oil and gas was found in paying quantities.

[8-10] The court found "that the defendants * * * on or about the 29th day of April, 1930, discontinued all of their operations on said property and ceased work on said property and conveyed all of the personal property located on said premises hereinabove described to Oil Tool Exchange Inc., and did then vacate and abandon said premises and thereafter did make no further attempt to drill or do any other work on said premises or to in any way comply with the terms or conditions of the lease under which they held title to said premises; that plaintiff made repeated demands on the defendants * * * but said defendants * * * thereafter failed to drill or do any further work on said premises nor made any attempt to do so." The evidence, without conflict, shows that production ceased on April 29; that thereafter the well was idle; that no further work was done; that demand was served by plaintiffs upon defendants notifying them as to their default and demanding their performance; that six or seven months before January 19, 1931, the Oil Tool Exchange had acquired all personal property, except the casing, used in the operation of the well; and that the parties for several months negotiated the purchase by plaintiffs of such personal property, including the casing and a relinquishment by defendants of all interest in the property and lease. Appellants do not deny these acts, but argue that there was no legal abandonment because of the absence of any evidence showing their intention to abandon. "Nonuser alone, without any intention to abandon, does not constitute an abandonment. Utt v. Frey, 106 Cal. 397, 39 P. 807." Herbert v. Graham, 72 Cal. App. 314, 317, 237 P. 58, 59. The intention is to be determined from the facts and circumstances. Herbert v. Graham, su-

pra. "The decisions are uniform in holding that abandonment is a question of intention, and that abandonment may be proved by the acts and conduct of the party alleged to have abandoned the property in controversy." Thornton v. Phelan, 65 Cal. App. 480, 483, 224 P. 259, 260. The following excerpt from Rea v. Glenn, 133 Cal. App. 82, 87, 24 P.(2d) 204, 206, is particularly appropriate: "The question of abandonment, whether it be a complete abandonment or a cessation of operations with intention of never resuming, is always one of act and intent. Every fact and circumstance is to be considered and given its proper weight. And we think this is exactly what the trial court did and in our opinion it reached a conclusion finding ample support in the evidence. Findings of ultimate facts are binding upon appeal, not only when there is a direct conflict regarding the probative facts, but when those facts are fairly susceptible to opposing influences. Northwestern P. C. Co. v. Atlantic P. C. Co., 174 Cal. 312, 163 P. 47."

[11, 12] In their amended cross-complaint, defendants sought to quiet their title to the casing left in the well, not as against the plaintiff, but solely as against the cross-defendant. The latter's answer pleaded certain facts, which it claimed estopped the defendants from asserting title to the casing. As to these facts the court made the following findings: "That it is true that the defendants * * * when informed of Chiksan's drilling operations on said premises and knew that said Chiksan Oil Co., Ltd., was drilling an oil well on said premises and using the casing already on said premises for such purpose and for its drilling operations, that said defendants * * * never at any time informed the cross-defendant, Chiksan Oil Co., Ltd., that they owned such casing so being used by said Chiksan Oil Co., Ltd., or did said defendants inform said cross-defendant that they owned an interest in and to said casing. It is true that the defendants knew that said Chiksan Oil Co., Ltd., was negotiating with the plaintiffs herein for the obtaining of an oil and gas lease on said premises above described and were also negotiating for the purchase of the casing in said oil well and the derrick and other equipment on said property and that when said defendants were informed of such negotiations, that said defendants asserted no claim or interest in any of said property and stated that they have lost all of their right, title, and interest in and to the lease and casing on said premises as well as the other oil well equipment and personal property on said premises. The court finds that it is true that by the conduct of the defendants * * * in not asserting their interest or claim in and to the leasehold interest and casing on said premises, that said defendants are estopped to now assert such claim and interest against the Chiksan Oil Co., Ltd., in and to said leasehold interest and said casing."

The evidence, without conflict, discloses the following facts pertinent on this issue: The lease between plaintiffs and defendant provided that, "in case of abandonment of any well by Lessee, if the Lessor desires to retain the same, he may notify the Lessee to that effect and thereupon the Lessee shall leave such casing in the well as the Lessor may require, and the Lessor shall pay to the Lessee fifty per cent (50%) of the original cost of such casing on the ground." Heretofore it has been shown that defendants abandoned the well and left therein the casing. The record shows that the complaint was filed October 24, 1930; that a default judgment was entered against defendants, which was vacated on February 21, 1931, because of a defective summons; that the answer was served and filed on March 2, 1931, and the cross-complaint served May 9, 1931, and filed May 14, 1931, pursuant to an order based upon a stipulation. The lease from plaintiff to cross-defendant was dated January 12, 1931, and the bill of sale to the casing between the same parties was dated January 17, 1931. Between the entry and vacation of the default judgment, plaintiffs and defendants had numerous negotiations, in which the latter were advised of the former's intention to lease the property and sell the casing to cross-defendant, and futile attempts were made to fix the amount and manner of payment due to defendants for the casing under the quoted provision of the lease. Some of these negotiations occurred in the presence of an officer of the Oil Tool Exchange and others in the presence of an official of cross-defendant. At all times it was assumed, with defendants' acquiescence, that they had abandoned the well, and their rights in the casing were limited to the compensation fixed by said provision of the lease. Their first assertion of ownership of the casing is contained in their cross-complaint. The findings are therefore amply supported by the evidence. Martin v. Feigenberg, 203 Cal. 347, 264 P. 477. Even if the findings were unsupported by the evidence, defendants could not quiet their title to the casing against cross-defendant, because, under the above-quoted provision, title had passed from themselves to plaintiffs.

[13] Defendants have made twelve assignments of error in the admission or exclusion of evidence in such a manner as to warrant no discussion. They merely refer to the portion of the transcript where the ruling occurs and baldly state the ruling is erroneous on specified grounds. The evidence in connection with which the question is asked is not given, so it is impossible to intelligently pass upon the matter. No assistance is given by way of argument or citation of authority. No attempt is made to show that the error claimed could have in any way affected the judgment. Cross-defendant in its brief has supplied these deficiencies and demonstrated, first, that the rulings are not erroneous, and, second, the errors, if any, are without prejudice.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.



139 Cal.App. 605

MORTE v. JUSTICE'S COURT OF OAKLAND TP. et al.

Civ. 8879.

District Court of Appeal, First District, Division 1, California.

July 9, 1934.

1. Justices of the peace ⇐52

Justice's court of township in which plaintiff resided had jurisdiction of action brought against administrator to enforce payment of $378 claim, although administrator was resident of another township, and claim sued upon was contracted and payable in administrator's township, as against contention that jurisdiction was limited to territorial limits of township (Code Civ. Proc. §§ 61, 106, 112).

2. Appearance ⇐19(1)

Where question of jurisdiction of person is only question involved, general appearance constitutes waiver (Code Civ. Proc. § 832).

3. Appearance ⇐9(2)

Defendant, wishing to insist upon objection that he is not in court for want of jurisdiction of his person, must appear specially for that purpose only, and, if he raises any other question, or asks for any relief which can only be granted upon hypothesis that court has jurisdiction of his person, his appearance is "general," although termed special.

[Ed. Note.—For other definitions of "General Appearance," see Words & Phrases.]

4. Justices of the peace ⇐84(1)

Administrator, by objecting to jurisdiction of justice's court of township of plaintiff's residence on ground that court had no jurisdiction of person or subject-matter and by moving for dismissal, *held* to have made "general appearance" and to have waived objection of lack of jurisdiction of person (Code Civ. Proc. § 832, subd. 9).

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Petition by Frank G. Morte, as administrator of the estate of Manuel Gonsalves Morte, deceased, for a writ of prohibition to the Justice's Court of Oakland Township, Alameda County, and Hon. Harry W. Pulcifer, Justice thereof. From a judgment denying the writ, plaintiff appeals.

Affirmed.

Arthur T. MacDonald, of Oakland, for appellant.

J. W. O'Neill and A. A. Rogers, both of Oakland, for respondents.

PER CURIAM.

An appeal from a judgment denying a petition for a writ of prohibition.

It appears that Oakland and Brooklyn townships in the county of Alameda each has a population exceeding 30,000 and that there is no municipal court in said county. On January 29, 1932, one Freitas brought suit against petitioner, as administrator of the estate of Manuel G. Morte, deceased, in the justice's court of Oakland township on a rejected claim against said estate in the sum of $378; that petitioner appeared before said justice's court and moved for a dismissal of the action on the grounds that the court was without jurisdiction of the person of petitioner or of the subject of the action, for the reason that petitioner at the time the action was filed was a resident of said Brooklyn township and the claim sued upon was contracted and payable in said township. The motion was denied, following which a writ of prohibition was sought. This also was denied, and petitioner has appealed.

He claims that the jurisdiction of justices' courts was limited by section 106 of the Code of Civil Procedure to the territorial limits of the township, and that his motion to dismiss should have been granted.

[1, 2] According to the view expressed in Van Horn v. Justice's Court, 216 Cal. 235, 13 P.(2d) 704, section 112 of the Code of Civil Procedure (since amended) related to the kind of civil causes of which justices' courts might take cognizance and did not purport to fix the territorial jurisdiction of those courts; and that section 106 of said Code (since repealed—Stats. 1933, p. 1835, § 61) limited the territorial jurisdiction of the justice's court to the boundaries of the township. It was there held that People v. Justice's Court, 212 Cal. 603, 299 P. 731, decided nothing to the contrary, as the only question considered was whether the summons issued in an action commenced in the justice's court of the township of Sacramento could be served out of the county. It was held in Van Horn v. Justice's Court, supra, that under the peculiar facts of that case respondent justice's court had no jurisdiction of the subject of the action, and that consequently the fact that the petitioner appeared generally was not a waiver. Here, however, the court had jurisdiction of the subject of the action (Code Civ. Proc. § 112); the petitioner's only tenable objection under the circumstances being that the action was not commenced in the township in which he resided (Code Civ. Proc. § 832). While this has been held to be a valid objection to the jurisdiction (Lowe v. Alexander, 15 Cal. 296, 301; Jolley v. Foltz, 34 Cal. 321; Bogmuda v. Young, 58 Cal. App. 19, 207 P. 915), it is well settled that, where only the question of jurisdiction of the person is involved, a general appearance is a waiver. Olcese v. Justice's Court, 156 Cal. 82, 103 P. 317; Vance v. Superior Court, 48 Cal. App. 327, 191 P. 945; Gulick v. Justice's Court, 101 Cal. App. 619, 281 P. 1031.

[3, 4] However, subdivision 9 of section 832 of the Code of Civil Procedure provided that actions in justices' courts might be commenced and tried in the township or city in which the defendant resided. Here both Brooklyn and Oakland townships are in the city of Oakland where petitioner resided; and, as held in the cases last cited, if a defendant wishes to insist upon the objection that he is not in court for want of jurisdiction of his person, he must specially appear for that purpose only; and, if under such circumstances he raises any other question, or asks for any relief which can only be granted upon the hypothesis that the court has jurisdiction of his person, his appearance is general, although termed special. Such was the effect of petitioner's objection to the jurisdiction of the court over the subject-matter of the action, and his demand for a dismissal on that ground was relief which could only be granted upon the theory that he was regularly before the court.

The judgment is affirmed.



139 Cal.App. 655

SAN DIEGO COTTON CLUB, Inc., v. STATE BOARD OF EQUALIZATION et al.

Civ. 1126.

District Court of Appeal, Fourth District, California.

July 12, 1934.

1. Mandamus ⇐154(4)

To furnish basis for relief sought, petition for writ of mandamus must show on its face that respondents are under some duty to do what petition asks that they be required to do.

2. Intoxicating liquors ⇐74

Petition for mandamus requiring board of equalization to issue "on sale" license for liquor, which alleged compliance with requirements relating to form of application for license and which alleged petitioner's good character, but which did not allege compliance with any other requirement, *held* demurrable, since petition did not on its face sufficiently negative existence of circumstances in which board was by statute expressly authorized to deny license (St. 1933, pp. 1698, 1701, 1702, 1705, §§ 3, 12, 13, 26).

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Mandamus proceeding by the San Diego Cotton Club, Inc., against the State Board of Equalization and others. From a judgment awarding to petitioner a peremptory writ requiring respondents to issue a license, respondents appeal.

Reversed.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for appellants.

William Roy Ives, of San Diego, for respondent.

HAINES, Justice pro tem.

This is a proceeding in mandamus. The petitioner, San Diego Cotton Club, Inc., alleges its incorporation under the laws of California and that its principal place of business is in San Diego county. The respondents in the trial court were the state board of equalization and John C. Corbett, Fred E. Stewart, R. E. Collins and H. G. Cattell, members thereof, and Louis C. Maire, designated in the petition as "Administrator of District No. 6."

The petition alleges that the respondents are "charged with the enforcement and administration of the State Liquor Control Act, chapter 658, p. 1697, Statutes of 1933, known as 'An act to control, license, and regulate the manufacture, transportation, sale, purchase, possession and disposition of wines, beer, and intoxicating liquor; to make an appropriation therefor; and to provide penalties for the violation hereof,' approved June 3, 1933." The petition goes on to allege that respondent board is charged, in respect of application for licenses, with the duty of making, with reference thereto, investigations and determinations in the particulars specified in section 12 of said act, and that petitioner has complied with all of the requirements of that section, in that it occupies premises "on which the equipment, plans and specifications thereof exist as required by law and the rules of the board; that petitioner has never had a license suspended, forfeited or revoked under the provisions of said act; and that petitioner is of good moral character and has submitted proof to respondents of such good moral character." It is further alleged that, pursuant to law, petitioner, on forms prescribed by the board, applied to respondents for a license for the year 1934, described as an "On Sale Beer and Wine License," in January of that year, and forwarded therewith the required $50 fee which respondents demanded, received, and retained, but that nevertheless respondents refused and still continue to refuse to issue the license. The petition further states that petitioner conducted an unincorporated club in 1933 and had an "On Sale Beer and Wine License" issued for that year by respondents, and that the denial by respondents of a license for 1934 was for the alleged reason that petitioner "was not conducting his (its) business in a legal and proper manner," but that respondents have refused to advise petitioner of any specific acts as a basis for such conclusion; that respondents in refusing to issue such 1934 license have arbitrarily, unreasonably, and unlawfully destroyed petitioner's business, and are causing it great and irreparable injury, and that their action is capricious and unreasonable and a discrimination against petitioner in favor of the applicants who received licenses in "similar and identical circumstances"; that respondents have, in the manner alleged, abused the discretionary powers and duties imposed upon them by law; and that the petitioner has no complete and adequate remedy at law. The petitioner prays for an alternative writ of mandate requiring respondents to issue to it the license, or show cause why they have not done so. Such an alternative writ issued.

The respondents appeared and filed a demurrer both general and special to the petition. Their demurrer was overruled, and, upon their failure to answer, judgment was entered awarding to petitioner a peremptory writ requiring them to issue the license. From this judgment the present appeal is prosecuted.

[1, 2] In our opinion the demurrer should have been sustained. To furnish any basis for the relief sought the petition for a writ of mandate must show on its face that the respondents are under some duty to do what the petition asks that they be required to do. Meyer v. City & County of San Francisco, 150 Cal. 131, 134, 88 P. 722, 10 L. R. A. (N. S.) 110. Under section 12 of the State Liquor Control Act the board of equalization is inhibited from granting a license to an applicant who has not complied with the provisions of that particular section. Section 13, however, going farther, in terms authorizes the refusal of "the license applied for if the applicant does not comply with the provisions of this act. * * *" The petition, in effect, alleges compliance with the requirements of section 12, but says nothing about compliance with any other requirements except those relating to the form of the application for a license. Everything alleged might be true and the petitioner still be disqualified to receive a license. For aught that appears, it may be interested in a "business in respect to which a winery, brewery or distillery license is issued," in which case by reason of section 26 of the act it could not be entitled to receive an "On Sale" license. Moreover, the mere allegation of its good character seems to us a very equivocal and insufficient negation, if it amounts to a negation at all, of the possibility that it may, while in the very act of applying for the license, be violating section

3 of the act to the effect that "No public saloon, public bar or barroom or other public drinking place where intoxicating liquors to be used for any purpose shall be kept, bought, sold, consumed or otherwise disposed of, shall ever be established, maintained or operated within this State."

Since the petition does not, on its face, sufficiently negative the existence of circumstances in which the board is by this statute itself expressly authorized to deny the license sought, we do not find it necessary to follow counsel in discussing what the situation would be had the petitioner alleged in its pleading that it was fully complying with all the requirements of the act.

The judgment is reversed.

We concur: BARNARD, P. J.; JENNINGS, J.



139 Cal.App. 641

BUTLER v. HASTINGS.

Civ. 8867.

District Court of Appeal, First District, Division 1, California.

July 11, 1934.

1. Appeal and error ⇐909(1)

In action to recover sum deposited by plaintiff's assignor as bail, where nothing contrary appeared from record, reviewing court must presume that necessary order fixing bail was made and that deposit was applied accordingly (Code Civ. Proc. § 1963, subd. 15).

2. Infants ⇐18

Where party was charged by complaint filed in police court with contributing to delinquency of minor girls, police court had preliminary jurisdiction of case.

3. Money received ⇐1

It is of essence of quasi contractual obligation supporting action for money had and received that defendant has received benefit and that retention is inequitable.

4. Evidence ⇐65

Chief of police accepting bail and person giving bail were both charged with knowledge of law.

5. Bail ⇐73

Where bail money was deposited with chief of police and prisoner thereby procured release, his assignee could not be heard to say that due to irregularity he was entitled to recover deposit.

6. Estoppel ⇐56

Where defendant, because of receipt of benefit and before learning of mistake, so changes his position that it would be inequitable to charge him with loss, recovery against him will be denied.

7. Bail ⇐73

Where magistrate issuing warrant indicated by indorsement amount of cash bail or bond and arrest was made after magistrate's office was closed and chief of police accepted cash bail and delivered it to magistrate and bail was subsequently forfeited, assignee of person depositing bail could not recover against chief of police on ground magistrate had no power to fix bail in alternative and delegate power to accept it.

Appeal from Superior Court, Santa Cruz County; James L. Atteridge, Judge.

Action by Thomas Butler against R. L. Hastings. From a judgment for defendant, plaintiff appeals.

Affirmed.

Thomas Butler and Stanford G. Smith, of Santa Cruz, for appellant.

A. W. Sans and Sans & Hudson, all of Watsonville, for respondent.

PER CURIAM.

An action by an attorney, as assignee, to recover from defendant, who was the chief of police of the city of Watsonville, a sum deposited by plaintiff's assignor as bail for his appearance on a criminal charge. Judgment was entered for the defendant, and plaintiff has appealed.

[1] The assignor was charged by a complaint filed in the police court of the above city with having contributed to the delinquency of two minor girls by the commission of certain acts tending to bring them within the Juvenile Court Law (St. 1915, p. 1225, as amended), namely, keeping them from home all night, plying them with liquor, and soliciting sexual intercourse with them. At the time the warrant issued, the magistrate indicated by an indorsement thereon the amount which he would require as cash bail and the amount in case a bond should be furnished; and the assignor at the time of his arrest was

apprised of this by the arresting officer. The arrest was made after the office of the magistrate had closed for the day. The evidence shows sufficiently that at the implied request of the assignor the defendant accepted the sum in question, to be delivered to the magistrate as cash security for the assignor's appearance, and it was so delivered on the same evening. The plaintiff appeared in court on the following morning as the assignor's counsel, and the hearing was regularly continued to the 17th of the same month. No question was raised by the attorney as to any irregularity in the previous proceedings. Nothing to the contrary appears from the record; and we must presume that any necessary order fixing the amount of bail was then made and the deposit applied accordingly. Code Civ. Proc. § 1963, subd. 15. Subsequently, the assignor not appearing, an order was made that the bail be forfeited, and the same was later deposited in the city treasury.

[2] The police court had preliminary jurisdiction of the case (14 Cal. Jur., Infants, § 46, p. 158; Gardner v. Superior Court, 19 Cal. App. 548, 126 P. 501; People v. Budd, 24 Cal. App. 176, 140 P. 714; People v. Superior Court, 104 Cal. App. 276, 281, 285 P. 871), and the warrant issued was regular in form.

Plaintiff claims that the complaint failed to state a public offense; that the magistrate was without power to fix bail in the alternative or to delegate to the arresting officer power to accept the same or to release the accused.

The complaint was sufficient as against a general demurrer. People v. De Leon, 35 Cal. App. 467, 170 P. 173; People v. Perfetti, 88 Cal. App. 609, 264 P. 318; People v. Kinser, 99 Cal. App. 778, 279 P. 488.

[3] As respects the further contentions by plaintiff, the circumstances disclosed by the evidence render the discussion thereof unnecessary. The present action was one for money had and received for the use and benefit of the assignor based upon a quasi contractual obligation. It is of the essence of such obligations that defendant has received a benefit and that its retention is inequitable.

[4-6] Section 1295 of the Penal Code provides for the deposit of cash in lieu of an undertaking; and section 1458 of the same Code makes the provisions thereof relative to bail applicable to justices' and police courts. In the present case there was no constraint or duress. Both parties were charged with knowledge of the law (Hoffman v. Department of Industrial Relations, 209 Cal. 383, 287 P. 974, 68 A. L. R. 294), and, if there was a mistake in that respect, as claimed by plaintiff, the same, so far as appears, was mutual. If it be assumed that the course pursued was irregular, it was taken pursuant to the assignor's implied request, and, as shown, the defendant, acting in exact accord therewith, subsequently paid the amount to the magistrate. It has been held in numerous cases that, where money is deposited under circumstances such as these, the prisoner, who thereby procures his release, will not be heard to say that due to an irregularity he is entitled to recover the deposit. 6 Cor. Jur. § 211, p. 983; Jones v. Gordon, 82 Ga. 570, 9 S. E. 782; Sauskelonis v. City of New Britain, 89 Conn. 298, 94 A. 368; State v. Scanlon, 2 Ind. App. 320, 28 N. E. 426; Cooper v. Rivers, 95 Miss. 423, 48 So. 1024. And it is well settled that, where a defendant, because of the receipt of a benefit and before learning of the mistake, so changes his position that it would be inequitable to charge him with a loss, a recovery against him will be denied.

[7] Under the facts in the present case there is nothing just or equitable in the claim against the defendant, and the trial court properly decided in his favor.

The judgment is affirmed.



139 Cal.App. 629

In re CARNIGLIA'S GUARDIANSHIP.

Civ. 9191.

District Court of Appeal, First District, Division 2, California.

July 10, 1934.

Hearing Denied by Supreme Court Sept. 7, 1934.

Insane persons ⊂=77

Insanity or incapacity *held* not "judicially determined" under statute by commitment to insane hospital, so as to avoid note made subsequent to commitment but prior to guardianship proceedings (Pol. Code, § 2168 et seq.; Civ. Code, § 40).

[Ed. Note.—For other definitions of "Judicial Determination," see Words & Phrases.]

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

First account of D. C. Carniglia, as guardian of the person and estate of Cesare Carniglia, an incompetent person, wherein J. M. Toner, as director of institutions of the state of California, filed objections thereto. From an order overruling the objections and settling and allowing the account, the objector appeals.

Affirmed.

See, also, 24 P.(2d) 944.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for appellant.

Randall O'Neill, Morettini & O'Neill, and George A. Martinelli, all of San Jose, for respondent.

SPENCE, Justice.

This is an appeal from an order overruling objections to the first account of the guardian and settling and allowing said account.

Cesare Carniglia was committed to the state hospital under the provisions of sections 2168 et seq. of the Political Code on March 23, 1928. On April 27, 1928, D. C. Carniglia was appointed the guardian of the person and estate of said Cesare Carniglia. Upon the filing of the guardian's first account, J. M. Toner, as director of institutions of the State of California, filed his objections thereto. A hearing was had and all objections were waived except an objection to an item of $2,572.95 expended as payment on account of a promissory note in the sum of $3,000 in favor of D. C. Carniglia. The evidence showed that said note was executed on June 15, 1927, and that it represented money loaned to said Cesare Carniglia. The only evidence offered by appellant in support of his allegation that said expenditure was not a proper charge was evidence relating to a prior commitment of said Cesare Carniglia to the state hospital. Over the objection of respondent, evidence was introduced to show that said Cesare Carniglia had been previously committed in 1910 and had thereafter been discharged in 1913. The assistant superintendent of the hospital was asked, "So far as your records show there was never any restoration to capacity given to this man?" He answered in the negative. No evidence was offered tending to show that said Cesare Carniglia was in fact insane or incompetent at any time between the time of his discharge in 1913 and the time of the execution of the note in 1927. On the contrary, the meager evidence shows that during said period he transacted business, engaged in litigation, acquired real property, and borrowed other money. It may also be noted that there was no evidence to show that there had ever been any proceedings instituted for the appointment of a guardian prior to 1928.

The sole question on this appeal according to appellant is, "Did the probate court err in ordering the allowance of the item of $2,572.92 on account of a note for $3,000, which note was made at a time subsequent to the judicial determination of incompetency of the maker and prior to his restoration to capacity?" Respondent takes exception to said statement of the issue and frames the question as follows: "Is a person who has been committed to the state hospital under the provisions of section 2168 et seq. of the Political Code deemed to be judicially determined an insane person within the meaning of section 40 of the Civil Code, so as to render void all contracts made by him subsequent to said commitment but prior to the institution of guardianship proceedings?"

In our opinion respondent correctly states the question involved, and it appears that this appeal may be decided upon the authority of Fetterley v. Randall, 92 Cal. App. 411, 268 P. 434. See, also, People v. Gilberg, 197 Cal. 306, 319, 240 P. 1000; People v. Willard, 150 Cal. 543, 89 P. 124; People v. McConnell, 80 Cal. App. 789, 252 P. 1068; Leggate v. Clark, 111 Mass. 308; Kirk v. McClendon, 94 Okl. 33, 220 P. 949; Ex parte Maas (Maas v. Phillips), 10 Okl. 302, 61 P. 1057; Reeves v. State, 186 Ala. 14, 65 So. 160; 14 Cal. Jur. 346. Under the authorities cited, we conclude that insanity or incapacity is not "judicially determined" within the meaning of section 40 of the Civil Code by a commitment under section 2168 et seq. of the Political Code. Appellant cites and relies upon Hellman Commercial Trust & Savings Bank v. Alden, 206 Cal. 592, 275 P. 794, and O'Brien v. United Bank, etc., Co., 100 Cal. App. 325, 279 P. 1048, but in each of said cases incapacity had previously been "judicially determined" in proceedings for the appointment of a guardian.

It therefore follows that the trial court did not err in treating the note as valid and in allowing and settling the guardian's account.

The order appealed from is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

139 Cal.App. 619

CITY OF LOS ANGELES v. HIGGINS et al.

Civ. 8256.

District Court of Appeal, Second District, Division 2, California.

July 9, 1934.

Eminent domain ⇨246(3)

City's failure to pay condemnation award for property taken for street within 30 days or one year *held* not implied abandonment of proceedings (Gen. Laws 1923, Acts 8198, 8199; Code Civ. Proc. §§ 1251, 1255a).

Code Civ. Proc. § 1251, provides that compensation awards in street opening cases shall be paid within 30 days after interlocutory judgment, or, in the event bonds are to issue, within a year.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Condemnation proceedings by the City of Los Angeles against Thomas F. Higgins and others. From a judgment dismissing the proceedings, the plaintiff appeals.

Judgment reversed.

Prior opinion, 26 P.(2d) 668.

Erwin P. Werner, City Atty., Frederick von Schrader, Asst. City Atty., and Thurmond Clarke and Arthur W. Nordstrom, Deputy City Attys., all of Los Angeles, for appellant.

J. R. Sahanow, of Los Angeles, for respondents.

STEPHENS, Presiding Justice.

This cause arises out of an eminent domain proceeding wherein the city of Los Angeles sought to take property belonging to defendant and appellant for street purposes under the Street Opening Act of 1903, as amended. Deering's Gen. Laws 1923, p. 3309, Act 8198, Stats. 1903, p. 376, and acts amendatory thereof. The interlocutory judgment was signed May 7, 1929, after the determination of awards. Such awards are to be paid from a special fund to be collected by the bureau of assessments of the city of Los Angeles from an assessment levied under and pursuant to the provisions of the Street Opening Act of 1903, which assessments may be represented at the option of those assessed by bonds to issue under and pursuant to the Street Opening Bond Act of 1911 (Deering's Gen. Laws 1923, Act 8199). On April 25, 1930, the court denied a defendant's motion to dismiss. Thereafter he filed another motion to dismiss which was granted July 21, 1931. This motion was based solely upon the files of the case and under section 1255a, Code of Civil Procedure, upon the theory that an implied abandonment had taken place under section 1251, Code of Civil Procedure. Section 1251, Code of Civil Procedure, states that awards in street opening cases shall be paid within 30 days after interlocutory judgment, or, in the event bonds are to issue, within a year. The Street Opening Act of 1903, however, provides by section 31 thereof that awards shall not be paid until there is sufficient money collected therefor to pay them. It would be highly impractical, if not impossible, to collect such money within such a specified time, and we think, therefore, that section 1255a is not applicable to the situation. City of Los Angeles v. Agardy (Cal. App.) 24 P.(2d) 915.

Judgment reversed.

We concur: CRAIG, J.; ARCHBALD, Justice pro tem.

139 Cal.App. 628

PEOPLE v. SCHEFFEL.

Cr. 1799.

District Court of Appeal, First District, Division 2, California.

July 10, 1934.

Criminal law ⇨1182

Judgment on conviction of violating statute, penalizing manufacture, sale, possession, etc., of certain dangerous weapons, was affirmed, where appellant filed no briefs and evidence amply sustained verdict (St. 1923, p. 696, § 1).

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Thomas Scheffel was convicted of violating a statute declaring the manufacture, sale, possession, etc., of certain dangerous weapons felonious, and he appeals.

Affirmed.

Henry J. Kleefisch and Joseph M. Trusty, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

SCHMIDT, Justice pro tem.

In the above-entitled matter the Attorney General has moved that the judgment and order appealed from be affirmed as no briefs have been filed by appellant.

Although no briefs have been filed we have read the entire record. The evidence amply sustains the verdict of the jury finding the defendant guilty of violating chapter 339, § 1 (page 696), of the Statutes of 1923 as charged in count 1 of the indictment filed in the lower court. The record does not disclose any reversible error.

Judgment affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



139 Cal.App. 734

PEOPLE v. PIERSON et al.

Cr. 2542.

District Court of Appeal, Second District, Division 2, California.

July 17, 1934.

1. Robbery ⇐24(3)

Evidence of defendants' identity as persons who committed holdup *held* sufficient to support conviction of first degree robbery.

2. Criminal law ⇐1159(5)

Jury's decision, supported by abundant legal evidence, that defendants were persons who committed robbery, is final.

3. Criminal law ⇐622(3)

Trial court was not bound to order separate trials of defendants on mere request of one of them without statement of grounds for, or filing of affidavits supporting, his motion therefor.

4. Criminal law ⇐622(1)

Whether trial court abused discretion in denying one defendant's motion for separate trial must be determined on basis of showing made when demand was presented, not what transpired afterward.

5. Criminal law ⇐1182

Conviction of defendant not prosecuting his appeal in Court of Appeal must be affirmed (Pen. Code, § 1253).

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Edolph Frederick Pierson, Raymond Donald Grant, and Venerio Del Fante were convicted of first degree robbery, and they appeal.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellants Pierson and Del Fante.

Ralph D. Paonessa, of Los Angeles, for appellant Grant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

SCOTT, Justice pro tem.

Appellants were convicted of two counts of robbery in the first degree. Pierson and Del Fante had each been charged with and had admitted a prior felony conviction. From the judgment and from the order denying motion for a new trial this appeal is taken on the ground (1) that the evidence is insufficient to support the verdict; and (2) that a separate trial should have been ordered as to Del Fante.

[1] Appellants entered the house of the witness Campbell, pointed a gun at the latter and his wife, and tied them up with wire and adhesive tape. Another witness, Lange, entered and was forced to submit to similar treatment. Money and liquor were then stolen, telephone wires were cut, and the perpetrators of the crime withdrew. Appellants Pierson and Del Fante question the sufficiency of the evidence to establish their identity as the persons who committed the holdup.

The evidence is clearly ample to support the verdict. The witness Campbell saw the faces of the men above their masks and recognized their "general appearance, size, the way they walk and their voices." He observed that Del Fante "is very hump-shouldered, his walk is very peculiar," and that he had a mark under his left eye. His wife observed their appearance and voices and noted that Pierson was tall and had light hair. The witness Lange had frequently seen and done business with the codefendant Grant on prior occasions, and on the night in question the latter's face was familiar to him. After the robbery he recognized photographs of appellants Pierson and Del Fante as being the other two men in the holdup. He also noticed that Pierson had a "deep bass voice," that Del Fante had a scar on his left eye, and said he was positive that they were the men from

the "way they acted and their voices and the height of them." A witness Frost testified that he had seen appellants together on more than one occasion before the crime.

[2] Identification of a defendant has been held sufficient to support a verdict even when the witnesses called to identify the accused had not seen his face, or when they decline to swear positively and testify merely that they believe accused is the person whom they saw commit the crime. People v. Wilson, 76 Cal. App. 688, 245 P. 781. In this case there is abundant legal evidence to establish the identity of appellants as being the ones who committed the robbery, and in such a case the decision of the jury is absolutely final. People v. Meyers, 5 Cal. App. 674, 91 P. 167.

[3, 4] Appellant Del Fante contends that a separate trial should have been ordered as to him because evidence was introduced at the trial which would have been inadmissible if he was being tried separately, and which was highly prejudicial notwithstanding the jury was admonished not to consider it as to him. When the trial was about to start the trial judge called the case, and counsel announced "Defendant Del Fante is ready," and then said, "Will the court grant a motion on behalf of the defendant Del Fante for a separate trial for that defendant?" The court ruled: "No, motion denied." No grounds for such a motion were stated and no affidavits were filed nor statement made to support this appellant's suggestion that a separate trial should be ordered. The trial court was not bound to order separate trials upon the mere request of a defendant. The question whether or not there was an abuse of discretion in denying the motion for a separate trial must be determined upon the basis of the showing made when the demand was presented, and not upon what transpired afterward. On the record here presented it appears that the trial court did not abuse its discretion in denying the severance. People v. Erno, 195 Cal. 272, 232 P. 710; People v. Tinnin (Cal. App.) 28 P.(2d) 951.

[5] Although he gave oral and written notice thereof, defendant Grant has not prosecuted his appeal in this court, and the affirmation hereinafter directed is, as to him, under the provisions of section 1253 of the Penal Code.

Judgment and order affirmed.

We concur: CRAIG, Acting P. J.; DESMOND, J.

139 Cal.App. 601

LAUGHARN v. CHAMBERLAIN et al.

Civ. 5105.

District Court of Appeal, Third District, California.

July 7, 1934.

1. Appeal and error ⇐1046(5)

That trial judge asked questions, made objections, and ruled thereon in behalf of absent defendant who was physically unable to appear and financially unable to employ counsel, *held* not reversible error in absence of clear showing of bias; judge having authority to rule out incompetent evidence on his own motion.

2. Evidence ⇐419(8)

In action by trustee in bankruptcy to set aside written assignment of property by bankrupt, recital of full consideration in assignment *held* not to preclude evidence to the contrary, since consideration is a matter of proof, though the writing was best evidence of contents of assignment (Bankr. Act § 70e, 11 USCA § 110 (e).

3. Bankruptcy ⇐175

Grantee need not have made request that grantor convey property in order that conveyance be valid as against trustee in bankruptcy of grantor (Bankr. Act § 70e, 11 USCA § 110 (e).

4. Bankruptcy ⇐418(1)

Discharge in bankruptcy *held* not to bar action by trustee in bankruptcy to set aside transfers of property by bankrupt (Bankr. Act § 70e, 11 USCA § 110 (e).

5. Bankruptcy ⇐186(1)

Trustee *held* not entitled to set aside transfers of property by bankrupt, where transferee was obligated to pay money to perfect title to property and did so partly from her pension money, and no suggestion or offer was made that such sum should be repaid to her (Bankr. Act § 70e, 11 USCA § 110 (e).

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by Hubert F. Laugharn, trustee in bankruptcy of the estate of Julia Chamberlain Van Winkle, against Flora G. Chamberlain and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

Franklin J. Cole and Cole & Sprague, all of Los Angeles, for appellant.

Osborn & Burum, of Bakersfield, for respondents.

GANS, Justice pro tem., delivered the opinion of the court.

This is an action by the trustee in bankruptcy to set aside certain transfers of property; judgment having been entered against the trustee. He now from that judgment prosecutes this appeal.

On June 15, 1925, an automobile driven by Julia Van Winkle collided with a car operated by Ralph F. Pollock. As a result of the collision Mrs. Flora G. Chamberlain, mother of Julia Van Winkle, and a passenger in her car, was injured, as was also Pollock. On December 2, 1925, Pollock commenced an action against Julia Van Winkle and in June, 1927, recovered a judgment for $2,500 against her for the injuries and damages he sustained. The husband of Julia Van Winkle having died, she became entitled to certain exempt property and a one-third interest in the remainder of the estate. On June 2, 1925, she assigned and conveyed to her mother all of her interest in the estate, which in due course was finally distributed in accordance with this assignment to Flora G. Chamberlain, and the estate was closed in April, 1927. The assignment of the interest of Julia Van Winkle in the estate to her mother recited that it was made because Flora G. Chamberlain claimed damages against Julia Van Winkle "in consideration of the foregoing recitals and as a full and complete settlement of any and all damages of any kind and nature" received by said Flora G. Chamberlain.

On April 7, 1927, Julia Van Winkle executed a deed to her mother of the real property described in the suit and known as the Walnut Grove property. She acknowledged said deed on April 9th and recorded it on April 28, 1927. This property was being purchased by said Julia Van Winkle on contract and there was something like $440 unpaid thereon, the whole being worth about $1,200.

On September 1, 1927, said Julia filed her petition in bankruptcy, showing no property at all, and applied for and had a discharge on September 10, 1928, over the objection of Pollock, who appeared and made formal objection. Said Pollock had filed his claim against said bankrupt in said bankrupt estate, it being the only claim filed, and it was in due course allowed.

This suit was filed to recover all of the property mentioned for the bankruptcy estate, the allegations being made that the conveyances were in fraud and without consideration and to evade payment to said Pollock of his said claim.

[1] The first ground urged for reversal of said judgment is that the judge at the trial acted as counsel for one of the defendants, to wit, Flora G. Chamberlain, who was not in court, and appointed Julia Van Winkle, who was present in court and representing herself, to act as counsel for her; they representing that they were unable to employ and have counsel present. The judge did ask questions, make objections, and rule on the same in behalf of said absent defendant, and did name Julia Van Winkle to appear for her mother, although said Julia Van Winkle is not a lawyer. It appeared from the statements that Flora G. Chamberlain was physically unable to be present.

An examination of the record discloses some irregularities perhaps, but none that will constitute prejudicial error. Nor does it appear that any of the objections urged to testimony, which were made and ruled on by the court, resulted adversely or to the prejudice of plaintiff. Bias and prejudice must appear clearly and this record does not show either. The court may on its own motion rule or strike out irrelevant and incompetent evidence, and it does not appear that any of the evidence to which objection was sustained was admissible or that such is the claim. Apparently the whole objection is that the judge was biased. This does not appear.

[2] The claim is made that the written assignment which recites a full consideration precludes either evidence or finding to the contrary. Consideration is always a matter of proof. While the writing is the best evidence of its contents, yet there is presented a conflict of evidence and it appears that the consideration was sufficient, being the recompense to the mother for her injuries; they being very severe and the mother crippled for life. There was a strong moral obligation resting upon the daughter towards her mother.

[3] It is claimed that the mother had made no request for the assignment to her of the Walnut Grove property. There is some testimony that the matter was talked of between mother and daughter; but it is not necessary that a request be made.

[4] It seems that the discharge in bankruptcy did not bar the action of the trustee. Section 70e of the Bankruptcy Act (11 USCA § 110(e); In re Groves (D. C.) 244 F. 197; In re Gammon (D. C.) 109 F. 312; In re Levy (D. C.) 261 F. 432; In re Margolies (C. C. A.)

266 F. 203; Friend v. Talcott, 228 U. S. 27, 33 S. Ct. 505, 57 L. Ed. 718.

[5] Flora G. Chamberlain was obligated to pay some $440 to perfect title to the Walnut Grove property, and did this partly from her pension money. No suggestion or offer was made that this should be repaid to her. 10 Cal. Jur. 50.

From an examination of this record we see no sufficient ground for a reversal.

Accordingly, the judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



139 Cal.App. 661

REED v. BOARD OF EDUCATION OF MONTEREY UNION HIGH SCHOOL DIST. et al.

Civ. 9256.

District Court of Appeal, First District, Division 2, California.

July 13, 1934.

Rehearing Denied Aug. 11, 1934.

Hearing Denied by Supreme Court Sept. 11, 1934.

Mandamus ⇐107

Mandamus *held* to lie to compel board of education to pay to teacher salary which was adjudged to be due teacher on former trial and costs for prior trial and prior appeal.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Mandamus proceeding by Hattie Belle Reed against the Board of Education of the Monterey Union High School District and others. From a judgment sustaining a demurrer to the petition and dismissing the petition, petitioner appeals.

Reversed, with directions.

Lemuel D. Sanderson, of San Francisco, for appellant.

C. F. Lacey, of Salinas, for respondents.

SCHMIDT, Justice pro tem.

Appellant filed in the lower court her "Supplemental petition for writ of mandate" in which she set forth that she held legal specifications for teaching in the senior high schools of this state and particularly for the Monterey union high school district; that in 1931 the board of education of the Monterey union high school district attempted to discharge her, whereupon she filed her petition for writ of mandate to be reinstated as a permanent teacher in said district and to have her salary fixed; that judgment was rendered in her favor; and that her salary was found to be $200 per month for twelve months and she was awarded a money judgment for her salary to March 1, 1931. Following the judgment, a peremptory writ of mandate was issued and served from which writ of mandate and judgment the defendants appealed; that said judgment was affirmed and a petition for the hearing of same in the Supreme Court was denied on November 10, 1932 [Reed v. Board of Education, 125 Cal. App. 714, 14 P. (2d) 330]; that "thereafter November 28, 1932 plaintiff reported for duty and was assigned to active teaching in accordance with the terms of the judgment affirmed, and defendants paid to plaintiff the following sums: $2,304 salary from July 1, 1931, to July 1, 1932; $768 salary from July 1, 1932, to November 31, 1932, and $192 per month from December 1, 1932, to April 1, 1933, or $768, a total amount of $3,840.

"Plaintiff alleges, that under the judgment herein her salary was found to be $200 per month for 12 months, which was admitted in the pleadings, that this amounted for the years 1931–32 to $2,400; that the judgment of $1,600 plus costs of $22.50 bore interest at 7 per cent. per annum to November 31, 1932, or $112.57 and that cost for plaintiff's brief on appeal was fixed at $100.50, and that plaintiff's salary for the year 1932-1933 should be $200 per month for 12 months, amounting to April 1, 1933 to $1,800 or a total amount due from defendants to plaintiff of $4,435.57.

"That on April 1, 1933, there is due, owing and unpaid from defendants to plaintiff the sum of $595.57 under the terms of said judgment, and that plaintiff has made demand, and that defendants have refused to pay said sum or any part thereof, and still so refuse."

The prayer for the writ of mandate reads as follows: "That defendants pay to plaintiff the sum of $595.57 and to make such payment forthwith; And for such other and further relief as may seem meet and proper to this Court in the premises."

To the supplemental petition for writ of mandate the defendant board of education of the Monterey union high school district and

its members interposed a general and specific demurrer. The lower court, after entering its minute order, made and entered its judgment in which it recited:

"The court having sustained said demurrer without leave to amend, on the grounds that Mandamus does not lie to enforce the obligations of a contract but only to enforce the performance of an act which the law specifically enjoins, and that the said action lies in debt at law;

"It is ordered, adjudged and decreed, that plaintiff take nothing by said supplemental petition, and that same be and it is hereby dismissed. * * *"

From the latter judgment, appellant appeals.

Although several questions have been raised, there is but one question involved, namely, Did appellant have the right to ask for a writ of mandate against the school board involving a dispute over her salary and the item of costs for the prior trial and the prior appeal? The answer to the question is found in Dupuy v. Board of Education, 106 Cal. App. 533, 289 P. 689, Chambers v. Davis, 131 Cal. App. 500, 22 P.(2d) 27. In the Dupuy Case it was said (page 539 of 106 Cal. App., 289 P. 689, 692): "It is urged, that conceding the correctness of the lower court's ruling mandate is not the proper remedy. It will be noted that the claim of plaintiff involves no terms of employment or dispute over services rendered. All that is involved is whether or not moneys, conceded to have been earned, are now due. All that remains is the issuance of the warrant and this is a ministerial duty enjoined by law. In such a case mandate will lie. Goldsmith v. Board of Education, 63 Cal. App. 142, 218 P. 296."

The Chambers v. Davis Case is even more in point. In that case there was a dispute between the board of education and the teacher as to the amount of salary to which she was entitled; no question whatever being raised concerning her position as a permanent teacher. At page 503 of 131 Cal. App., 22 P. (2d) 27, 28, in the opinion we find: "We are of the opinion the petition states facts sufficient to constitute the special proceeding authorizing the issuance of a writ of mandamus to compel a board of trustees to fix and allow a permanent teacher a reasonable salary for services for instruction in a particular subject. Mandamus is the proper remedy. Dutart v. Woodward, 99 Cal. App. 736, 279 P. 493."

It necessarily follows that the trial court should not have sustained the demurrer. The judgment is reversed, with directions to overrule the demurrer allowing the defendants in the action the usual time to file an answer.

We concur: NOURSE, P. J.; STURTEVANT, J.



139 Cal.App. 575

PEOPLE v. ALSTON.

Cr. 2517.

District Court of Appeal, Second District, Division 1, California.

July 6, 1934.

Hearing Denied by Supreme Court Aug. 2, 1934.

1. Larceny ⇐82

Jury's verdict of guilty of grand theft necessarily implied finding of four elements necessary to constitute "grand theft," which were intent to defraud, actual fraud committed, false pretenses used for purpose of accomplishing fraud, and accomplishment of fraud by means of pretenses used.

[Ed. Note.—For other definitions of "Grand Theft," see Words & Phrases.]

2. Criminal law ⇐822(1)

Instructions must be considered as a whole in ascertaining their true meaning.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Elward H. Alston was convicted of grand theft, and he appeals.

Affirmed.

W. T. Kendrick, Jr., of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

HAHN, Justice pro tem.

From a judgment of conviction of the crime of "grand theft," and a denial of his motion for a new trial, defendant appeals, urging, as grounds for reversal of the judgment and the court's order, the following points: "1. Insufficiency of the evidence. 2. Errors in in-

structions." We find no merit in either of these contentions.

As there is no new question involved in this appeal, we feel that no useful purpose will be served by reciting in detail the evidence bearing upon the charge, nor in an extended discussion of the evidence or the cases cited by counsel in their briefs.

[1] A careful examination of the record satisfies us that there is sufficient evidence to support the findings of the jury necessarily implied in their verdict of guilty of the four elements necessary to convict one of the offense here charged, namely: "(1) An intent to defraud; (2) an actual fraud committed; (3) false pretenses used for the purpose of accomplishing the fraud; and (4) the accomplishment of the fraud by means of the pretenses used." People v. Harrington, 92 Cal. App. 245, 267 P. 942, 946.

[2] As to appellant's attack upon certain instructions given by the court, we have examined all of the instructions given and are of the opinion they fairly state the law relating to the charge involved. It is indeed elementary that the instructions must be considered as a whole in ascertaining their true meaning. The instructions when so viewed are not subject to the criticism urged.

The judgment and order are affirmed.

We concur: CONREY, P. J.; HOUSER, J.



139 Cal.App. 650

ANDERSON v. BLEDSOE.

Civ. 9803.

District Court of Appeal, Second District, Division 2, California.

July 11, 1934.

Judges ⇐25(2)
Prohibition ⇐10(1)

Authority of appointment as judge pro tempore to try case continues until final disposition thereof; hence party was not entitled to writ prohibiting judge from hearing motion to vacate his order granting new trial, notwithstanding time for appealing from such order had expired (Const. art. 6, § 5, as amended in 1928).

Petition by Mabel P. Anderson for a writ of prohibition against Benjamin F. Bledsoe to prevent respondent, sitting as judge pro tempore in an action brought by petitioner and others against the City Railway Company and others, from hearing a motion to vacate respondent's order granting a new trial in the action in question.

Alternative writ discharged, and peremptory writ denied.

L. J. Styskal, of Los Angeles, for petitioner.

Gibson, Dunn & Crutcher, of Los Angeles, for respondent.

STEPHENS, Presiding Justice.

Honorable Benjamin F. Bledsoe, for many years a distinguished judge of the superior court, and later judge of the United States District Court, obliged the litigants and the presiding judge of the superior court of Los Angeles county by accepting appointment as a pro tempore judge to try the case of Mabel P. Anderson et al., Plaintiffs, v. City Railway Company et al., Defendants, pending in the said superior court. The case was tried without a jury, judgment was duly rendered and entered, and thereafter a motion for a new trial was made and granted. The order granting the new trial was appealed and this appeal was subsequently dismissed. A motion was made in the superior court of Los Angeles county to vacate the order granting the new trial, and this motion, it is conceded, will be heard by Judge Bledsoe under his continuing authority as judge pro tempore unless we issue the writ of prohibition preventing it. Judge Bledsoe responds by filing a demurrer on the ground that no cause has been stated, and this pleading was treated at the argument as a return. The point raised is conceded by all concerned as wholly legal in nature and in no sense as an aspersion upon the ability or integrity of the distinguished respondent.

We think the demurrer must be sustained. The authority of the appointment continues until the final disposition of the case. Const. of Calif., art. 6, § 5, as amended November 6, 1928. The fact that the order granting the new trial has become final so far as a direct appeal therefrom is concerned is wholly immaterial.

The alternative writ is discharged, and the peremptory writ is denied.

We concur: CRAIG, J.; DESMOND, J.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

BRAINARD v. FITZGERALD et al. *

Civ. 9272.

District Court of Appeal, First District, Division 2, California.

July 11, 1934.

Rehearing Denied Aug. 10, 1934.

Hearing Granted by Supreme Court Sept. 7, 1934.

Assignments for benefit of creditors ⇐193, 194

Assignment for benefit of creditors, which did not contain list of creditors of assignor and was not recorded nor had time elapsed for making and filing of inventory provided by statute, would not prevent levy of attachment of another creditor or prevent sheriff from selling attached property under execution in his hands (Civ. Code, §§ 3440, 3449–3473).

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Suit by G. W. Brainard against W. J. Fitzgerald, the Massachusetts Bonding & Insurance Company, and another. From a judgment in favor of plaintiff, the Massachusetts Bonding & Insurance Company appeals.

Reversed.

Fred A. Watkins, of Long Beach, for appellant.

Norman A. Eisner and Grant H. Wren, both of San Francisco, for respondent.

SCHMIDT, Justice pro tem.

The facts out of which this case arose are: Richard Behrendt Company was a copartnership consisting of Alvin H. and Arthur Behrendt engaged in the business of selling at wholesale toys, fireworks, novelties, etc., at 711 Mission street, San Francisco. The copartnership was indebted to the National Fireworks Distributing Company to the amount of $1,225.03, for which the fireworks company, in the morning of January 20, 1932, filed suit in the municipal court of the city and county of San Francisco. In connection therewith it caused a writ of attachment to be issued, which the sheriff on the same day, between 2 and 3 o'clock p. m., levied by placing a keeper in the store of the aforementioned Behrendt Company. At about 9:15 a. m. of the same day, unknown to the fireworks company, the Behrendt Company made to one G. W. Brainard, secretary of the board of trade of San Francisco, a general assignment for the benefit of creditors. At about 10 o'clock of that day a representative of said G. W. Brainard arrived at the store of the Behrendt Company and proceeded to check the books and take inventory, remaining at the store until shortly before 2 o'clock, when he attended a meeting at the board of trade office. It was while he was at this meeting that the sheriff levied the aforementioned writ and placed the keeper in possession. The representative of Brainard returned to the store within an hour or so and found the keeper there. He continued with his work of taking inventory and examining the books. Both copartners remained on the premises and were still there at the time of the trial in the lower court. The same clerks were retained except one who was discharged a few days later. No change was made in the large sign appearing above the front of the store and none in the sign on the window. However, Brainard's representative, when he first went to the store, in his own handwriting, wrote on a sheet of paper described as a half-letter size, the words "G. W. Brainard, Assignee," and placed same on the floor of the window. The same letterheads were used and bills were sent out as usual. All business was transacted as before under the name of Richard Behrendt Company. The sheriff removed certain quantities of merchandise inventoried at $3,000, which was later sold by the sheriff under execution issued out of the municipal court, realizing the sum of $1,400.

On January 23, 1932, respondent Brainard served a third party claim on the sheriff, whereupon the National Fireworks Distributing Company filed a bond with the sheriff to prevent the release of the property. The appellant herein, Massachusetts Bonding & Insurance Company was the surety on that bond. Respondent brought suit on the bond including as defendants, in addition to the appellant, Sheriff Fitzgerald and the National Fireworks Distributing Company, but abandoned the suit as to the two latter named defendants and proceeded against the appellant alone on its bond.

From the judgment entered in respondent's favor this appeal was taken. The evidence does not show that the assignment was ever recorded, and the assignment filed as an exhibit does not show that it was recorded. Respondent proceeds on the theory of a common-law assignment for the benefit

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 44 P.2d 336.

of creditors as being within the exception contained in section 3440, Civil Code.

Section 3440, Civil Code, provides: "Every transfer of personal property * * * is conclusively presumed if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession; * * * provided, also, that the sale, transfer or assignment of a stock in trade, in bulk * * * otherwise than in the ordinary course of trade and in the regular and usual practice and method of business of the vendor * * * will be conclusively presumed to be fraudulent and void as against the existing creditors of the vendor * * unless at least seven days before the consummation of such sale * * * the vendor * * * shall record in the office of the county recorder * * * a notice of said intended sale; * * * provided, further, that the provisions of this section shall not apply or extend to any * * * transfer or assignment * * * made for the benefit of creditors generally. * * *"

Sections 3449 to 3473, Civil Code, exclusively provide for assignments for the benefit of creditors.

These sections have received the attention of our courts particularly in Wilhoit v. Lyons, 98 Cal. 409, 33 P. 325; Garn v. Thorwaldson, 40 Cal. App. 62, 180 P. 9; Jarvis v. Webber, 196 Cal. 86, 236 P. 138.

In the latter case we find (page 94 of 196 Cal., 236 P. 138, 141): "In order to determine the validity of a transaction purporting to be a statutory assignment for the benefit of the creditors of an assignor, we look to the provisions of the Civil Code, found in the title covering that subject. Watkins v. Wilhoit, 104 Cal. 395, 399, 38 P. 53. It is therein provided that an insolvent debtor may, in good faith, execute an assignment of property in trust for the satisfaction of his creditors (section 3449). Such assignment must conform to the provisions of the code sections. It must be in writing, must contain a list of the creditors of the assignor, their places of residence, the amount of their respective demands, and the amounts and nature of any security therefor. * * * There is the further requirement (section 3458) that an assignment for the benefit of creditors must be acknowledged, proved, and certified in the mode prescribed by the chapter on recording transfers of real property, and must be recorded. Unless that be done, the assignment is void against every creditor of the assignor not assenting thereto (section 3459)."

The assignment under consideration in this appeal did not contain a list of the creditors of the assignor, it was not recorded nor had the time elapsed for the making and filing of the inventory provided by section 3461, Civil Code. It therefore follows that there was nothing in the property assignment which prevented the levy of the attachment by the National Fireworks Distributing Company or which prevented the sheriff from selling the attached property under the execution placed in his hands.

Judgment reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.



139 Cal.App. 607

RELIANCE ACCEPTANCE CORPORATION v. HOOPER-HOLMES BUREAU.

Civ. 9087.

District Court of Appeal, First District, Division 2, California.

July 9, 1934.

1. Damages ⇐23

Damage for breach of contract, made under special circumstances known to both parties, is amount of injury ordinarily following therefrom, but is only amount of injury arising generally, if such circumstances were unknown to party breaking contract (Civ. Code, § 3300).

2. Damages ⇐22

Automobile finance company *held* not entitled to recover amount of dealer's indebtedness to it for automobiles sold by him as damages for mercantile agency's breach of checking contract by failure to report absence of such cars from dealer's place of business; loss not being natural, proximate result of breach (Civ. Code, § 3300).

3. Damages ⇐18

Automobile finance company *held* not entitled to recover amount of dealer's worthless check for moneys collected from automobile purchasers and embezzled by him as

damages for mercantile agency's breach of checking contract by failure to report absence from dealer's place of business of other automobiles sold by him; loss not being proximate result of breach (Civ. Code, § 3300).

4. Damages ⇐23

Automobile finance company *held* not entitled to recover amount it paid dealer for fictitious conditional sale contract as damages for mercantile agency's breach of checking contract by failure to report absence from dealer's place of business of automobiles sold by him; loss not being within parties' contemplation as damage from breach (Civ. Code, § 3300).

5. Damages ⇐123

Automobile finance company *held* not entitled to recover amount of losses on conditional sales contracts purchased from dealer as damages for mercantile agency's breach of checking contract by failure to report absence from dealer's place of business of other automobiles sold by him.

Appeal from Superior Court, San Francisco County; John J. Van Nostrand, Judge.

Action by the Reliance Acceptance Corporation against the Hooper-Holmes Bureau, a corporation. Judgment for plaintiff, and defendant appeals.

Reversed.

Bronson, Bronson & Slaven, of San Francisco, for appellant.

Louis E. Goodman, Louis H. Brownstone, and Goodman, Bachrack & Brownstone, all of San Francisco, for respondent.

SCHMIDT, Justice pro tem.

One H. O. Cummins had the exclusive Chrysler agency at Vallejo, Cal. Commencing in 1925, respondent, a finance company, engaged in the business of purchasing new automobiles from distributors for dealers, and discounting and purchasing conditional sales contracts and other paper from such dealers, financed said Cummins in connection both with his purchase of new automobiles from the distributor and in connection with his conditional sales contracts. In August and September, 1929, respondent purchased from the distributor three new Chrysler sedans, which cars were then shipped and delivered to Cummins at his place of business in Vallejo. As security for Cummins reimbursing respondent for these three cars respondent took from Cummins trade acceptances and trust receipts, in which receipts Cummins acknowledged that said three automobiles were the property of respondent; that they were held by him in trust and that upon a sale of said automobiles or any of them he, said Cummins, would remit to respondent the amount of the trade acceptance, which trade acceptance and trust receipt contained the date of purchase, the amount of indebtedness, and the usual description of an automobile, such as type, motor number and serial number. The due dates of the respective indebtedness were one month after purchase, September 8, September 15, and October 4, 1929. In the ordinary course of his business Cummins sold the aforementioned cars on August 12, September 4, and September 19, respectively, but failed to notify respondent of any of the sales and appropriated to his own use the proceeds of each sale. Respondent did not at any time inquire of Cummins whether he had disposed of the cars.

On January 23, 1930, respondent furnished appellant, a mercantile agency, with a typewritten list of approximately thirty automobiles which respondent had theretofore financed for Cummins, including the three aforementioned Chrysler sedans. At the bottom of this typewritten list appeared: "Please check these cars at H. O. Cummins, 515 Marin street, Vallejo. Insurance Company request." The said list was the only communication, either oral or written, addressed by respondent to appellant in connection with the checking of that particular list of cars. Respondent on other occasions had made request of appellant to make checks, these requests usually being made over the telephone. About the time respondent commenced to do business with appellant, which was several years prior to the check herein involved, an officer of respondent discussed with an officer of appellant that in making checks appellant should leave the impression with the dealer that appellant was checking for an insurance company.

After receiving the aforementioned list appellant sent an employee to the place of business of Cummins. There the employee exhibited a list of automobiles and stated he desired to check same. Cummins, or one of his men, went from car to car on the premises and read the serial and motor numbers thereon to said employee of appellant, who in turn checked the numbers on his list. At the time of this check Cummins did not have in his possession the three aforementioned Chryslers, the same having already been

sold by him, but did have three other similar Chryslers which had been consigned direct to him by the distributor. In the course of the check Cummins had in his possession cards with the data concerning the three Chryslers involved herein and when he came to the three Chryslers that were then on his floor he read to the employee of appellant the motor and serial numbers not as they were on the three cars on his floor, but those upon the cards describing the three Chryslers already sold. The employee of appellant made his report accordingly and this report was on January 27, 1930, forwarded by appellant to respondent. Neither appellant nor its employee knew of any error in the report. At the time of the report Cummins was indebted to respondent on account of the three cars in the total sum of $3,817.15. Subsequent to this report Cummins collected on behalf of respondent payments totaling $675.75 paid by vendees on conditional sales contracts which Cummins had previously sold and assigned to respondent. Cummins embezzled this $675.75. On February 4, 1930, Cummins mailed respondent his personal check for $675.75, which check, after being twice deposited for collection by respondent, proved to be worthless. Respondent immediately investigated and discovered the embezzlement. Nevertheless, respondent made arrangement with Cummins for the payment of the $675.75 out of commissions to be earned later by Cummins in business to be sent respondent by Cummins. On a few occasions prior to this respondent had received bad checks from Cummins and knew that he had theretofore embezzled their funds collected by him. All these checks had, however, been made good.

Subsequent to this $675.75 matter respondent continued to do business with Cummins. On February 24, 1930, Cummins forwarded to respondent for discount a conditional sales contract purported to have been signed by one D. D. Baker and supposed to represent the sale of an automobile by Cummins to Baker. Respondent purchased this contract for $1,345. Later it was found that this contract was fictitious, neither the automobile mentioned in the contract nor said D. D. Baker existed.

After January 27, respondent continued to discount conditional sales contracts on cars sold by Cummins and in connection with the repossession of said automobiles sustained a loss of $405.21.

On March 6, 1930, Cummins closed his place of business, whereupon he informed respondent of that fact and how he had misled the employee of appellant relative to the check of the three Chryslers involved herein. This was the first information respondent had of the falsity of the check in so far as it related to the three Chrysler cars. Respondent thereupon took an assignment from Cummins of his accounts receivable and took over the conduct of Cummins' business, conducting same for several months. Respondent, however, permitted Cummins to retain for his own use certain conditional sales contracts held personally by Cummins, on which contracts Cummins succeeded in collecting about $1,000. Later respondent permitted Cummins to sell for his own use the furniture and fixtures, upon which Cummins realized $200. During the period of the so-called liquidation Cummins continued as a salesman with respondent.

The evidence further showed that during the entire period that Cummins did business with plaintiff, Mr. Rapheld, the president of respondent finance company, went to Cummins' place of business. In this connection Cummins testified: "During the five years that I was in business Mr. Rapheld of the finance company would come to my place of business approximately every month or six weeks, and I would discuss my business with him. This continued during all of the period I did business with the Reliance Acceptance Corporation—Rapheld always checked the cars on the floor—both new and used. There was no fixed time but I would say it would average every six weeks." Mr. Rapheld testified: "I know Mr. Cummins. Prior to March 5, 1930 I visited Cummins' place of business at Vallejo. I had no regular time of doing this but I would say three or four or five times a year. On many occasions I went over the books with him. On no occasion would I make a detailed survey of his cars because I would not be in a position to pass upon their condition other than in a general survey as the cars appeared on the floor. But his books I did check up with him from time to time; I would say probably two or maybe three times during the year I would look over certain items with him for partially our benefit and likewise for the purpose of assisting him if I could to catch any leakage he could overcome."

Respondent brought action in the lower court setting forth the employment of appellant to make the aforementioned check of January 27, 1930, the falsity of the report made by appellant, and claimed as damages for breach of contract the loss sustained by

respondent on account of (a) the three Chrysler sedans; (b) $675.75 check; (c) the D. D. Baker transaction; and (d) the $405.21 loss on the repossession of cars. Upon findings of fact in its favor respondent had judgment against appellant for $6,263.11 consisting of (a) three Chrysler cars, $3,837.15; (b) collections made by Cummins not paid represented by bad check, $675.75; (c) amount advanced on the Baker fictitious sale contract, $1,345; and (d) losses on used car contracts purchased after January 27, $405.21; total, $6,263.11.

From this judgment appellant appeals claiming that as a matter of law under the facts herein respondent was not entitled to judgment for any of the items set forth as one of said items proximately resulted from the breach by appellant of its contract.

[1, 2] 1. What is the liability of a mercantile agency which in good faith and without knowledge of the error informs a finance company that certain automobiles were on the floor of the automobile dealer? The measure of damage is fixed by section 3300 of the Civil Code: "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." The rule is stated in 8 California Jurisprudence, 759, as follows: "To warrant a recovery of damages, a causal connection must exist between the breach and the detriment * * * the breach must be the efficient cause of the detriment, the one that necessarily sets other causes in operation. Causes which are merely incidental, or instruments of some other controlling agency, are not proximate within the purview of the law. * * *" We find the rule laid down in Hadley v. Baxendale, 26 Eng. L. & Eq. 398, as quoted in Wallace v. Ah Sam, 71 Cal. 197, at page 200, 12 P. 46, 48, 60 Am. Rep. 534: "'Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damage resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But on the other hand, if those special circumstances were wholly unknown to the party breaking the contract, he at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances for such a breach of his contract.'" This interpretation of the rule of damages for breach of contract has been adhered to ever since. Bearing this rule in mind, can it be said as to the item of loss involved in connection with the three Chrysler cars that such loss naturally flowed from the breach of contract by appellant? The loss had already occurred through the criminal acts of Cummins. As to this item, had the report been true what could respondent have done to collect upon its account that would have brought the money to respondent? A close analysis of the testimony shows that the financial condition from January 27 until the discovery of the error in the report caused by the fraud of Cummins remained substantially the same. This alleged item of damage is not therefore one which naturally proximated from the breach.

[3] 2. The next item of damage resulting from a series of embezzlements of moneys collected and not turned over by Cummins to respondent could not by any stretch of imagination be the proximate result of the breach of contract by appellant. As to this item respondent knew a few days after receipt of the report from appellant that the check for $675.75 was not good. Mr. Rapheld, president of respondent, testified that the amount of the check could not be collected because Cummins did not have the assets. If respondent could not collect on the check of $675.75, how could respondent collect the $3,375 represented by the indebtedness on the three Chryslers?

[4] 3. We do not believe that the Baker item could have been in the contemplation of the parties as a damage resulting from appellant's breach of contract. How could appellant anticipate that respondent would purchase fictitious paper—fictitious both as to person and car, and all the more so after respondent knew from prior checks, and more particularly from the $675.75 check, that Cummins was not to be trusted?

[5] 4. The losses involved in item 4 arose from repossessions of cars upon which Cummins held conditional sales contracts of the vendees and which contracts respondent purchased. In no way were these cars or contracts connected with the three Chrysler sedans. Did respondent purchase same upon anything set forth in the report of appellant? No. Respondent must have purchased same

upon the purported security of the cars named in the conditional sales agreements. The fact either that respondent would buy contracts where the security was inadequate, or that the market value of the security declined during the period involved between purchase of the contract and the subsequent repossession, was not within the contemplation of the parties to the contract for the check of Cummins' cars.

From the foregoing views it necessarily follows that the judgment of the lower court is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.



139 Cal.App. 679

BROOKS et al. v. SESSAGESIMO.

Civ. 1271.

District Court of Appeal, Fourth District, California.

July 13, 1934.

1. Death ⇐75

In action for death of deceased who was shot when caught in alleged attempt to burglarize chicken house of defendant who was in fear of his life, evidence *held* sufficient to support finding that homicide was justifiable (Pen. Code, §§ 197, 198, 459).

2. Evidence ⇐60

In action for death by shooting, no presumption exists that defendant was an alien in possession of concealed firearm in violation of law, and defendant did not have burden of proving his citizenship (Gen. Laws 1931, Act 1970, § 2).

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by Alonzo Brooks and others against Antonio Sessagesimo. From a judgment for defendant, plaintiffs appeal.

Affirmed.

Percy C. Church, of Fresno, and Edwin C. Jamison, for appellants.

David E. Peckinpah and Bert M. Green, both of Fresno, for respondent.

BARNARD, Presiding Justice.

About 1 or 2 o'clock on the morning of April 14, 1932, one Joe Brooks, a colored man, broke into a chicken house at the home of the defendant, and, while there, was shot and killed by the defendant. The defendant at once reported the matter to the police authorities, and an investigation was immediately made, the result of which was that the defendant was not held or prosecuted. This action was brought by the heirs of the deceased to recover damages; it being alleged that the death was caused by the willful act of the defendant. The court found in all respects in favor of the defendant and, among other things, found as follows: "That on or about the 14th day of April, 1932, the defendant shot and killed Joe Brooks; that at the time said defendant shot and killed said Joe Brooks, said Joe Brooks manifestly intended by violence and surprise to commit a felony, and at said time, said Joe Brooks was committing a felony, to-wit, burglary, and said burglary was being committed by said Joe Brooks in the nighttime, and that it was being committed upon the property and habitation of defendant. That it is true that defendant acted at all times in a careful and prudent manner and as a reasonable man would act under all the circumstances." From the ensuing judgment the plaintiffs have appealed.

[1] It is first urged that the evidence is insufficient to support the finding that the homicide was justifiable. The respondent owned his own home in the city of Fresno. There was a fence along the alley at the rear of his lot, and on the evening before the shooting occurred the gate in this fence was left shut. About twenty feet away from this fence there was a chicken house and chicken yard, in which were a large number of chickens. The door to the chicken house was locked with a padlock. The respondent was awakened by the barking of his dog which was chained up in the back yard. He heard a noise coming from the direction of the chicken house which sounded like something breaking and, after arming himself, went out to investigate. It was quite dark, but he saw a man move at the chicken house door, either just inside or just outside of the chicken house. He also heard the chain on the chicken house door rattle. He immediately fired three shots, one of which killed the deceased. He testified that he was afraid to call out or give a warning for fear the man he saw would kill him, and that he had previously known a man who was killed after giving such a warning. When the

officers arrived, they found the door to the chicken house broken, the body of the deceased just outside this door, and what was apparently the intruder's hat inside of the chicken house. The gate through the rear fence was found open.

The evidence supports the conclusion that the chicken house in question was a building within the meaning of section 459 of the Penal Code. There is ample evidence that the deceased, at the time he was discovered by the respondent, was not only manifestly intending to commit a felony, but that he was then actually engaged in committing such a crime. Pen. Code, § 197. The evidence justifies the inference that the respondent was actuated by more than a bare fear that a felony would be committed by the deceased, and that a reasonable person must have known that a felony was being committed. Pen. Code, § 198. There is also some evidence that the respondent was in fear of his life, and it cannot be said, under the circumstances, that this fear was an unreasonable one. While no gun was found upon the deceased, an open pocketknife was found in his pocket. One who is committing a burglary is apt to be armed with a gun, and it is not unusual for such a person to shoot when caught in the act. It cannot be held as a matter of law that it was the duty of the respondent to give the intruder the first opportunity to shoot by waiting to see whether or not he had a gun. The question before the trial court was one of fact, and the evidence, with the reasonable inferences therefrom, is sufficient to sustain the findings.

[2] The second point raised by the appellants is that the respondent was himself guilty of a felony at the time in question and that a homicide perpetrated while in the commission of a separate and distinct felony cannot be justified. This contention is based upon the claim that the respondent was not a citizen of the United States and that under section 2 of Act 1970, General Laws of California 1931, he was guilty of a felony in that he was then in the possession of a firearm capable of being concealed upon the person. Not only is there no evidence that the barrel of the firearm used by the respondent was less than twelve inches in length, but there is no evidence in the record that the respondent was not, at the time, a citizen of the United States. Upon cross-examination the respondent testified that he was born in Italy. The cross-examination stopped at that point, and he was not asked whether he had been naturalized, and it is perhaps a fair inference that the question was not asked because it was known that the answer would be unfavorable. The respondent testified upon direct examination that he had owned his home, where the shooting occurred, for more than twenty years. Assuming that the burden was upon the respondent to show a justification for his act by a preponderance of the evidence, there is no presumption that he was himself engaged in a criminal act, and it could not be held, under the circumstances, that the burden rested upon him in a civil case to affirmatively prove his citizenship. Especially is this true when the point was not raised in the trial court, with an opportunity to meet the same.

The judgment is affirmed.

I concur: JENNINGS, J.

MARKS, J., being absent, does not participate in this opinion.



139 Cal.App. 731

UNITED STATES GYPSUM CO. v. SNYDER–ASHE CO. et al.

Civ. 7891.

District Court of Appeal, Second District, Division 1, California.

July 17, 1934.

1. Novation ⇐4

Novation of debt for materials furnished corporation was not effected by execution of notes by corporation pursuant to agreement, where cash payment of certain amount was condition precedent to acceptance of notes, which payment was never made and creditor promptly returned notes to corporation on receipt thereof.

2. Novation ⇐1

"Novation" implies a previous valid obligation, agreement of parties to new contract, extinguishment of old contract, and validity of new one.

[Ed. Note.—For other definitions of "Novation," see Words & Phrases.]

3. Corporations ⇐243(1)

Defendants as stockholders *held* liable for materials furnished corporation, where they retained possession of stock certificates

issued them as owners and records of corporation failed to disclose that defendants held stock other than as owners.

Appeal from Superior Court, Los Angeles County; Warran V. Tryon, Judge.

Action by the United States Gypsum Company against the Snyder-Ashe Company and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

Fred E. Peterson, Berge Lion, and Hugh M. Foster, all of Los Angeles, for appellants.

Gibson, Dunn & Crutcher and Henry F. Prince, all of Los Angeles, for respondent.

YORK, Justice.

This is an appeal from a judgment recovered by plaintiff in an action brought against the defendant corporation upon an open book account for materials furnished by plaintiff to the defendant, the unpaid balance of which was found by the court to be $8,603.32. The complaint alleged a second cause of action upon an account stated dated on or about July 29, 1929, by the terms of which it was found that defendant was indebted to plaintiff in the sum set out in the first count. The third cause of action alleged a common count for materials sold and delivered, and the fourth, fifth, and sixth causes of action set up three trade acceptances and, in addition, the complaint attempted to join an action for stockholders' liability.

The answer denied all the allegations of the complaint and alleged that the obligation was extinguished by an agreement under the terms of which the defendant corporation agreed to pay to plaintiff the sum of $2,000 on July 15, 1929, and agreed to and did give to the plaintiff its promissory notes extending over a period of six months for the balance due to the plaintiff. It was found by the court that the defendant corporation never made the $2,000 cash payment, but "that sometime subsequent to July 15, 1929, and prior to July 30, 1929, said defendant delivered to plaintiff six promissory notes in the total amount of eight thousand six hundred three and 32/100 dollars ($8,603.32) and that these notes were not accepted by plaintiff, and were, on July 29, 1929, deposited by plaintiff in its outgoing mail in an envelope addressed to the said defendant. That plaintiff did not, on July 11, 1929, or at any other time, or at all, offer or agree to accept said or any promissory notes of the said defendant, or any notes whatever, except upon the condition that a cash payment of two thousand dollars ($2,000.00) be made by defendant Snyder-Ashe Company, Inc., on or before July 15, 1929."

Upon this appeal appellant contends that the evidence is insufficient to sustain the decision of the court or the judgment, or to sustain or justify the findings of fact; that the complaint does not state facts sufficient to constitute a cause of action against the stockholders; that motion for nonsuit should have been granted; and, finally, that the evidence is insufficient to sustain the findings of fact or the judgment as to the ownership of the shares of stock and as to any liability thereon.

[1] This appeal comes to this court upon a bill of exceptions, which, however, does not show by any statement that it contains all of the evidence adduced at the trial of the case. Nevertheless, we are of the opinion that the evidence in the record before us is sufficient to sustain the findings of fact and the judgment, both as to the question of novation and of stockholders' liability. The evidence shows that the cash payment of $2,000 was a condition precedent to the acceptance by plaintiff of the promissory notes, and that until both the cash payment and the notes were in the hands of plaintiff, the original obligation remained in full force and effect, and the novation (if any) was not effective. It would seem, too, that plaintiff on receipt of the notes promptly returned them to defendant corporation.

[2] "Novation, strictly speaking, implies four essential requisites: (1) A previous valid obligation; (2) the agreement of all the parties to the new contract; (3) the extinguishment of the old contract; and (4) the validity of the new one." Young v. Benton, 21 Cal. App. 382, 131 P. 1051, 1052; California C. P. Growers v. Downey, 76 Cal. App. 1, 18, 243 P. 679. There is nothing in the evidence before us that shows an extinguishment of the old contract.

[3] The court found that at all times mentioned in the complaint and during the period subsequent to December 31, 1927, the total subscribed capital stock of the defendant corporation consisted of two hundred shares of the par value of $100 each; the court also found that the said defendants Ashe, Peterson, and Hart, prior to the year 1928, caused the defendant company to issue to them in their respective names as owners, original certificates of stock representing in the case of each of said defendants the number of shares of capital stock of said company set

opposite their names, as follows: R. C. Ashe, 89 shares; Fred E. Peterson, 59 shares; Cornie W. Hart, 48 shares; and that they have at all times since said time retained possession of said certificates of stock so issued; that the names of said defendants, with the knowledge and consent of each of them, have at all times since said date appeared on the stock books of the defendant corporation, as the owners of said certificates of stock and the shares represented thereby, without any entry whatever being made on the record of said defendant corporation to indicate that the defendants or any of them held or claimed to hold said certificates or shares or any of them otherwise than as owners. There is ample evidence in the record to justify and sustain each of the findings of the court objected to by appellants.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.



139 Cal.App. 664

In re PEOPLE on Behalf of BULLOCK.

BULLOCK v. BULLOCK.

Civ. 9555.

District Court of Appeal, First District, Division 2, California.

July 13, 1934.

1. Infants ⇨19

Evidence *held* not to show that divorced mother given custody of minor child had neglected to care for its health or failed to have child attend school so as to authorize making child ward of juvenile court.

2. Infants ⇨19

Where finding that mother of minor child failed to provide proper maintenance and education for child and was incapable of doing so was unsupported by evidence in record, it could not be contended on appeal that stipulation that court could examine minor alone if it desired showed that finding was supported by evidence outside record, in view of judge's certification that reporter's transcript contained all testimony taken.

3. Infants ⇨19

Petition that minor child be made ward of juvenile court on ground that divorced wife who was given custody of child failed to care for it properly and to have it attend school, which did not show that father was unwilling or incapable of exercising proper parental control or had failed to do so, *held* insufficient (Gen. Laws 1931, Act 3966, § 1, subd. 2).

4. Infants ⇨19

Petition that minor be made ward of juvenile court, filed without approval of probation officer or order of juvenile court, *held* not to confer jurisdiction on juvenile court (Gen. Laws 1931, Act 3966, § 3).

5. Infants ⇨19

Juvenile court would not adjust parental disputes concerning care and education of minor, since such matters are for court of equity where parents are actual parties.

Appeal from Superior Court, San Mateo County; Wm. F. James, Judge.

Proceeding in the matter of the People of the State of California, on behalf of Joseph J. Bullock, Jr., alleged ward of the juvenile court, in which Joseph J. Bullock filed a petition against Charlotte C. Bullock praying that Joseph J. Bullock be made a ward of the juvenile court free from the custody of respondent. From an order granting the petition, the respondent appeals.

Reversed.

Leo R. Friedman, of San Francisco, and Elinor Louise Falvey, of Redwood City, for appellant.

Vincent W. Hallinan, of San Francisco, and William E. Ferriter, for respondent.

NOURSE, Presiding Justice.

On November 2, 1933, in a divorce action between Mr. and Mrs. Bullock, a decree was entered denying divorce to either party and awarding custody of the minor child—a boy of eleven years—to the mother, subject to the boy being placed as a boarding pupil in a certain military school.

On November 9, 1933, the mother filed her notice of appeal from the portion of the decree denying her a divorce and from that portion directing that the child be placed in the military school. On November 16 the father filed his petition in the juvenile court charging that the mother had failed and neglected to exercise proper parental control over the child and asking that the child be made a ward of the court free from the custody of the mother as provided in the former decree. The juvenile court granted this petition, and the mother appeals.

A preliminary attack is made upon the allegations of the petition upon which the child was brought into the juvenile court. This petition is filled with conclusions of law and expressions of the personal opinions of the pleader. There are just two allegations of fact which, under any possible theory, would justify a hearing on the petition. These are that the mother "has actually failed and neglected to properly care for said minor's health" and that she had failed "to have said child attend school."

[1] The order must be reversed for the reason that the petition was insufficient to give the juvenile court jurisdiction and also for the reason that the evidence does not support it. Discussion of the pleading will be deferred to a review of the evidence.

The testimony of the petitioner discloses that the father and mother have been separated since the child was seven months old. Throughout this ten-year period the parents have engaged in bitter controversies over the care and education of the child. When the mother placed the boy in a parochial school the father insisted that he should attend the public schools. When the mother placed the boy as a day pupil in a private military school the father objected that the daily bus ride was injurious to the boy's health. When the mother planned to place the boy in a public school situated two blocks from her home the father insisted that he be sent to a private boarding school. These differences of opinion were emphasized in the hearing in the juvenile court, but there is nothing in the record which might be characterized as evidence tending to prove that the mother had failed to care for the child's health or had failed to have him attend school. The only evidence was to the effect that the mother regularly employed a family physician to give medical care and attention to the boy, that she complied strictly with his directions and advice, and that when she kept the boy out of school it was on the advice of this physician because of his illness.

The essential finding of fact upon which the order depriving the mother of the custody of her son is based is that she "has failed and neglected to provide proper maintenance, training and education for said minor child, and is incapable of so providing the same for him." As to the matter of maintenance, the only testimony was that the father had continually provided ample means for the support of the child and that the mother also had ample means for that purpose. As to the matter of training there was no testimony of any character. As to the matter of education the only testimony related to the opinions of the parents as to what would be most pleasing to them rather than what would be to the best interest of the minor.

[2] The respondent practically concedes the absence of evidence to support these findings and suggests that there might have been something else outside of the record of which the court had knowledge. He refers to the stipulation at the close of the hearing that, *if* the court should desire to examine the minor, it might do so alone. But it does not appear that such examination was had. To the contrary, the trial judge certified that the reporter's transcript contained a full and correct transcript of the proceedings and of the testimony taken.

[3, 4] But, aside from the question of the evidence, the court was without jurisdiction to make the order. The Juvenile Court Law (Deering's Gen. Laws 1931, Act 3966) is expressly limited in its application to fourteen separate classes of persons under the age of twenty-one years. The petition alleged that the minor came under subdivision 2 of section 1 of the act, which reads: "Who has no parent or guardian; or who has no parent or guardian willing to exercise or capable of exercising proper parental control; or who has no parent or guardian actually exercising such proper parental control and who is in need of such control."

Section 3 of the act provides that: "Any person may present * * * a petition showing that there is within the county * * * a person coming within the provisions of section 1; * * * provided, however, that prior to the filing of such petition, the probation officer of such county shall make such investigation as he may deem necessary, *and no petition shall be filed* without the approval of such probation officer except by order of the juvenile court."

The petition is insufficient to bring the minor within subdivision 2 of section 1 of the act. Though it alleged that the mother was not capable of exercising proper parental control over the child and that she had failed to do so, it did not allege that the father, who is the petitioner, was incapable of, or that he had failed or neglected to exercise such control. Furthermore, the report of the probation officer (or the order of court dispensing with it) is juris-

dictional. The petition did not allege that such a report was made or excused by order of court. That this is not merely a technical objection is shown by the fact that the record discloses that neither the report nor the order was made and that the probation officer was not even called as a witness.

[5] From the entire record it is apparent that the petition was filed for the single purpose of counteracting the effect of the mother's appeal from the order in the divorce proceeding relating to the place of schooling of the child. The decree in the divorce proceeding, which was received in evidence, recites that: "This disposition of the minor is not made because of any moral unfitness of his mother as a custodian." In the proceeding under review no investigation was made by the court or by the probation officer of the moral, mental or physical fitness of the mother to exercise the "proper parental control" over the child. The only evidence of her failure or neglect was in the hearsay testimony of those who had no knowledge of the subject matter. The personal differences of the parents—not the welfare of the child—were the moving cause of the proceeding. The purpose of the juvenile court law is not the adjustment of parental disputes concerning the care and education of a minor, but those matters are to be settled in a court of equity where the parents are the actual parties.

The order is reversed.

I concur: STURTEVANT, J.



139 Cal.App. 688

RITCHIE et al. v. LONG BEACH COMMUNITY HOSPITAL ASS'N et al.

Civ. 8395.

District Court of Appeal, Second District, Division 2, California.

July 14, 1934.

Rehearing Denied Aug. 13, 1934.

1. Charities ⇐45(2)

Evidence as matter of law established that hospital supported in part from voluntary contributions and proceeds of trust fund and incorporated as nonprofit association was charitable institution, in action for damages for patient's death.

2. Charities ⇐45(2)

X-ray department which earned slight profit should not be considered apart from hospital itself in determining whether hospital was charitable institution, in action for patient's death from burn from X-ray machine.

3. Charities ⇐45(2)

Direction of verdict for charitable hospital, in action for patient's death resulting from servant's alleged negligence, *held* proper, where evidence established hospital's use of due care in selecting servant, though use of such due care was not pleaded.

4. Trial ⇐141

Defendant may make motion for directed verdict whenever complete defense has been made out by uncontradicted evidence.

5. New trial ⇐102(3)

Refusal of plaintiffs' motion for new trial on ground of newly discovered evidence *held* proper, where plaintiffs before trial knew of witnesses and materiality of their testimony and failed to show effort to secure their attendance or a continuance, and where witnesses in fact were in court and were produced as witnesses for defendants.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by Grace Ritchie and others, by their guardian ad litem, against the Long Beach Community Hospital Association and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Alex. W. Davis and Mitchell, Silberberg & Knupp, all of Los Angeles, for appellants.

Kidd, Schell & Delamer, of Los Angeles, for respondents.

SCOTT, Justice pro tem.

The heirs at law of William Ritchie, deceased, brought this action against defendant hospital association and two of its employees for damages for his death. At the conclusion of plaintiffs' case, which was tried by a jury, the court granted a motion for nonsuit as to the employees. Evidence was then presented by the remaining defendant, the hospital association, and at the conclusion of the case the court directed a verdict in favor of that defendant. Plaintiffs appeal.

The deceased had been working as an oil field driller when on May 12, 1928, he was injured and taken to the hospital, operated by defendant association for diagnosis and treatment. X-ray pictures were taken on May 12, 14 and 15. A year and a half later, October 15, 1929, an operation was performed on the patient to remove an ulcer on his hip, which plaintiffs attribute to a burn from the X-ray machine when the pictures were being taken. After the operation and while the patient was still under the anesthetic he died.

[1, 2] The first ground stated for the motion for a directed verdict was that defendant association was at all times a charitable institution and was, therefore, not liable if it had used due care in the selection of its employees. The evidence discloses that defendant was incorporated as a nonprofit association. The city of Long Beach leased the land and buildings used for the hospital to defendant association for a monthly rental of one dollar. A portion of the support of the hospital came from the proceeds of a trust fund created to "enable the said hospital to render charitable, benevolent and humane services to the citizens of Long Beach and vicinity," and "members" of the association made voluntary contributions to its support. In addition to the buildings leased from the city the association had expended $176,000 on buildings and equipment. Free clinics were maintained in co-operation with the welfare bureau of the city, furnishing nurses, doctors, and medicine for which the hospital received no payment. Indigent patients were cared for without charge, and others were charged for the service rendered. For its entire period of operation down to July 1, 1930, defendant association showed an operating loss in excess of $28,000, without taking into account depreciation of buildings and equipment. Appellants suggest that the X-ray department disclosed a slight excess of receipts over operating costs for the period in question and therefore should be considered apart from the hospital, but that portion of its diagnostic and treatment facilities is so essential and integral a part of a modern hospital that such a separation would be unwarranted.

[3] The character of respondent association as a charitable institution being established, the trial court properly directed a verdict in its favor if it exercised due care in the selection of its servants. Thomas v. German Gen., etc., Soc., 168 Cal. 183, 141 P. 1186; Burdell v. St. Luke's Hospital, 37 Cal. App. 310, 173 P. 1008; Stonaker v. Big Sisters' Hospital, 116 Cal. App. 375, 2 P.(2d) 520. Appellants contend that the association was required to plead and prove that it had used due care in selecting its servants whose negligence caused the injury to deceased. Out of four persons who might have taken the X-ray pictures of deceased, three testified without contradiction that they had not done so and the fourth stated that she probably had done so. The evidence showed that due care had been used in the selection of that employee. The case of Meyer v. McNutt Hospital, 173 Cal. 156, 159 P. 436, is cited by appellants in urging that the doctrine res ipsa loquitur be applied; that is, that proof of the injury establishes not only negligence in the operation of the X-ray machine, but also negligence in the selection of servants by respondent, and that so applied, evidence of the exercise of due care by the latter would merely create a conflict which should have been submitted to the jury for its determination. In the case cited there is nothing to indicate that evidence was offered to establish due care by defendant association in selecting its servants, and it is, therefore, not authority for the proposition that where there is such evidence the presumption raised by the application of the doctrine of res ipsa loquitur would create a conflict sufficient to require its submission to the jury. The rules applied in Burdell v. St. Luke's Hospital and Stonaker v. Big Sisters' Hospital, supra, are contrary to the suggestion of appellants in this regard.

Defendant hospital association did not plead its defense that due care had been exercised in selecting its servants. Evidence was admitted, however, establishing that such due care had been used. The court in Lewis v. Y. M. C. A., 206 Cal. 115, 273 P. 580, indicated that where defendant relies upon the defense that it is a charitable organization it must plead and prove that it had used due care in selecting its servants whose negligence had caused the injury to plaintiff, and commented upon the case of Burdell v. St. Luke's Hospital, supra, in which a rehearing had been denied by the Supreme Court. In the latter case, there is no intimation that defendant pleaded the use of due care in selecting its employees, but the reporter's transcript was examined by the Supreme Court when it was considering the case of Lewis v. Y. M. C. A., supra, and it disclosed that defendant fully *proved* as a part of its case that it had exercised reasonable care in the selection of its agents and employees. We have examined the clerk's transcript in Burdell v. St. Luke's Hospital and find that the

defendant did not *plead* the use of due care in selecting its servants. The rule would appear to be, therefore, that where such proof has been made, the fact that defendant has not pleaded the use of such due care will not of itself deprive him of the defense here relied upon.

Appellants contend that deceased may not have known of the charitable nature of the hospital association and could not be bound by any implied contract regarding its liability. The name of the hospital and its widespread community service were matters which the court might assume were of common knowledge, and nothing in the record would support a suggestion either that the hospital's character was unknown to deceased or that he indicated to any person that he refused to be bound by the contract waiving liability which the law inferred from the acceptance by him of the benefits of its service.

[4] A motion for a directed verdict may be made by a defendant whenever a complete defense has been made out by uncontradicted evidence. Kohn v. National Film Corporation, 60 Cal. App. 112, 212 P. 207.

While the above matters are determinative of this appeal, it should be added that there was no substantial evidence tending to show that deceased died as the result of any X-ray burns received while at the hospital. The evidence showed that he died from coronary thrombosis, a condition of the heart, which was not attributable to the X-ray burn, the operation or the anesthetic, nor any other act or omission of defendant association or its servants.

[5] Appellants moved for a new trial as to defendant McCray, based on the ground of newly discovered evidence. The names of two witnesses and the materiality of their testimony were made known to appellants before the trial, upon the taking of certain depositions. There was no showing of an effort to secure their attendance at the trial or to call them as witnesses, or to secure a continuance to produce them before the close of plaintiff's case. In fact, they were in court and were produced as witnesses for defendants. The court properly denied the motion. Eason v. General Mortgage Co., 101 Cal. App. 186, 281 P. 514; Scanlan v. San Francisco, etc., Ry. Co., 128 Cal. 586, 61 P. 271.

Judgment affirmed.

We concur: STEPHENS, P. J; CRAIG, J.

139 Cal.App. 721

PEOPLE v. GETZOFF.

Cr. 2533.

District Court of Appeal, Second District, Division 1, California.

July 16, 1934.

Burglary ⇐41(6)

Evidence that accused rented room over burglarized store under assumed name and disappeared therefrom before morning and that chemical tests showed that substances found in safe which had been broken open were same as those found on accused's clothing *held* to sustain conviction of burglary.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Sidney Getzoff was convicted of burglary, and he appeals.

Affirmed.

Chotiner & Chotiner, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

CONREY, Presiding Justice.

The sole ground of appeal is that the evidence is insufficient to support the verdict. Appellant contends that the case for the people depends wholly upon the testimony of the witness Ray Pinker, an expert chemist. It appears that in connection with the burglary of a grocery store a small safe was broken open and the contents taken away. The defendant's place of residence was in another part of the city, but on the night of the burglary he and another man rented a room in a lodging house over the grocery store, but they disappeared therefrom before morning. The defendant registered at the lodging house under an assumed name not his own.

The witness Pinker was a chemist in the employ of the police department of the city of Los Angeles. He made an examination of the safe and its contents as found after the burglary, and also of certain débris taken from the cuff of a pair of trousers which were proved to be the property of appellant. In the safe he found fire clay, chips of steel, etc., and in the dark trousers "he found the same objects." He also found in the safe a small portion of a button of similar substance to buttons on a jacket belonging to appellant,

from which jacket one of the buttons had been removed, and apparently had been torn out by the threads. The witness testified that the chipped portion of the button which he found in the safe corresponded in color, ultra violet fluorescence, "and joined, that is, in shape and size, to two of the buttons on the jacket." It is not necessary to extend this opinion by describing the various items of circumstantial evidence outside of the testimony of the witness Pinker, which tend to prove that appellant was one of the men who committed the burglary. We are satisfied that the evidence is sufficient to sustain the verdict.

The judgment and the order denying defendant's motion for a new trial are, and each of them is, affirmed.

We concur: HOUSER, J.; YORK, J.



139 Cal.App. 486

EZMIRLIAN et al. v. OTTO.

Civ. 7931.

District Court of Appeal, Second District, Division 1, California.

July 2, 1934.

Rehearing Denied July 26, 1934.

Hearing Denied by Supreme Court Aug. 30, 1934.

1. **Appeal and error** ⇐854(5)

Judgment of nonsuit must be affirmed, if supported on any ground, whether stated or not.

2. **Appeal and error** ⇐927(3)

In reviewing order granting nonsuit, all evidence favorable to plaintiff will be given its full probative value, regardless of conflicts, and only inferences favorable to plaintiff will be indulged.

3. **Libel and slander** ⇐139
Money received ⇐19(1)

Evidence in action for slander of title and money had and received *held* sufficient to take case to jury.

4. **Libel and slander** ⇐139

Evidence in action for slander of title *held* sufficient to take to jury question whether defendant was prompted by malice in causing assignment to him of oil and gas royalties to be recorded.

5. **Libel and slander** ⇐139

Evidence in action for slander of title *held* to show that plaintiffs' assignment to defendant of percentage of oil and gas produced from land involved was intended and operated to convey only share of royalties, and conveyed no interest in land.

6. **Mines and minerals** ⇐55(4)

Ambiguous document, such as assignment of percentage of oil and gas produced from certain land, will be interpreted most strongly against party causing uncertainty, as in determining whether such assignment conveyed interest in land or only share in royalties (Civ. Code, § 1654).

7. **Evidence** ⇐458

Oral testimony was competent to show circumstances leading to, and parties' intention in, execution of ambiguous instrument, assigning percentage of oil and gas production from described land, for purpose of ascertaining whether it assigned interest in land, or only share in royalties.

8. **Compromise and settlement** ⇐2

Term "settlement," in legal parlance, implies meeting of minds of parties to transaction or controversy.

[Ed. Note.—For other definitions of "Settle; Settlement," see Words & Phrases.]

9. **Compromise and settlement** ⇐23(3)

Evidence in action for slander of title *held* to show that plaintiffs did not arrive at settlement with defendant by ordering payment of latter's demand for fourth of sale price of land as compensation for services in effecting sale, but did so to avoid liability to purchaser for breach of contract if defendant failed to release cloud on title occasioned by his recording of plaintiffs' assignment to him of share in oil and gas royalties.

10. **Libel and slander** ⇐139

Complaint in action for slander of title by wrongful recordation of assignment of oil and gas royalties to force plaintiffs to pay defendant sum to which he was not legally entitled for services in effecting sale of land *held* to state cause of action, though not reciting that assignment conveyed any interest in property to defendant.

11. **Money received** ⇐1

Basis of action for money had and received is defendant's possession of money which he should pay to plaintiffs in equity and good conscience.

12. **Money received** ⇐18(3)

Evidence in action for money had and received *held* sufficient to justify jury's finding that plaintiffs paid money to defendant under duress (Civ. Code, § 1569, subd. 2).

13. Money received ⊂⇒6(8), 8

Action for money had and received lies to recover money paid by mistake, under duress or oppression, or where money, to which defendant had no legal right, was exacted by taking undue advantage of plaintiff's situation (Civ. Code, § 1569, subd. 2).

14. Money received ⊂⇒8

Lawyer, causing recordation of assignment of oil and gas royalties to him, with knowledge that it conveyed no interest in land, for purpose of preventing consummation of sale thereof or wrongfully compelling owners to pay him fourth of proceeds, *held* liable for money had and received because of undue advantage taken of owners and unlawful detention of their property (Civ. Code, § 1569, subd. 2).

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Action by Garabed Ezmirlian and another against Paul J. Otto. From a judgment of nonsuit, plaintiffs appeal.

Reversed.

Walter L. Mann, of Los Angeles, for appellants.

C. E. McDowell, of Los Angeles, for respondent.

HAHN, Justice pro tem.

This appeal comes to us from a judgment of nonsuit rendered in an action wherein the complaint contains two counts. The first is a cause of action for damages for alleged slander of plaintiffs' title to lots 1 and 4 of block E of Vista Del Mar tract. The second is in the form of common count for money had and received.

Defendant based his motion for a nonsuit on the following grounds:

"1. That the plaintiff in this action has failed to prove the existence of any malice on the part of the defendant.

"2. That the plaintiff has failed to prove the issuance of any false statement either in writing or orally by the defendant.

"3. That the plaintiff has failed to prove any damages resulting from any act of the defendant.

"4. That the cause of action, if any, of the plaintiff is barred by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure, and

"5. On the ground there has been a settlement between the parties, as shown by the evidence on the part of the plaintiff."

[1] In granting defendant's motion, the trial court indicated it was granted on the ground of insufficiency of evidence to prove malice on the part of the defendant. However, if the court's ruling can be supported on any ground, whether stated or not, the judgment must be affirmed. Anchester v. Keck et al., 214 Cal. 207, 4 P.(2d) 934; Miller v. Wade, 87 Cal. 410, 25 P. 487.

[2, 3] It is a well-established rule that when the granting of a motion for nonsuit is under review, all of the evidence favorable to plaintiff will be given its full probative value without regard to the conflicts, and only such inferences as are favorable to the plaintiff's side of the controversy will be indulged. Gonzales v. Davis, 197 Cal. 256, 240 P. 16; Murray v. Southern Pacific Co., 89 Cal. App. 741, 265 P. 337; Rade v. Western Union Telegraph Co., 198 Cal. 290, 244 P. 1077. Guided by the rule thus stated, the facts necessary to a consideration of the points here raised may be fairly summarized as follows:

Plaintiffs are Armenians, one of whom, Goorjian, a vegetable peddler, could neither read nor write the English language. The other, Ezmirlian, could read and write, but with limited ability to understand English, especially when spoken and written in other than simple terms. About the year 1920, defendant, who is an attorney at law, was first employed by plaintiff Ezmirlian to attend to some legal matters for him. Between that time and July, 1923, defendant frequently acted as legal adviser and attorney for Ezmirlian. Indeed, such was the confidence each reposed in the other that on a number of occasions, when defendant was acquiring real property, or an interest therein, he caused the title to be taken in the name of Ezmirlian, who always signed any documents relating to such transactions when requested so to do by defendant.

In 1923, Ezmirlian, who was the owner of six lots in the Signal Hill oil district, requested defendant to negotiate an oil lease for him on these lots. As compensation for defendant's services to be rendered in connection with this proposed oil lease, Ezmirlian agreed to pay defendant one-fourth of the amounts which he would receive in bonuses and royalties under the lease.

In July, 1923, after defendant had succeeded in negotiating the oil lease on Ezmirlian's six lots, plaintiffs, who were joint own-

ers of the two lots involved in this action, requested of defendant that he find a lessee to drill for oil on these two lots. In this connection it was agreed that, if defendant consummated a satisfactory oil lease on the lots in question, they would pay him for his services by giving him the same share in any bonuses and royalties received by them as he received under his agreement in connection with the oil lease on Ezmirlian's six lots.

Pursuant to this arrangement, defendant consummated with one Hugh R. Kennedy an oil lease on the two lots in question, which lease was executed by the parties on July 23, 1923. By the terms of this lease, the plaintiffs were to receive a bonus of $500 and a one-fifth royalty in all of the oil and gas recovered from the property by the lessee. About the time the lease was consummated, the defendant suggested to plaintiffs that in order that he be protected in his share of the royalty, in the event that anything happened to plaintiffs, he wanted them to sign a paper showing his right to share in the royalties paid under the lease. To this proposal plaintiffs agreed, and two or three days later, at the request of the defendant, they called at his office, where defendant read to them an instrument which was designated "assignment of oil and gas royalties." After this instrument had been read, the plaintiff Goorjian asked what was meant by 5 per cent. of the total gross production of oil and gas; that he understood the agreement was to provide that defendant was to receive one-fourth of the amount of bonuses and royalties paid to plaintiffs by Kennedy under the lease; to which inquiry reply was made that 5 per cent. of the oil and gas produced was the same as one-fourth of the amount of royalties received by them. Thereupon, plaintiffs signed the instrument; the essential provisions of which read as follows:

"Witnesseth: Whereas, the parties of the first part are the owners of Lots One (1) and Four (4) in Block 'E' of the Vista Del Mar Tract No. 2, as per map recorded in the office of the County Recorder of Los Angeles County in Book 10, Page 158 of Maps, Records of Los Angeles County; and

"Whereas, the parties of the first part have executed a lease upon said property above described to Hugh R. Kennedy;

"Now, Therefore, the parties of the first part herein, for Ten ($10.00) Dollars to them in hand paid and for good and other valuable consideration, to-wit, for Attorney's fees and services rendered to the parties of the first part by the party of the second part, hereby grant, bargain, sell, assign, transfer and convey unto the said Paul J. Otto, the party of the second part, five (5%) per cent of the total gross production of all oil and gas produced from the following described property:" (Here follows a description of the two lots above referred to.)

Kennedy failed to do the drilling as required under the terms of the lease, and after some months, during which the time limit for drilling was extended several times by plaintiffs, the lease was canceled by mutual consent. Prior to the cancellation of the lease, however, Kennedy had paid in bonuses and sums agreed to for extensions of time within which to drill the sum of about $3,000, one-fourth of which amount was retained by defendant.

Upon the cancellation of the Kennedy lease, the plaintiffs discussed with defendant the matter of securing another lessee, and defendant agreed to undertake to consummate another oil lease on their two lots with the understanding that he was to have as compensation for his services the same share or interest in the bonuses and royalties provided for and paid under such new lease, as had been agreed to for his services in the Kennedy lease.

Defendant's efforts to consummate another lease satisfactory to plaintiffs, however, were not successful, and after a period of some four years, during which there was no activity in drilling on the property in question, plaintiffs entered into negotiations with one Edward Whitley for the sale of the two lots to him for a consideration of $15,000. The plaintiffs advised defendant of their negotiations and desire to sell, and requested him to represent them in the negotiations and the consummation of the deal through a proposed escrow. The defendant at this time was otherwise occupied, and called in his associate and assistant, one Roy C. Kaiser, who was instructed by defendant to look after the interest of the plaintiffs in the transaction. Kaiser thereupon accompanied plaintiffs to the bank in Long Beach, where the escrow was to be placed, and under his direction and advice plaintiffs signed the necessary documents by which they agreed to convey to the purchaser a clear and merchantable title to the two lots, and furnish to the purchaser a contract of guarantee of title executed by the California Title Insurance Company. Several days later defendant called Ezmirlian to his office in connection with some other business matters, and while there asked Ezmirlian how they were "going to take care of him"? Ezmirlian re-

plied that they expected to pay him $250 for his services in connection with the escrow, which was the amount the defendant on a previous occasion had fixed as his fee for similar services in a real estate transaction wherein he represented Ezmirlian. Defendant thereupon expressed dissatisfaction with the amount suggested for his fee, and after an extended argument displayed anger, and finally, in a somewhat excited manner and tone of voice, told Ezmirlian that he wanted one-fourth of the sale price of the property. Ezmirlian protested payment of any such sum, claiming that he had no interest in the property and that the sum of $250 was a fair compensation for the services rendered by him through his associate Kaiser in the matter of the escrow.

Two days later, defendant called plaintiffs to his office, when the matter of the compensation he was to receive was again discussed. Plaintiffs testified that at the conference defendant was greatly wrought up and indulged in a tirade of abusive and insulting language to them, and threatened them with dire results if they did not pay him the amount he demanded. According to defendant's own testimony of what occurred he "got mad instantly, lost his head, blew up," and called plaintiffs "a couple of damn crooks." When plaintiffs persisted in their refusal to meet defendant's demands, defendant shouted: "God damn it, I am going to fix you." Thereupon he called his clerk, handed her the "assignment of oil and gas royalties" executed four years before in connection with the Kennedy oil lease, and told her to record it. The instrument was forthwith recorded. On August 16th, at the request of the title company that was to furnish the guarantee of title, defendant executed and forwarded to it a quitclaim deed for the purpose of clearing the title of the cloud occasioned by the recorded assignment, but with the proviso that it was to be used only in the event he was paid the sum of $3,652.50 on or before August 30, 1928. It does not appear that plaintiffs had anything to do with the title company's request to defendant to forward the quitclaim deed.

On August 23d and again on August 27th, plaintiffs with Walter L. Mann, their new counsel, called upon defendant and endeavored to settle the controversy so as to permit the sale to go through, on which occasions defendant refused to accept any less than one-fourth of the sale price. At these conferences he was told by plaintiffs and their attorney that Whitley, the purchaser, had entered into a contract to resell the lots for $22,500, and that although plaintiffs had requested Whitley to cancel the agreement, because of the trouble plaintiffs were having with the cloud on the title, Whitley had refused to do so and had threatened plaintiffs with a damage suit if they failed to convey title to him in accordance with the escrow instructions. Defendant persisted in his refusal to remove the cloud except on payment of his demand, and on the following day plaintiffs sent him a letter making a written demand upon him to quitclaim the cloud which was occasioned by the recording of the assignment, and further advised him that in the event of his refusal so to do, they would hold him liable for any damages they suffered by reason of such refusal. On the same day, plaintiffs directed a letter to the title company instructing them to pay the sum demanded by the defendant and use the quitclaim deed, so as to remove the cloud, and thus enable the consummation of the sale.

Weighing the evidence as we must on an appeal from a judgment of nonsuit, we are constrained to hold that the trial court erred in granting defendant's motion.

[4] As to the ground assigned by the court for granting the motion, we are of the opinion that there is sufficient evidence in the record to have justified the jury in finding that defendant was prompted by malice when he caused the assignment to be recorded which clouded plaintiffs' title. The Kennedy lease had been canceled by mutual consent, with the knowledge of defendant, at least three years prior to the recording of the assignment. Hence, unless the assignment conveyed to him an interest in the lots, the recording of the assignment served no purpose except to cloud plaintiffs' title. While respondent does not in his brief directly assert that the legal effect of the assignment was to convey an interest in the property, his contention that the recording of the document "was not wrongful" must be based, if sustained, on the premise that it did convey to him an interest in the property which he had a lawful right to protect by its recordation.

[5-7] Assuming that the legal effect of the assignment is pertinent to the inquiry, no difficulty would be encountered in reaching the conclusion that it was intended by the parties, and in fact did operate, to convey only a share in the royalties payable under the Kennedy lease. The language of the document is conceded by respondent to be ambiguous. Inasmuch as it was prepared by defendant, the rule that where the language of a document is ambiguous, it will be interpreted most

strongly against the party who caused the uncertainty to exist, would apply. Section 1654, Civ. Code.

In view of this ambiguity, oral testimony was competent to show the circumstances leading up to, and the intention of the parties in, the execution of the instrument. The testimony of plaintiffs was unequivocal in the assertion that the assignment was intended to put in written form their previously agreed to arrangement to give defendant, as compensation for his services in the Kennedy lease, one-fourth of the royalties and bonus they received under the lease. Furthermore, plaintiffs testified they executed the assignment in the belief and on the representation of defendant, who then was acting as their attorney, that such was the effect of the document. It would seem that by reason of these considerations there can be no escape from the conclusion that at the time the assignment was recorded defendant had no interest in the lots that justified the recordation of the instrument. With this legal conclusion as a premise, the jury might well have found from the evidence relating to the conduct of, and language used by, the defendant, as also his threat "to fix them," that as a lawyer he well knew the assignment conveyed to him no interest in the lots, and, as a party to it, he knew that the document was never intended so to do, and as a conclusion from these findings that his action in recording the document was prompted by malice.

In the case of Coley v. Hecker, 206 Cal. 22, 272 P. 1045, 1046, the court had under consideration the question as to the nature of the cause of action set up in the complaint, wherein it was alleged that the defendant "acting maliciously, and with the evil purpose of vexing and annoying respondent" had filed of record, in the county in which plaintiff owned real estate, an abstract of a judgment he had obtained against plaintiff in an action wherein the judgment had been previously stayed by a good and sufficient bond on appeal. The court, in holding the action one for damages for slander of title, said: "'The phrase 'slander of title' is a figure of speech in which the title is personified. In the instant case, the phrase seems to be an anomaly as applied to a situation which, strictly speaking, is a libel upon the title, inasmuch as the damage was accomplished by the recordation of a written document, and no spoken words were uttered. However, the term 'slander of title' includes both spoken and written means by which the right of property may be invaded and a right of action exists, irrespective of the means by which the title is traduced. This is so because a property right has been invaded—an injury to real property has been sustained. 'Persons may have a right in or to a thing—the right of property—and this right may be invaded by language concerning the thing. When this invasion occurs the language which affects a thing is actionable.' * * * Appellants further contend that the recording of the abstract of judgment, if it gives rise to any cause of action, is one for malicious abuse of process, and consequently is a personal action, the venue of which is at appellants' place of residence. We think there is no merit in the contention that the facts alleged state an action for the abuse of process rather than slander of title. It was the filing, maliciously and falsely, of a document which clouded the title of respondent that caused the injury. The effect would be the same had said document been a forged deed, rather than an unauthorized abstract of judgment."

[8, 9] Respondent urges that the plaintiffs in ordering the title company to pay defendant's demand "shows that a settlement was arrived at between the parties." In legal parlance the term "settlement" implies a meeting of the minds of the parties to a transaction or controversy. The evidence not only fails to support a finding of meeting of the minds, but on the contrary abundantly supports plaintiffs' contention that they ordered payment of defendant's demand in order to avoid a greater disaster in the purchaser's claim for damages, if they failed to fulfill their contract. If defendant had any right in the property, but the extent of such right or interest had alone been in controversy, then there might be merit in respondent's theory that in ordering the payment to defendant a compromise of the controversy had been arrived at. Plaintiffs in their written demand to defendant, at the very time they ordered payment of his claim, gave him notice they would hold him liable for any damages they suffered by his refusal and failure to release the cloud on their title.

[10] Respondent next urges support of the judgment of nonsuit on the ground that, "The alleged first cause of action of appellants' complaint does not state a cause of action" because the complaint fails to recite that the recorded assignment conveyed any interest in the lots to defendant.

There is no merit in this point. The very gravamen of plaintiffs' complaint is that the assignment gave defendant no interest in the property, and that therefore his recordation of the document was wrongful and prompted

alone by a desire to vex and annoy plaintiffs, and thus force them to pay him a sum of money to which he was not legally entitled. In urging this point, it would seem that respondent places himself in a unique position because his argument in support of the court's ruling that plaintiffs failed to prove malice was, as pointed out, necessarily based on the premise that the assignment did convey to defendant an interest in the property.

The last of the points urged by respondent in support of the court's ruling is stated as follows: "The respondent is not liable to appellants under the common counts since he has not been guilty of either duress, oppression or fraud."

[11] "The basis of the action for money had and received is that the defendant has money which in equity and good conscience he ought to pay to plaintiffs." 17 Cal. Jur. 602.

[12, 13] As already indicated in the views expressed, there is abundant evidence that would have justified the jury in finding that plaintiffs paid the money under duress. Section 1569 of the Civil Code defines duress as: "2. Unlawful detention of the property of any such person." It is well established in our practice that an action for money had and received will lie to recover money paid by mistake, under duress, oppression, or where an undue advantage was taken of plaintiffs' situation whereby money was exacted to which the defendant had no legal right. Minor v. Baldridge, 123 Cal. 187, 55 P. 783.

[14] Defendant's action in causing the recordation of the assignment at the time he did, when he well knew it neither conveyed, nor was it intended to convey, to him any interest in the property, was undoubtedly motivated by a purpose to prevent the consummation of the sale of the property, or compel plaintiffs, in order that they might convey title as they were under contract to do, to pay him one-fourth of the proceeds derived from the sale of the property to which he had no lawful right. That such action operated to take undue advantage of plaintiffs and constituted an unlawful detention of their property cannot successfully be denied.

In view of the considerations pointed out, and the conclusions indicated, we are of the opinion the trial court erred in granting the nonsuit.

Therefore, the judgment is reversed.

We concur: HOUSER, Acting P. J.; YORK, J.

HAIGH v. CITY OF LOS ANGELES.

Civ. 8430.

District Court of Appeal, Second District, Division 2, California.

July 7, 1934.

Hearing Denied by Supreme Court Sept. 4, 1934.

1. Eminent domain ⇐277

Claim against city for damages to property from street improvement *held* properly filed with city council, instead of board of public works, so as to entitle claimant to sue for damages after rejection of claim (Los Angeles Charter, §§ 37, 234, 363, 376; Improvement Act 1911; Const. art. 1, § 14).

2. Eminent domain ⇐277

Filing of claim with city council for damages to property from street improvement within six months after full and final acceptance thereof by board of public works *held* timely, though property abutted on portion of improvement completed and accepted year before filing (Los Angeles Charter, § 376; Improvement Act 1911; Const. art. 1, § 14).

Appeal from Superior Court, Los Angeles County; H. Parker Wood, Judge.

Action by Frederick Haigh against the City of Los Angeles. Judgment for plaintiff, and defendant appeals.

Affirmed.

Erwin P. Werner, Frederick von Schrader, and Jerrell Babb, all of Los Angeles, for appellant.

Andrew J. Copp, Jr., of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Plaintiff recovered judgment against the city of Los Angeles for damages to his property resulting from a street improvement. The trial court found that the work was fully and finally completed on or about September 21, 1927; that plaintiff made demand upon defendant on October 10, 1927, for payment of damages thereby sustained "in the form and manner provided by the city charter," and that the claim was rejected March 6, 1929, whereupon plaintiff brought suit. The sole question to be determined on this appeal is whether plaintiff made his demand in the manner and within the time as required by the charter of the city of Los Angeles so as to entitle him to institute this action.

[1] Respondent filed his demand against the

city with the city council, and appellant contends that it should have been filed with the board of public works. An analysis of the provisions of the city charter and of the decisions construing it supports respondent's contention that his claim was filed with the proper body. The charter (art. XXVIII) provides in effect that demands against the city "shall be first presented to and approved in writing by the board, officer or employee authorized by this charter to incur the expenditure or liability represented thereby" (sec. 363), and no suit can be brought until such demand has been presented and rejected; and that such claim for damages must be presented "within six months after the occurrence from which the damages arose" (sec. 376). Without deeming it necessary to set out at length the provisions of section 37 of the charter, we must conclude that the powers of the city council as therein defined include the acts necessary to incur a liability such as this. The board of public works, on the other hand, has limited powers, as set out in article XXIII of the charter, which provides that it "shall have charge, superintendence and control" of construction, maintenance, and improvements of streets (sec. 234), and shall have certain limited functions and powers as enumerated in said article XXIII, which by no reasonable interpretation could be said to include the power to incur the liability for damages such as is sued upon herein.

Appellant relies upon Spencer v. City of Los Angeles, 180 Cal. 103, 179 P. 163, which was an action brought by the city upon certain invalid assessments for a street opening. The assessments in that case had been paid by plaintiff to the board of public works as "collection agent" for the city and as a matter incidental to the determination of other issues in that case, the court held that the demand required by the charter before plaintiff could bring suit was properly presented to the same board which had collected the money. By having such claims presented first to the board of public works the correctness of the amount which plaintiff claimed he paid could in this manner be checked by the same "collection agent" who had received the money in the first instance. The view expressed in the cited case was not inconsistent with the charter provisions above set out, since the liability, if any, to refund was incurred at the time and by the performance of the act of collecting the money by the board of public works. Neither the express provisions of the charter nor the obvious intent underlying them would require plaintiff in this case to submit his demand to the board of public works instead of the city council before bringing his action, for the following reasons: That the board could not undertake to pass upon the validity or amount of plaintiff's demand; it would not be warranted in assuming to act as interpreter of the law to determine whether plaintiff was entitled to recover any amount, nor to act as appraiser to determine what that amount might be; nor should it be required to wholly disapprove a claim for damages which reason and experience must indicate had some basis.

Certain other cases in which similar questions have been considered on appeal have been brought to our attention; but the principles upon which they were decided are readily distinguishable from the instant case. Continental Insurance Co. v. City of Los Angeles, 92 Cal. App. 585, 268 P. 920, cited by appellant, was an action to recover the amount of insurance paid by plaintiff for loss by fire alleged to have been caused by negligent construction and maintenance of electric wires in the city of Los Angeles, and the presentation of a demand to the board of public service commissioners was held to be a necessary prerequisite to a suit against either the city or the board. Any liability in that case was incurred by the act or omission of the board of public service commissioners or its servants, and not by the city council, and that board was obviously the proper body to which such a claim should have been submitted for consideration before suit was instituted. In Beeson v. City of Los Angeles, 115 Cal. App. 122, 300 P. 993, a ten year old boy was drowned in a water hole while playing in a storm drain, and his mother brought action for damages for his death. It was held that the claim should have been presented to the board of public works and not to the city council. Any liability in that case was incurred by reason of the negligent act or omission of the board in the performance of its duty of maintaining its own sewers and drains, and it could not have been incurred by any act of the city council. In Crescent Wharf, etc., Co. v. City of Los Angeles, 207 Cal. 430, 278 P. 1028, also cited, the demand was not presented to any official or board of the city sooner than two years and eleven months after the claim for money or damages accrued, and that case, therefore, does not assist in the consideration of the question here presented. The liability in this case was incurred by the action of the city council in adopting the ordinance ordering the street improvement work to be done under the Improvement Act of 1911, since the change of grade therein provided

constituted damage to respondent's property which entitled him to compensation under article I, section 14, of the Constitution of the state of California. His claim therefor was properly filed with the city council.

[2] Appellant further contends that the demand of plaintiff was not filed within six months following the occurrence from which the damages arose because respondent's property abutted on a portion of the improvement which was completed and accepted in October, 1926, a year before his claim was filed. As above stated, the trial court found that the street improvement work provided for by the ordinance in this case was fully and finally completed on or about the 21st day of September, 1927, when it was fully and finally accepted by the board of public works of the city of Los Angeles, and the demand was filed October 10, 1927. No authority is cited by appellant for its suggestion that when part of the improvement had been completed and approved the "occurrence from which the damages arose" will be sufficiently complete to permit a claimant to file his demand. The contrary would seem to be true. The city council in this case treated the improvement as an entirety and included it in a single proceeding, as it had a right to do (Remillard v. Blake, etc., Co., 169 Cal. 277, 146 P. 634, Ann. Cas. 1916D, 451), and a citizen affected thereby would reasonably be expected, if not required, to adopt the same course. The board of public works, acting for the city, did not consider the work complete until it had so determined for itself and had accepted it, and plaintiff, as a citizen whose right to submit a claim for damages did not arise until the work resulting in the damage had been done, would properly be expected, if not required, to await its determination of this matter before taking any action to enforce a claim predicated thereon. In fact, if plaintiff had presented his claim before the board of public works had made such a determination that the work was completed, appellant might well have argued that it was premature. While it does not affect the determination of this appeal, it might be added that the record shows that six months prior to this action the plaintiff had made an ineffectual demand by starting an action for damages growing out of this improvement and serving the complaint on the mayor of the city, who in turn transmitted it to the city attorney. The subsequent disposition of that case is not material here, but it must be observed that actual notice was thereby given to the chief executive and attorney of the city that plaintiff sought redress for damages arising out of the street improvement here involved and for which he later made a legal demand.

Plaintiff's claim was presented within the time required by the charter, and to the proper body.

The judgment is affirmed.

We concur: CRAIG, Acting P. J.; DESMOND, J.



139 Cal.App. 552

WRIGHT v. STROBECK.

Civ. 1079.

District Court of Appeal, Fourth District, California.

July 5, 1934.

1. Account stated ⊂⊃19(3)

Evidence of attorneys' transmission of statement to client and of client's failure to object thereto for about one year justified finding of existence of account stated.

2. Account stated ⊂⊃1

"Account stated" is document in writing which exhibits state of account between parties and balance owing from one to other, and, when assented to expressly or impliedly, it becomes new contract.

[Ed. Note.—For other definitions of "Account Stated," see Words & Phrases.]

3. Account stated ⊂⊃6(4)

Assent to statement of account between parties is ordinarily implied from failure to object thereto within reasonable time.

4. Account stated ⊂⊃7

Bill rendered by attorneys for services in bankruptcy court in which one-third of amount was deducted as "withheld for later payment," in hope that this amount could be obtained from court, should be construed as bill for entire amount less credit actually received.

5. Account stated ⊂⊃5

In action on account stated, based on bill rendered by attorneys to client, subsequent letter from attorneys offering concessions to obtain settlement should be treated as withdrawn, where client failed to agree to settlement.

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by Alice H. Wright against G. L. Strobeck. Judgment for plaintiff, and defendant appeals.

Affirmed.

Phillip Storer Thacher, of El Cajon, and Lester J. Penry, of San Diego, for appellant.

Robert B. Burch and Harrison G. Sloane, both of San Diego, for respondent.

HAINES, Justice pro tem.

This action was originally brought by Alice H. Wright, plaintiff and respondent, as assignee of Harrison G. Sloane and Robert B. Burch, to recover from appellant, G. L. Strobeck, V. A. Adams, and W. E. McDonald, as defendants, the amount of certain attorneys' fees alleged to be due from them to said Sloane and Burch. The complaint, as initially filed, set out two causes of action, the first, against all three defendants upon a quantum meruit, and the second, against Strobeck alone upon an account stated, both counting on an alleged employment of respondent's assignors by appellant, Strobeck, and said Adams and McDonald, on or about March 25, 1931, to prosecute in the United States District Court for the Southern District of California a proceeding in bankruptcy against one Claus Spreckels to enforce and collect certain claims against him, in consequence of which certain settlements were alleged to have been obtained. In the second cause of action it was claimed that on or about September 23, 1931, an account was stated between Strobeck and respondent's assignors whereby it was agreed that, "taking into account payments theretofore made by said defendants (Strobeck et al.) there was due to said attorneys for the service hereinabove referred to, for the benefit of defendant G. L. Strobeck, the sum of $1,883," upon which a subsequent payment of $480 was said to have been made, leaving the rest unpaid. The defendants made separate answers to the complaint. The answer of appellant, Strobeck, traversed all of the matters alleged, and by way of a separate defense asserted that plaintiff's assignors had been employed by one Thacher to represent him and his co-defendants for the sole purpose of obtaining an adjudication of bankruptcy against Spreckels, and had been fully paid the amount of their reasonable compensation therefor. At the trial respondent dismissed her case as to the first cause of action stated in her complaint and as to the defendants other than appellant, Strobeck, and proceeded against him upon her second cause of action. Upon the conclusion of the trial she was allowed to file, as conforming to the proofs, an amended complaint following generally the lines of the second cause of action in her original complaint, but alleging that her assignors "were duly employed at the special instance and request of and rendered legal services for and to the defendant G. L. Strobeck in and about proceedings in bankruptcy against one Claus Spreckels in the United States District Court * * * at the conclusion of which the defendant effected a compromise of his claim against said bankrupt for the sum of approximately $20,000.00." This pleading went on to allege the account stated, and that it showed a charge of $2,000 less a credit of $167, leaving a balance of $1,833 on which respondent's assignors later received $605.32, leaving still due $1,227.68, the right to collect which had been assigned to respondent. The court's findings were in accordance with the amended complaint, and judgment against appellant for the said $1,227.68 in favor of respondent followed, from which the present appeal is prosecuted.

Some question has been raised about the sufficiency of the showing in the trial court that Sloane and Burch had, in fact, assigned the account to respondent, but any doubt on that score has been resolved by evidence which was permitted to be taken at the time of the oral argument, so that it will be considered that the assignment has been shown, and this leaves, as the only matter to be determined, whether there is evidence in the record from which the trial court could reasonably have concluded that an account had been stated as now alleged.

It appears that in April, 1931, Philip Storer Thacher, who had been and is the general attorney for appellant, Strobeck, arranged with Harrison G. Sloane, also an attorney, to represent Strobeck, who held a judgment against Spreckels, as well as to represent Adams and McDonald, two other creditors of Spreckels, in procuring an adjudication of bankruptcy against him. Whether the employment went any farther and contemplated that Sloane should represent the creditors' claims after such adjudication had been obtained is disputed. At any rate Sloane, assisted by Robert B. Burch, also an attorney, whom he called into the matter with Thacher's knowledge, instituted the bankruptcy proceedings, and the adjudication of bankruptcy eventually followed. In the meantime, and on May

19, 1931, Sloane wrote Thacher that the bankruptcy petition had been set down to be heard on July 27; that a vigorous contest was to be anticipated; that he and Burch had tackled the matter on short notice without stopping to make an arrangement about fees, but that there should be a retainer provided, going on to say: "You do not appear as an attorney of record and I do not know just what your relationship is with the different parties as to fees. One way or another, of course, you must be taken into consideration. I believe that we should call on the petitioners for a levy at this time which will raise sufficient funds to pay Burch and myself at least $500.00 as a retaining fee. What will be the best way to go about it? Do you want to negotiate it or shall we take it up direct with our clients?" Thacher, according to Sloane, answered that "he had other arrangements with Mr. Strobeck, did not participate in ours, we were to deal directly with the petitioners." Accordingly, Sloane on May 25, 1931, wrote an identical letter to each of the three petitioners containing, among other things, the language: "We have suggested to Mr. Strobeck the propriety of receiving a $500.00 retaining fee, which will also compensate us for our services up to the present time, and he has responded by giving us his check today for one third, $167.00." According to Sloane, Adams and McDonald on receiving this letter came in and asserted that Thacher had told them they need pay no fees, and paid none. Thereafter, on June 6, Burch and Sloane wrote Thacher that Strobeck, McDonald, and Adams, doubtless in good faith, had all reported him as saying that all expenses except the court fees would be paid from the bankrupt estate; that Strobeck had nevertheless appreciated the situation and had paid $167 as his share of a $500 retaining fee, but the other two had declined to do so, but that: "As we explained to him (Strobeck) the Bankruptcy Court sometimes allows fees to the attorney for the petitioning creditors. It is purely discretionary, however, and the amount is purely conjectural, and is likely to be inadequate. If no adjudication follows there could, of course, be no allowance of fees. Under these circumstances, you would not, and I am sure you realize that we would not, agree to tackle a proposition of this magnitude, on a fair chance of going unpaid." In this letter the writers go on inter alia to say: "It appears that as a result of the filing of our petition and the prospect of an attack being made upon the trust, representatives of Mr. Spreckels have been moved to offer real money in settlement of these claims. Mr. McDonald has accepted the offer made to him and has assigned his claim. Mr. Adams apparently is contemplating a similar settlement and his total figure will undoubtedly be greater. * * * So far as Mr. Strobeck is concerned we are willing to proceed with the matter upon the retaining fee which he has paid. We will apply to the court for an allowance and give credit for whatever is received, but we will expect our total fee to be commensurate with the work involved and the amount finally realized. We appreciate his spirit in the matter, to the extent that we told him we would expect no further payment from him in case the effort to throw Spreckels into bankruptcy should fail, but if as a result of the bankruptcy he gets paid pretty substantially we will call on him for a further substantial fee. On the other hand if he does not do much better than McDonald and Adams, we will be easy on him."

Sloane says that copies of this letter were sent to Strobeck and the other two petitioners. There is in the evidence a further letter from Sloane to Thacher under date of July 14, 1931, discussing the progress of the case. Subsequently, after a contest complicated by an effort of McDonald and Adams to withdraw as petitioning creditors, and after certain Los Angeles creditors had intervened, Sloane and Burch succeeded in procuring the adjudication of bankruptcy, after which Thacher procured for Strobeck a settlement satisfactory to Strobeck, apparently in the amount of $20,000. Thereafter, on September 1, 1931, Sloane wrote Thacher a letter which is in part as follows: "Mr. Burch and I are in a good deal of a quandary about the matter of our attorneys' fees in the Spreckels case. We can hardly dispose of it on the basis of an ordinary bankruptcy proceeding, for the reason that it has resolved itself into an enforced settlement of the debts due to Adams, McDonald and Strobeck. Our attorneys' fees should, therefore, be measured properly by the standard of the ordinary situation when a claim is disputed and remains unpaid until suit is filed and brought to an issue, whereupon the parties agree on settlement. Since this suit involved an attack on the Spreckels clan complicated by the attempted withdrawal on the part of Adams and McDonald it seems to me that a ten per cent levy on the total amount of cash paid to the respective petitioners would be about right."

On September 23, 1931, Sloane wrote Strobeck in part as follows: "* * * It seems

to be in order * * * to submit our bill, which we enclose herewith. We believe, in view of the nature of the case and the time and skill which we expended in the matter, coupled with a prompt settlement of your claims on a basis satisfactory to you, that a charge of 10% on the actual cash received by you is reasonable and we have made our bill on that basis. We will be able to recover some portion of this amount from the bankrupt's estate, and will, of course, give you credit for your proportion of such sum and for the small balance of costs which remain unexpended on our hands." Sloane went on in this letter to suggest that the recovery from the bankruptcy court would probably not exceed $1,000, "which should be prorated on the charge to you"; that, "accordingly, if you will remit to us $1,166.33 * * * at this time, we will let the rest of it ride until this figure has been fixed by the Referee in Bankruptcy." With this letter was inclosed a bill in the words and figures following:

"September 23, 1931

'Mr. G. L. Strobeck
"932 Seventh St.,
"San Diego, California
"In re—Claus Spreckels, Bankrupt.

Professional services in preparation of Bankruptcy Proceedings against Claus Spreckels, filing and prosecution of the same to adjudication and collection of $20,000.00 in settlement.....	$2,000.00
Withheld for later payment.....	666.66
	$1,333.34
Credit:	
Received on account.....	167.00
Balance payable.....	$1,166.34"

Sloane received a reply to this communication under date October 3, 1931, from Thacher, the body of which is as follows: "Mr. Strobeck has asked me to reply to your recent letter to him, and as soon as I can get time from the melee caused by the absence of my secretary, I will reply to your letter to him, as well as to your letter to me of September 1st."

On October 29, 1931, Sloane wrote Thacher that he had heard nothing either from him or from Strobeck relative to the attorneys' fee; that the Los Angeles creditors had finally agreed to take one-third of whatever attorneys' fee allowances were made, leaving two-thirds to the San Diego claimants; that the writer understood that Strobeck had secured his cash from the Spreckels people and that a proper portion of it would be devoted to taking care of his attorneys' fees. No answer was made to this letter.

No further communication passed in either direction on the subject, if Sloane's account is accepted, except that Thacher testified to having called three times at Sloane's office to discuss the fees, but to have found him out, until April 14, 1932, when Sloane and Burch joined in a letter to Strobeck saying that on September 23, 1931, they had stated to him their account in the matter wherein they had deferred payment to the extent of $666.66 on the assumption that the petitioners would receive a total of $1,000 to apply on attorneys' fees; that the petitioners had asked an attorneys' fee allowance of $2,500, but that some part of whatever was allowed would have to be credited to the attorneys for the Los Angeles creditors who had agreed to be satisfied with one-third. It was then suggested with respect to the San Diego petitioners that, rather than have the matter drag indefinitely, "we are willing to assume that they will receive as their share the full amount asked for, namely $1,666.66." The implication was evidently intended to be that, if so much as that were received from the bankrupt estate, the portion of the money so received attributable to Strobeck's share of the attorneys' fees would be $404 more than the $666.66 assumed to be obtainable from that source in the bill of September 23, 1931, and the letter was accompanied by a new bill as follows:

"Robert B. Burch
"Harrison G. Sloane
"Attorneys at Law
"1230 J. D. Spreckels Bldg.,
"San Diego, California,
"April 14th, 1932.

"Statement of Account of Mr. G. L. Strobeck
"932 Seventh St., San Diego, California.
"In re—Claus Spreckels, Bankrupt.

Account stated September 23, 1931, Balance payable.....	$1,166.34
Credit	
By further allowance.....	404.00
	$762.34"

Sloane testified that long after sending the bill of April 14, 1932, and, as best he could place the time in September, 1932, "I met Mr. Strobeck on the corner of Sixth and Broadway, in front of the Bank of America, and he was going in one direction, and I was going in the other, and he held up his hand and stopped me. He came over in a cordial way and said: 'That bill of yours. I have arranged with Mr. Thacher to take care of

that,' and I said, 'That's fine,' and I went on down to the Court House." He says that neither Strobeck nor Thacher made any objection to the bills submitted. Strobeck's account of the conversation just referred to is that it occurred earlier, just after he received the letter of September 23, 1931, and that he said to Sloane: "I received your bill, but I won't pay that because I employed Mr. Thacher and I expect to pay Mr. Thacher and whom he employs to assist him it is up to him to pay. So settle that bill with Mr. Thacher." The trial court apparently accepted Sloane's account, both with respect to the date and the substance of this conversation, and it was within its province to do so.

The actual allowance in the bankruptcy proceeding made for the attorneys' fees of the petitioning creditors was $1,250, of which the share of the San Diego petitioners was $833.33, which was on September 7, 1932, collected by Sloane and Burch. Burch thereupon on September 16, 1932, wrote Thacher that, though the allowance from the bankruptcy court had been less than anticipated in the original statement of September 23, 1931, yet he and Sloane would "absorb" the difference and accept from Thacher in full of the balance due from him the $1,166.34 called for in this original statement. This resulted in further correspondence back and forth which we do not consider it necessary to recite. The final position taken by Sloane and Burch after the negotiations for settlement had failed and when the case came to trial was that, of the $833.33 collected, $555.32 should be credited to Strobeck. Sloane and Burch also recovered for Strobeck $50 expended on costs, the addition of which to the $555.32 makes $605.32. The court's findings and judgment proceed, then, upon the theory that there was an account stated whereby the fees payable on Strobeck's account to respondent's assignors were fixed at $2,000, against which he was entitled a credit for the $167 retainer, leaving a balance of $1,833, on which the said $605.32 should be treated as a further credit, leaving $1,227.68 still due and unpaid.

The evidence shows that Strobeck often consulted with Sloane and Burch while they were engaged in the proceedings to have Spreckels adjudicated a bankrupt. There is no doubt that he ratified Thacher's act in employing Sloane and Sloane's act in associating Burch with him. He is shown to have known that Sloane and Burch intended to look to him personally for their fees, less what they could get from the bankruptcy court, and actually to have paid $167 on account of their fees. He was one of the parties to whom they sent their letter of May 25, 1931, and one of the parties to whom copies of their letter of June 6, 1931, were mailed. In these circumstances he permitted them to go on and render important services which produced the results that he sought. Sloane and Burch were entitled, in view of what had passed, to assume that he had assented to their position in respect of their fees, and there can be no real doubt but that he knew what their position was. Such was the situation when they rendered their statement of September 23, 1931, to which, if Sloane is right about the date of the sidewalk conversation, no other reply was made than Thacher's letter of October 3, 1931, which the trial judge in his oral opinion aptly said amounted to saying: "I am not answering you. I will answer you when I get around to it," and which he concluded to amount in effect to no answer at all. This, if we assume that the sidewalk conversation did not occur until the fall of 1932, was followed by entire silence on the part of Strobeck and Thacher for the most of a year. To be sure, Thacher says that he called three times at Sloane's office and found him out, but that appears to be neither here nor there. There is nothing to show that Sloane knew anything about his visits or that he could not at any time have sought and made an appointment with him nor what he was commissioned to say to Sloane if he had met him.

[1-3] We think that the record amply justified the trial court in finding that, in view of all that had gone before, the statement of September 23, 1931, when coupled with what it believed to be Strobeck's prolonged failure to object to it, resulted in an account stated. "An account stated is a document, a writing, which exhibits the state of the account between parties and the balance owing from one to the other, and when assented to, either expressly or impliedly, it becomes a new contract." Merchants' Nat. Bank v. Carmichael, 50 Cal. App. 749, 752, 753, 196 P. 76, 78. Consent to such a statement is ordinarily implied from failure to object to it within a reasonable time. Auzerais v. Naglee, 74 Cal. 60, 15 P. 371; Hendy v. March, 75 Cal. 566, 17 P. 702; Mayberry v. Cook, 121 Cal. 588, 54 P. 95; Atkinson v. Golden Gate Tile Co., 21 Cal. App. 168, 171, 131 P. 107; Schneider v. Oakman Consol. Min. Co., 38 Cal. App. 338, 342, 176 P. 177. The question of what is a reasonable time arose in Crane v. Stansbury, 173 Cal. 631, 161 P. 7, 9, which was an action

to recover on an account stated for services rendered by an attorney. The Supreme Court there said: "While all questions of fraud and mistake in combating the force of an account stated are questions of fact for the jury, *where assent is based upon acquiescence arising from a failure to object, the length of time which must pass before an account rendered becomes, by virtue of the recipient's failure to object, an account stated, is one of law for the court.*" (Italics ours.) Having reference to the circumstances of that case, the Supreme Court said further of the trial court's action: "What the court told the jury in effect was that this delay of six months, if unsatisfactorily explained, was as matter of law unreasonable, and that because of it acquiescence would be presumed and the account would become an account stated. Such, we repeat, is the law"—citing Cusick v. Boyne, 1 Cal. App. 643, 82 P. 985; Hendy v. March, supra; Standard Oil Co. v. Van Etten, 107 U. S. 325, 1 S. Ct. 178, 27 L. Ed. 319; Fleischner v. Kubli, 20 Or. 328, 25 P. 1086, and Wiggins v. Burkham, 10 Wall. (77 U. S.) 129, 19 L. Ed. 884. In the case at bar we cannot see that the trial court could have done otherwise than hold that Strobeck's failure, for what it took to be about a year, to make any objection to the account rendered by plaintiff's assignors, was a failure to object to it within a reasonable time. It is indeed urged that the failure to make an objection is excused if the previous relations between the parties have been such as to exclude any idea of an acquiescence in the account rendered, as, for example, when the party charged had previously repudiated the obligation. Suffice it to say that we think the evidence discloses no such situation here so far as Strobeck is concerned. We are in entire agreement with the trial court that respondent made out a case of an account stated on the basis of the bill rendered on September 23, 1931.

[4] It is claimed, however, that, even if there was an account stated, its effect would be to entitle respondent's assignors to only $1,166.34, as the balance claimed in this original bill, instead of $1,227.68, for which respondent was given judgment. We do not accede to that view. The bill of September 23, 1931, must of course be read in the light of the accompanying letter of even date. When that is done and we disregard the form of the bill and look to its substance, as clearly explained in this accompanying letter, it is manifest that what it means is that there is a charge made of $2,000 and that there is credited against that, as actually paid, only $167, and that the whole balance, which would be $1,833, is treated as still due. The rest of the statement goes not to the statement of the account, that is, not to this balance that is due, but only to the method proposed for its payment. Sloane and Burch propose that Strobeck pay them at once $1,166.34 in the hope that $666.66 can be gotten from the bankruptcy court and this $666.66 is described as "withheld for later payment." As shown by the letter, Sloane expected to get from the bankruptcy court (that is, as we take it, for the San Diego petitioners) not to exceed $1,000, and it was Strobeck's share of that that he figured would amount to $666.66. In that event this would be credited to him, and he would not be called upon to himself pay more than the $1,166.34. But it is not intimated that, if less were obtained from the bankruptcy court, he would not be called upon to make up the difference. Ultimately the amount attributable to Strobeck obtained from the bankruptcy court turned out to be less than had been hoped, so that, in the judgment rendered, the amount directly payable by Strobeck was correspondingly increased. But these adjustments in no wise changed the amount the statement of September 23, 1931, had shown to be, at that time, still unpaid on his indebtedness therein stated.

[5] The second statement rendered April 14, 1932, as shown by the accompanying letter as well as certain negotiations shown in the record as having occurred in the fall of that year, amounted, so far as respondent's assignors were concerned, only to efforts to obtain a settlement, and whatever concessions were offered with that in view must, in view of appellant's failure to agree to a settlement, be treated as now withdrawn.

We find no error in the record. The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

139 Cal.App. 668

SPARR v. BYERS et al.

Civ. 1106.

District Court of Appeal, Fourth District, California.

July 13, 1934.

1. New trial ⇐163(1)

Only effect of order granting plaintiffs' motion for new trial after judgment for cross-complainant and directing plaintiff to prepare amended findings was to grant new trial; order to prepare amended findings being ineffective (Code Civ. Proc. § 662).

2. New trial ⇐165

Order setting aside order granting plaintiff new trial and reinstating original findings and judgment for cross-complainant over 60 days after plaintiff served and filed notice of intention to move for new trial *held* void (Code Civ. Proc. § 660).

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by Edward C. Sparr against F. W. Byers, Rosa Byers and others, in which defendant Rosa Byers filed a cross-complaint. From a judgment for cross-complainant and an order setting aside an order granting plaintiff a new trial, plaintiff appeals.

Reversed and remanded.

Harry W. Horton, of El Centro, for appellant.

Olin N. Mackay, of Los Angeles, for respondent.

BARNARD, Presiding Justice.

In this action brought to quiet title to certain real property situated in Imperial county, Rosa Byers, one of the defendants, filed a cross-complaint asking that title to the property be quieted in her. After a trial the court made findings and entered judgment in favor of the cross-complainant on February 1, 1932. On February 9, 1932, the plaintiff served and filed a notice of intention to move for a new trial. On March 30, 1932, after oral argument, the court granted the motion for a new trial and ordered the findings and judgment set aside. After making this order the court directed the plaintiff to prepare amended findings and to mail the same to the defendants on or before April 1, 1932, granted the defendants leave to file objections to such amended findings, if desired, and stated that the matter would then be taken under submission by the court and judgment entered within ten days. Apparently, amended findings were submitted as the record contains an unsigned set of findings on which counsel for defendants have admitted receipt of a copy on April 1, 1932, and on which is indorsed "April 19, 1932, refused signing, V. N. Thompson, Judge." The minutes of the court then show that the following order was entered on April 19, 1932: "At this date the court sets aside the order heretofore made on March 30, 1932, and now orders that the original findings of fact and judgment in the above entitled action shall be permitted to stand." Thereafter the plaintiff appealed from the judgment entered on February 1, 1932, and from the order entered on April 19, 1932, purporting to set aside the order granting a new trial which was made and entered on March 30, 1932.

[1] While, under section 662 of the Code of Civil Procedure, a trial court may, in lieu of granting a new trial, vacate and set aside the findings of fact and the judgment and reopen the case for further proceedings, this course was not here followed. The order made on March 30, 1932, granted the motion for a new trial and set aside the findings and judgment theretofore filed and entered. The further order directing the plaintiff to prepare amended findings and giving the defendants the right to object thereto could have no effect, as a new trial had already been granted, and, under the circumstances, such a new trial could not be limited to the mere preparation of new findings. The procedure here attempted is not authorized by the statute, and the only effect of the order entered on March 30, 1932, was to grant a new trial.

[2] We also think the order entered on April 19, 1932, purporting to set aside the order granting a new trial, was void under section 660 of the Code of Civil Procedure, as the same then stood. The power of the court to pass upon a motion for a new trial expired sixty days after February 9, 1932. Notwithstanding this fact, on April 19, 1932, the court attempted to set aside the order granting a new trial and to reinstate the original findings and judgment. This was an attempt to pass upon the motion for a new trial after the sixty days had expired by another and new order, the effect of which would be to deny a new trial. This was beyond the court's power, as it had then lost jurisdiction to pass upon the motion for a new trial.

It is not necessary to pass upon the question as to whether the appeal from the judg-

ment entered on February 1, 1932, was taken in proper time, as that judgment has been set aside by the order entered on March 30, 1932. A number of other points are raised in connection with the appeal from the judgment which need not be here considered, although it may be observed that most of the errors complained of can be avoided on a retrial by proper amendments to the pleadings.

The judgment and order appealed from are reversed, and the cause remanded for a new trial.

I concur: JENNINGS, J.

MARKS, J., being absent, does not participate in this opinion.



137 Cal.App. 654

PEOPLE v. GREEN.

Cr. 2508.

District Court of Appeal, Second District, Division 1, California.

April 17, 1934.

Criminal law ⇐823(4)

Failure of prosecution's approved instructions to contain certain elements necessary to commission of crime of grand theft *held* not prejudicial to accused, where other instructions contained such elements.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

On petition for rehearing.

Petition denied, and former opinion amended.

For former opinion, see 31 P.(2d) 207.

Entenza & Gramer, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

PER CURIAM.

On consideration of the petition for rehearing herein, it is ordered that the third paragraph from the end of the opinion be and it is stricken therefrom; and that in the place and stead thereof, the following be inserted as a part of such opinion, to wit:

"Appellant also asserts that error prejudicial to the substantial rights of defendant was committed by the trial court in giving to the jury certain instructions that were offered by the prosecution, but which instructions failed to contain therein certain elements necessary to the commission of the crime of grand theft. However, since an examination of the record herein discloses the fact that the elements to which appellant refers in substance were contained within other instructions which were given to the jury by the trial court, it is clear that on that account appellant has no just cause for complaint."

It is further ordered that the petition for rehearing be, and it is, denied.



139 Cal.App. 644

PEOPLE v. MILLER.

Cr. 2509.

District Court of Appeal, Second District, Division 2, California.

July 11, 1934.

Rehearing Denied July 20, 1934.

1. Robbery ⇐24(3)

Testimony as to defendant's identity as driver of automobile, used in bank robbery, by police officer, stationed where he had excellent opportunity to observe driver's features, *held* sufficient to support conviction of robbery.

2. Criminal law ⇐741(1), 742(1)

Jurors are sole judges of witnesses' credibility and reliability and weight and effect of testimony not inherently incredible.

3. Criminal law ⇐1088(5)

Affidavit controverting testimony of people's witness cannot be considered on appeal where dated after filing of transcript in appellate court.

4. Robbery ⇐24(3)

Testimony of active participant in robbery charged that defendant was not with him at time and of another witness that he was driver of automobile used in robbery *held* not to require acquittal of defendant, identified by policeman as driver of automobile, in view of such witnesses' admissions

of their convictions of felonies and contradictory testimony.

5. Criminal law ⇐804(5)

Giving of stock instructions, approved by appellate courts or stating mere commonplaces, in robbery trial, was not error.

Appeal from Superior Court, City and County of Los Angeles; Charles S. Burnell, Judge.

Richard Miller was convicted of robbery, and he appeals.

Affirmed.

Richard Miller, in pro. per.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

ARCHBALD, Justice pro tem.

From a judgment of conviction of robbery entered on the verdict of a jury, and from the order denying his motion for a new trial, defendant has appealed.

[1, 2] It is urged that the testimony of certain witnesses identifying defendant as the driver of a Chevrolet coupe used in connection with the robbery of a bank in Los Angeles, and in which the man who actually perpetrated the act escaped from the scene, is too vague, indefinite, and uncertain to support the conviction, and is wholly unreliable and untrustworthy.

Most of the identification testimony impresses us, as we read the record, as unsatisfactory; but this comment does not apply to the testimony of officer Young, who apparently was stationed in position where he had an excellent opportunity to observe the features of the driver of the Chevrolet car. Although this officer was mistaken as to the date when, after the robbery, he first saw the defendant, the jury would in our opinion still be justified in accepting his identification of the latter as sufficient. The arguments made by appellant, who appears in this appeal in propria persona, against the substantiality of his identification as the driver were undoubtedly made by his counsel to the jurors, who were the sole judges of the credibility and reliability of the witnesses and who alone could determine the weight and effect to be given such portion of the testimony as does not appear to be inherently incredible. We do not overlook the fact that respondent in its brief has mistaken testimony relating to the man who actually robbed the bank cashier as testimony identifying appellant as the driver of the car.

[3] Appellant asks us to consider an affidavit which controverts testimony given by a witness for the People, named Wassel, who testified to witnessing the robbery in company with the maker of the affidavit, a Mrs. Mayberry, stating also that the night before the robbery he saw Mrs. Mayberry with defendant and the man who entered the bank in a restaurant together, and overheard them planning the robbery, that Mrs. Mayberry telephoned him about it and they went out together to see "a little action." The meeting in the bank, telephone call and her presence there with Wassel were denied. Such affidavit was dated after the transcript on appeal was filed in this court and of course forms no part of the record on appeal and cannot be considered. Even if such testimony had been produced at the trial, it only affected the testimony of Wassel, whose credibility was more seriously affected by his manner on the stand and the fact that he was then in jail serving a sentence. There was sufficient evidence otherwise to support the judgment.

[4] It was entirely within the province of the jury to disbelieve the testimony of defense witness Blake, a brother of appellant and the active participant in the robbery, who said that appellant was not with him the day of the robbery, and of the witness Piper, who stated that he was the driver of the Chevrolet coupe. Both admitted facts showing that they had been convicted of felonies, and contradicted each other on important matters of fact.

[5] Appellant urges error in the giving of certain instructions. We have examined them. All are stock instructions given in practically every criminal case. Many of them have been approved by appellate courts and others state mere commonplaces. No error was committed in giving them.

Appellant also complains of certain remarks made by the court throughout the trial, charging that they were flippant and tended to place the defendant in a bad light before the jury. We do not find that any of these comments reflected upon the character of appellant or prejudiced him in any way.

Judgment and order affirmed.

We concur: STEPHENS, P. J.; DESMOND, J.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

ABRAHAM v. SIMS et al., School Trustees.*

Civ. 1103.

District Court of Appeal, Fourth District, California.

July 12, 1934.

Hearing Granted by Supreme Court Sept. 7, 1934.

1. **Mandamus** ⇐77(4)

Evidence *held* to show that, notwithstanding permanent teacher's alleged original refusal, because of salary reduction, to sign contract for ensuing year, such refusal, before being acted upon by board of trustees, was to knowledge of majority of members thereof, so qualified that it could no longer be treated as refusal, entitling teacher, who offered to perform duties, to mandamus compelling reinstatement (School Code, § 5.500, as added by St. 1931, p. 1394, § 4).

Evidence showed at most that, as of time board accepted what it saw fit to treat as teacher's resignation, teacher had not actually refused to teach for salary offered, but had not affirmatively expressed a willingness to waive any excess over the offered salary that might turn out to belong rightfully to teacher or that board might be willing to concede to her; it appearing that teacher considered salary reduction inequitable as to her, since in preceding years her salary had not been increased in accordance with that of other teachers of same classification.

2. **Schools and school districts** ⇐133

Permanent teachers under statute have vested right to be so classified and to teach as permanent instructors in particular district where right has been secured, subject to reasonable rules not in conflict with law (School Code, §§ 5.500–5.504, as added by St. 1931, p. 1394, § 4).

3. **Schools and school districts** ⇐133

Right to teach is incident to classification as permanent teacher and, after three consecutive years of employment and service and reelection by board for succeeding school year, law, as of beginning of that year, automatically effects the classification and nothing more is required to accomplish it (School Code, § 5.401, as added by St. 1929, p. 748; § 5.500, as added by St. 1931, p. 1394, § 4).

4. **Schools and school districts** ⇐133

Permanent teacher, unless notifying board to contrary or failing to appear for purpose of teaching at opening of school year, must be deemed to have accepted re-employment (School Code, § 5.401, as added by St. 1929, p. 748; § 5.500, as added by St. 1931, p. 1394, § 4).

5. **Schools and school districts** ⇐144(4)

Trustees of school district have power to raise or reduce salaries of permanent teachers, provided power is reasonably exercised and no attempt is made after beginning of particular school year to reduce salaries for such year (School Code, § 5.500, as added by St. 1931, p. 1394, § 4).

6. **Schools and school districts** ⇐147

Trustees of school district have power to change permanent teacher's assignment and from time to time to prescribe his duties, so long as the power is reasonably exercised and duties prescribed are in line of his profession and he is not required to teach outside district (School Code, § 5.500, as added by St. 1931, p. 1394, § 4).

7. **Schools and school districts** ⇐133

Permanent teacher not refusing to do duties is not bound, on pain of forfeiture of permanency of status, to abandon his bona fide views as to compensation to which he is entitled (School Code, § 5.500, as added by St. 1931, p. 1394, § 4).

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Mandamus proceeding by Beulah J. Abraham against Virgil J. Sims and others, as Trustees of the Brawley Elementary School District, County of Imperial, State of California. From a judgment denying the writ, petitioner appeals.

Reversed.

W. E. Abraham, and H. B. Stewart, both of Brawley, for appellant.

Elmer W. Heald, Dist. Atty., and S. L. McCrory, Asst. Dist. Atty., both of El Centro, for respondents.

HAINES, Justice pro tem.

This is a mandamus proceeding instituted by Beulah J. Abraham, as petitioner, to require the respondents Virgil J. Sims, A. M. Whipple, and W. W. Goodson, as members of and constituting the board of trustees of the Brawley school district in Imperial county, Cal., to reinstate her as a teacher in the Brawley schools; to classify her as a permanent teacher in said district and to issue warrants for her salary as a teacher in said schools for that part of the year 1932 which had elapsed between the opening of said schools on September 19, 1932, and the filing of this petition on November 14, 1932.

The petition alleges that said Sims, Whipple, and Goodson have constituted and do con-

stitute the board of trustees of said district, and that one McIntire has been and is the superintendent of schools for said district; that the petitioner was employed as a teacher in the schools of said district for the school years 1927–28, 1928–29, 1929–30, 1930–31, 1931–32, and by reason of having taught therein for a period of three years became entitled to be classified as a permanent teacher under the provisions of section 5.500 of the School Code (as added by St. 1931, p. 1394, § 4), and upon her reelection and employment as a teacher in said schools for the year 1930–31 she became such permanent teacher. It is further alleged that on September 16, 1932, she was notified by said McIntire that she had been assigned to teach 4B and 5B grades in one of the schools of said district for the year 1932–33; that on September 19, 1932, the date on which the school year commenced, she presented herself at the school ready and willing to proceed with her duties as such teacher, but that without assigning any reason therefor McIntire refused to allow her to do so; that on the next two days she again presented herself with the same result; that on the last of these days he told her she would no longer be permitted to teach in said schools and that she need not return, and at that time placed another teacher in charge of the classes to which she had been assigned. It is further alleged that she afterward received from respondents a letter to the effect that on September 20, 1932, the board had "accepted the return of an unsigned contract as her resignation as teacher in said schools"; that it is untrue that she ever refused to sign any contract tendered her by respondents, and it is untrue that she ever tendered any resignation as such teacher; but that on the contrary she has at all times since the beginning of said school year been ready and willing to assume and perform her duties as such teacher and has so notified respondents both verbally and in writing; that she has demanded reinstatement as a teacher and that she be permitted to assume and perform her duties as such "under the classification to which she was entitled"; but that respondents and their said superintendent made no reply to her communications and have refused to reinstate her; that no charges for her removal as a teacher have been preferred against her and that she is the holder of a life certificate from the state and has all the qualifications required by the School Code to entitle her to classification as a permanent teacher. Respondents, she says, refuse to issue warrants for her salary from the beginning of the school year 1932, and she has no plain, speedy, and adequate remedy in the ordinary course of law.

Respondents answered, admitting many of the allegations of the petition, but claiming that her employment for the year 1930–31 did not include the first month of that year. They admit that at the beginning of the school year 1932–33 she presented herself and offerred to assume her duties as alleged, and admit that McIntire refused to allow her to do so, and that they have, for what they describe as the "current school term," refused to draw any salary warrants in her favor. This refusal they justify by saying that at a meeting on April 18, 1932, they ordered a general reduction of the salaries of all teachers in the elementary schools of the district, that all $1,600 salaries, including petitioner's, were reduced to $1,557 "for the next school term" (evidently meaning "year"), of all of which petitioner was notified in May, 1932; that she was subsequently tendered, by respondents, a contract for teaching at such reduced figure for the school term (year) beginning September 19, 1932, but refused to sign it and has ever since persisted in such refusal, for which reason respondents have refused to permit her to enter upon the duties of a teacher for that term (year).

To this answer the petitioner interposed a demurrer, which was overruled. Thereafter the case was tried and judgment rendered in favor of respondents, denying to petitioner the writ sought. Hence this appeal.

It is petitioner's claim that she never in fact refused to sign the contract tendered her, but, on the contrary, was prevented by respondents and their superintendent from doing so. It is her further claim that, since she had become a permanent teacher, no new contract was necessary to the continuance of her status as such; and, therefore, that in the absence of any evidence that she intended to abandon her position as such teacher, her action in returning unsigned the contract tendered her could not amount to a resignation or justify respondents in treating her position as vacant. Respondents dispute the correctness of both of these contentions, and it will, therefore, be necessary to consider them.

It appears that for the school year 1931–32, petitioner had been employed at a salary of $1,600, and the respondents, at a regular meeting held on April 18, 1932, voted to fix, for the succeeding school year, the salaries of all teachers then receiving pay at the rate of $1,600 per year, at the lower rate of $1,557 per year. A teachers' meeting attended by petitioner was held on the following day, at

which this reduction was explained by McIntire, the superintendent. For some reason, not clearly disclosed by the record, respondents undertook to dispense with petitioner's services for the ensuing school year and she was so notified on May 16. Either just before or just after that time, she raised the question of her classification as a permanent teacher. Respondents took the position that since she had not served during the first month of the school year 1930–31, she was not entitled to be so classified and it was agreed that the question should be submitted to the district attorney. His opinion was that she was entitled to this rating and he submitted the question to the Attorney General, who expressed the same opinion. These rulings were ultimately accepted by respondents, who held a meeting on September 16, 1932, three days before school was to open, and voted to offer petitioner a contract for the school year 1932–33, at the $1,557 rate. Such a contract was on the same day prepared, executed by the clerk of the district and handed to a Mrs. Burris, who was McIntire's secretary, to take to petitioner, which was done. Petitioner's account of what she said to Mrs. Burris and the latter's account of the interview differ. Mrs. Abraham says that when the contract was handed to her she said: "I want to see if the salary is what it should be before I sign it." That she looked at it and said: "No, the salary is not what it should be." She says that she spoke of the omission to raise her salary in the preceding year (1931–32), when the salaries of others in her group were raised, though in former years she had participated in such salary increases as they had received. Her point seemed to be that if salaries were now to be reduced, this ought not to apply in her case as she had not, for the last year, received an increase when the rest in her group had. She says that she then asked Mrs. Burris to take the contract back to McIntire "and show it to him and tell him about the salary," and she added, "If it is not all right 'phone me and I will come over"; that Mrs. Burris took the contract back, and though she, that is, Mrs. Abraham, expected her to return with it, she did not.

Mrs. Burris testified: "I handed Mrs. Abraham the contract and before she looked at it she said she didn't believe she was going to sign it, and then she got her glasses—she read it over and she said, 'No, I won't sign that, this is not the right salary. I won't sign that contract,' and I took it back to Mr. McIntire's office. * * * I told her I would take it back and give it to him. She said, 'I will come over and see him this afternoon. I don't have time right now.'" Mrs. Burris went on to say that she did not see Mrs. Abraham further that afternoon (Friday), but that she saw her go into McIntire's office the next morning (Saturday, September 17), between 9 and 10 o'clock, and that on that (Saturday) afternoon Mrs. Abraham had told her that "she didn't mean to send the contract back, that she just meant to have it come back for consideration of the salary and I told her I brought it back and told Mr. McIntire she would not sign it because the salary was not right." Asked further about what Mrs. Abraham had said to her the preceding afternoon, Mrs. Burris said: "She said that she thought she should have had more money the previous year, her salary was not right, and that she wanted to see if she could not get the difference in the salary she got and what some of the other teachers got, she thought she should have got the same as them that year." She further testified that Mrs. Abraham never did say that she would work for the salary specified in the contract offered her, but that on Saturday, October 1, 1932, Mrs. Abraham had come to witness' home and "said she didn't quite remember what was said and wanted to know if I would tell her what she said that day I delivered her the contract, and I told her I went back and told Mr. McIntire she would not sign it because it was not the right salary," whereupon, "she told me she had went to Mr. McIntire and he had refused to give her the contract. She asked for it again on Saturday morning, and then we didn't talk about it any more."

Mrs. Burris testified further that McIntire had put the contract in the safe on instructions from respondent Sims. Asked whether when she had originally taken the contract to Mrs. Abraham the latter had not asked her to take the contract back to McIntire "for the purpose of ascertaining whether or not the salary mentioned therein was correct," her answer was: "She just said she wouldn't sign it, that the salary was not right * * * she said something about calling her, but I didn't have time. I thought she would come over."

McIntire testified that pursuant to the board's action on September 16, he caused a contract at a salary of $1,557 to be submitted on that day to Mrs. Abraham by his clerk, Mrs. Burris; that she brought it back and after a conversation with respondent Sims, who was in the office, he (McIntire) placed it in the safe; that next morning Mrs. Abraham called between 9 and 10; that he had a private conversation with her in his inner

office, at which time "she told me that she had returned the contract and she was not willing to sign it because it was not a sufficient salary. I asked her if she had been delivered a contract the previous day, and she said, 'Yes.' I asked her if she returned it voluntarily, and she said 'Yes,' and she added she was not willing to sign it because it was not sufficient salary. * * * I told her that I would be glad to submit, that I intended to submit the matter to the Board at the next meeting on September 20, and they would take care of the matter, and if she wished to be present at that meeting, we would be very glad to have her." He says that the contract, at the time of the conversation, was in the safe and that Mrs. Abraham neither said that she wanted to sign it nor that she would work for the $1,557. He did say, however, that he told her that the contract had been placed in the safe at the direction of respondent Sims, who was chairman of the board; that he did not then offer it to her to sign and he does not know whether she then wanted to sign it or not. He admits that on the same morning at his own suggestion she attended a teachers' meeting at which he introduced her as a teacher of grades 4B and 5B. He admits that on Monday, Tuesday, and Wednesday (September 19, 20, and 21) she presented herself for the purpose of teaching and that he refused to permit her to do so. He says that she did not, even up to the time of the trial, express any willingness to teach for the salary offered her.

All three of the respondents testified at the trial. Sims, the chairman of the board, says that when Mrs. Burris came back from Mrs. Abraham's house on the afternoon of September 16, he happened to be in the office and directed McIntire to put the contract into the safe until the board could act on it. Some one, and Sims believed it was he, suggested that an opinion be gotten from the district attorney about the legal effect of Mrs. Abraham's having returned the contract unsigned. This was done and apparently the opinion rendered was that her act was tantamount to a resignation. Sims had an interview with Mrs. Abraham on Sunday, September 18. "She told me she had refused to sign a contract on account of the stipulated salary * * *. She told me in the conversation that she thought she had been discriminated against the year before." He says he doesn't remember her saying that she would teach for the coming year at the salary fixed by the board. I said: "If you are not satisfied with the salary schedule, and not satisfied with the assignment given you, or, if you are not satisfied with anything, why did you send the contract back when it was presented to you, and that she had twenty days to work out any difficulty that might arise between her and the Board, or Mr. McIntire, or classification, or anything else, and she said she realized she had made a mistake." He discouraged her from presenting herself on the following day to teach, saying that McIntire could not allow her to do so. He admits that on September 20, when the board undertook to treat the return of the contract as a resignation on her part, it was advised that she had presented herself and claimed the right to teach.

Respondent Whipple, clerk of the board, testified that: "Mrs. Abraham called me on Saturday preceding the meeting of the 20th and asked me to come over. She said she had something she wanted to talk to me about, but I didn't go and nothing about the contract was mentioned over the 'phone." As to the reason for the action taken on September 20, he said: "My feeling was that she was offered the contract at the regular rate, and had turned it down, and therefore, there was nothing else the Board could do."

Respondent Goodson, the third member of the board, testified that Mrs. Abraham came to his house on Saturday evening, September 17, and that "she was very much disturbed about the contract, about not being able to sign the contract when she went to school the next morning, or that morning." He told her the board would meet on September 20 and that she might be there if she wished. "She stated then the salary was the reason she returned it," i. e., the contract. She said she had sent it back with the idea of discussing that matter with McIntire. "I took it that he didn't let her sign the contract because it had been returned to him the evening before and was in the safe there in the office and he had no authority to let her sign it." Asked why the board made no effort to adjust matters with Mrs. Abraham, Goodson said: "We have so much criticism on permanent teachers from a great majority of people in the district, and when Mrs. Abraham returned that contract unsigned, we took it as the same as her resignation; naturally we made no effort to adjust the salary schedule with her because of the feeling up there; and we wanted to get away from this permanent teaching, this tenure of office. That is the whole thing in a nutshell. There is no objection to Mrs. Abraham." Her services, he said, were perfectly satisfactory. He was asked: "The only reason you didn't take any

action was you wanted to, if possible, evade the permanent tenure law?" His reply was: "Exactly."

On September 27 Mrs. Abraham wrote McIntire to the effect that she had not returned the contract "other than for information as to whether or not the salary therein mentioned was correct"; that the day following she had called at his office for the purpose of signing the contract "and adjusting the salary to which I would be entitled later," but "you refused to permit me to sign the contract and informed me that I was not entitled to teach during this year"; that if the board had accepted her action as a resignation it must have been because of his failure to inform it of the facts. She concluded: "I am making demand upon you at this time for the delivery of my contract for my signature, and permission to resume my duties as a teacher in the Brawley Elementary Schools within my proper classification."

On October 4, 1932, she wrote the board a letter reciting that on September 19, 20, and 21 she had been present at the school to which she had been assigned but was prevented by McIntire from performing her duties and that on the latter date he had informed her that she would not be allowed to teach because the board had decided that the returning, unsigned, of the contract on September 16 amounted to a resignation, that she advises the board that she did not refuse to sign it but merely returned it to ascertain if the salary mentioned in it was correct "because of my status as a permanent teacher"; also stating that on September 17 she had called at McIntire's office to sign the contract but had been told by him that the contract was locked up in the safe and that she would not be permitted to sign it.

No attention was paid to either of these letters.

The trial court found: "That the petitioner refused to accept and/or sign the contract so offered to her by respondents and gave, as her reason therefor, that the salary was not right; that at no time thereafter did she offer to teach for the salary specified in said contract, but has at all times herein refused to do so; that thereafter respondents placed another teacher in charge of the classes to which petitioner had been assigned."

[1] It may be conceded that the testimony conflicts as to whether, before the board's action of September 20, Mrs. Abraham refused to sign the contract presented to her. If she returned it merely to obtain further information on the subject of her salary, and made that clear to Mrs. Burris or to McIntire, such action on her part could not be deemed a refusal to sign it. Mrs. Burris, McIntire, and Sims have all quoted her as saying, either that she did refuse, or had refused, to sign it. There is enough of a conflict, therefore, in the evidence so that, if nothing more had transpired, we would feel bound by the finding that she did so refuse. Such refusal, however, was not necessarily final. Even if her relations with the board had been purely a matter of contract she might lawfully have reconsidered her decision at any time before the board acted upon it at its meeting on September 20, at least if she did not in the meantime omit to perform, or offer to perform, her duties as a teacher. There can be no question from those passages from the testimony of respondents Sims and Goodson, which we have recited, that both of them knew prior to the board's meeting on that day that Mrs. Abraham's attitude was no longer, if it ever had been, one of unequivocal refusal to sign the contract, for, according to Sims, she had told him that she had in returning it "made a mistake" and according to Goodson she was "much disturbed" about her inability to sign the contract on Saturday morning. With this knowledge of her attitude, both of these men, who together constituted the majority of the board, participated at the meeting in treating her refusal to sign as definite. We are of the opinion that the evidence shows without any conflict that at the time they acted upon her supposed refusal to sign the contract, such refusal, if there ever had been one, had been, to their knowledge, so qualified that it could no longer be treated as such. The third member of the board knew at the time that she wished to communicate something to him, the nature of which he did not take the trouble to learn. Moreover, we do not think the record contains any substantial evidence that Mrs. Abraham would not have taught for the school year 1932–33 even had she been entitled to no greater salary than the $1,557 offered her, or that she ever actually refused to teach for that salary. Certainly, in presenting herself at the opening of the school, she manifested the willingness to perform her duties and take at least the chance that she might be found entitled to no greater salary than that. True, McIntire quotes her as saying that she "was not willing to sign the contract and teach for that amount of money." In the light of other evidence the most she could have meant by this, if she said it at all, was that she was not willing to waive any additional salary to which she might be entitled. Again, if it be true, as McIntire claims, that when she called on Saturday

September 17, she neither asked to be allowed to sign the contract nor was she refused the opportunity to do so, she had the right to treat the statement which he says he made to her that morning, that he would submit the matter to the board at its meeting on September 20, as a promise to submit to the board the question, not of dispensing with her services, about which nothing seems to have been said at that time, but the matter of what her salary should be.

Taking the evidence in the light most favorable to her, we think the most it can be said to show, so far as Mrs. Abraham's conduct is concerned, as of the time the board accepted what it saw fit to treat as her "resignation," is that she had not affirmatively expressed a willingness to waive any excess over the $1,557 salary that might turn out to rightfully belong to her, or that the board might be willing to concede to her.

No point seems to be made of the circumstance that Mrs. Abraham, for some reason, did not teach during the first month of the school year 1930–31, and we shall, for the purpose of this decision, assume that her status in the Brawley school district, as of the time that respondents, through McIntire and his clerk, Mrs. Burris, tendered her the contract for the year 1932–33, was that of a permanent teacher within the meaning of section 5.500 of the School Code.

[2-4] As was said in Leymel v. Johnson, 105 Cal. App. 694, 702, 288 P. 858, 862: "The conclusion that the status of a teacher is that of an employee is irresistible. The position is secured by selection by the board of trustees, and the terms of the employment are fixed by contract, the authority for which is found in the Political Code (section 1609). Under its general powers the board of education is authorized to enter into contracts with teachers and fix their compensation and terms of employment. Marion v. Board of Education, 97 Cal. 606, 32 P. 643, 20 L. R. A. 197." The authority to employ teachers is now contained in article 1 of chapter 1 of part 3 of the School Code (section 5.400 et seq.), and the provisions in respect to fixing their compensation in article 1 of chapter 8 of part 3 thereof (section 5.730 et seq.). Notwithstanding, however, that the relation between a teacher and the board of trustees is essentially one of contract, and that, until the teacher has attained a permanent status, his or her re-employment in succeeding years is a matter purely in the board's discretion, the situation is so far modified by the teachers' tenure enactments (now represented by sections 5.500 to 5.504, both inclusive, of the School Code [as added by St. 1931, p. 1394, § 4]), that as said with respect to permanent teachers in Dutart v. Woodward, 99 Cal. App. 736, 739, 279 P. 493, 494, "The Legislature has conferred upon teachers, under specified circumstances, a vested right to be so classified and to teach as permanent instructors, in the particular district where this right has been secured, subject to such reasonable rules as may be adopted, which are not in conflict with law." The result of these enactments was not to make the relation any the less one originating in contract, but to annex to contracts of employment when repeated for a sufficient time certain legal consequences. These consequences are not contractual except in the broad sense of being annexed by operation of law to the contract and have been said to be "in the nature of a civil service regulation." Buckbee v. Board of Education, 115 App. Div. 366, 100 N. Y. S. 943, 950, cited in Fidler v. Board of Trustees, 112 Cal. App. 296, 305, 296 P. 912. One of the consequences is a permanent right to teach so long as the board's reasonable regulations are complied with, save in certain exceptional circumstances with which we are not here concerned. This right to teach is an incident to classification as a permanent teacher and after three consecutive years of employment and service, and reelection by the board for the next succeeding school year, the law as of the beginning of that year automatically effects the classification, and nothing more is required to accomplish it. School Code, § 5.500; Grigsby v. King, 202 Cal. 299, 307, 260 P. 789; Owens v. Board of Education, 68 Cal. App. 403, 405, 406, 229 P. 881; La Shells v. Hench, 98 Cal. App. 6, 13, 276 P. 377; Gastineau v. Meyer, 131 Cal. App. 611, 617, 22 P.(2d) 31. It was said in the Buckbee Case that the board's obligation is merely "to re-employ the teacher from year to year, as if taken from an eligible list of the civil service." Under our statute, however, no affirmative action of the board is requisite to accomplish such re-employment. It is automatically done by virtue of sections 5.500 and 5.401 (St. 1929, c. 428), of the School Code, and a permanent teacher need not even notify the board of his acceptance, such notice under section 5.402 being only required of those not "under permanent tenure." The manifest implication is that unless he notifies the board to the contrary or fails to appear for the purpose of teaching at the opening of the school year he must be deemed to have accepted the re-employment. In these circumstances it is questionable whether under our own system what has occurred is very happily described as a

"reemployment" at all and whether it would not be more aptly designated as a "continuance of an employment." It is perfectly true, as said in Martin v. Fisher, 108 Cal. App. 34, 39, 291 P. 276, 278, that "the position of a teacher in the public schools of California is not an office." It is strictly an employment and initiated by a contract. But, as said in the case last cited: "The becoming a permanent teacher, and the continuation of this employment, is a right given by statute. * * *"

[5, 6] The Legislature in this state designed to give to teachers, under the defined conditions, a permanency of tenure, but this has, however, been held to carry with it no assurance against change in salary. That phase of the subject has been so ably discussed in Fidler v. Board of Trustees, supra (pages 301–305 of 112 Cal. App., 296 P. 912), that it is needless to enlarge upon it here. The power of the trustees to raise or reduce the salaries of permanent teachers cannot be doubted, provided it is reasonably exercised and no attempt is made after the beginning of any particular school year to reduce the salaries for that year. No more can it be doubted that despite the permanency of a teacher's tenure the board is fully empowered to change his assignment, and from time to time to prescribe his duties, so long as such power is reasonably exercised and the duties prescribed are in the line of his profession and he is not required to teach outside the district. (Dutart v. Woodward, supra.) It was said, however, in Fidler v. Board of Trustees (page 301 of 112 Cal. App., 296 P. 912, 914): "Respondents do not contend, however, that there can be any arbitrary or unreasonable exercise by the board of the power to reduce the salary of a permanent teacher." And with respect to the assignment of duties it was said in Dutart v. Woodward that: "For the refusal on the part of the teacher to comply with * * * unreasonable or dangerous assignments, the board would have no legal authority to prefer charges against the teacher and deprive her of her lawful status as a permanent teacher."

In the instant case Mrs. Abraham seems to have entertained the belief that she had been discriminated against in an arbitrary way in the matter of her salary; that instead of its reduction having been made on the basis of the sum that she should have received the previous year, it had been made on the basis of a lesser sum than she had been required to accept for that year. We cannot possibly determine from the present record whether she had, on that score, any just ground for complaint or not; but we are emphatically of the opinion that her whole conduct, as shown by the record, and as known to at least a majority of the board when it undertook on September 20, 1932, to accept her "resignation," presented no "resignation" for their acceptance. Counsel for respondents insist that Fidler v. Board of Trustees, to which we have referred, and with which, as to much of what is said in the opinion we agree, requires an affirmation of the judgment here. The petitioner in that case, who occupied the status of a permanent teacher, had for the school year 1928–29 been employed as a vice principal at a salary of $2,900. The board of trustees, having decided to assign to him duties for 1929–30 that only involved teaching offered him a contract for that year at $2,500. This led to correspondence back and forth, including a letter under date of June 17, 1929, in which he informed the board that "I have refused your offer of contract," referring to grounds set out in a previous letter in which he had disputed the board's right to reduce his salary. He went on to say, however, that he maintained his right to continue as a permanent teacher under his former salary. At the beginning of the school year he presented himself but was assigned no duties. The board thereupon wrote him asking him to teach, reiterating its willingness to pay him the $2,500 salary, and saying that unless he commenced teaching it would be forced to conclude that he refused employment. He replied that he was ready to teach, that no teaching had been assigned him, but that he should "expect to be paid the sum to which I am legally entitled, whether it be twenty-five hundred dollars or twenty-nine hundred dollars."

The court said of the correspondence: "We think these letters manifest a refusal on the part of appellant to accept the offered contract. Conceding, however, only for the purpose of discussion, appellant's contention, that he was willing to work for $2,500 per year, leaving the amount of his compensation to be determined later by litigation, or otherwise, to be meritorious, it is met and overcome by conflicting evidence." This conflicting evidence was, according to the opinion, a stipulation that witnesses would testify that by reason of petitioner's *refusal* to accept the precise terms of the board's offer "and by reason of the position and demands of petitioner," the board made other arrangements for the performance of the duties assigned to the petitioner, and that, therefore, its offer to him was deemed finally rejected by him and no longer subject to acceptance. The court de-

clared itself bound by the trial court's determination of this conflict in the evidence and concluded that there must be held to have been a "refusal to teach" which was "of course tantamount to a resignation." No hearing in the Supreme Court was requested. We shall not conceal our inability to see the conflict in the evidence deemed by the court to exist nor our view that the result reached was an unsatisfactory conclusion to an opinion otherwise luminous and instructive.

[7] Without attempting to draw any tenuous distinctions, we can only say that we do not subscribe to the view that a teacher is bound to abandon views held in good faith as to the compensation to which he or she is entitled, on pain of forfeiture of permanency of status, and that, in the case at bar, it is abundantly manifest that there was, on petitioner's part, no "refusal to teach" and no "resignation" for the board to consider.

The judgment is reversed.

We concur: BARNARD, P. J.; JENNINGS, J.



139 Cal.App. 737

NEWTON et ux. v. S. A. GERRARD CO. et al.

Civ. 4977.

District Court of Appeal, Third District, California.

July 17, 1934.

1. Factors ⇐47(2)

Where vineyard was leased for $2,000 rent plus half of profit from sale of crop and lessee had exclusive right to harvest and market crop, though lessors agreed that crop might be marketed in name of one of lessors, title to crop *held* in lessee, so that marketing corporation, in selling grapes, did not act as lessors' factor, held no factor's lien on part of proceeds belonging to lessors, and could not charge against lessors advances made to lessee (Civ. Code, §§ 1926, 2026, 3053).

2. Landlord and tenant ⇐330(1)

Under lease of vineyard whereby lessee agreed to pay $2,000 rent plus half of profit, lessee *held* required to cultivate and farm premises and harvest crop at own expense, so that marketing corporation had no authority to charge lessors with any portion of deficit which accrued on account of marketing of crop.

3. Landlord and tenant ⇐330(1)

Where vineyard lease required lessee, in addition to $2,000 rent, to pay to lessors half of profit after deducting agreed cost of farming and marketing, lessors did not, by signing subsequent agreement to postpone final division of returns from sale of crop, assume liability for lessee's indebtedness to marketing corporation, or authorize marketing corporation to pay any portion thereof from proceeds of sale of crop to be produced by successor lessee under separate lease for next season.

4. Landlord and tenant ⇐321

Where vineyard lease required lessee to pay $2,000 rent plus half of net profit after deducting agreed cost of farming and marketing, subsequent written instrument purporting to postpone division of returns between lessors and lessee *held* without consideration and void.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by C. L. Newton and wife against the S. A. Gerrard Company, Tom M. Watanuki, and another. From a judgment for plaintiffs jointly against named defendants, defendant first named appeals.

Affirmed.

Hinsdale, Otis & Johnson, of Sacramento, for appellant.

Glenn West, of Lodi, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

In this action for money had and received judgment was rendered jointly against the S. A. Gerrard Company and Tom M. Watanuki. From this judgment the company only has appealed. A motion for nonsuit was granted with respect to the defendant H. M. Young.

The appellant, a fruit marketing company, concedes that the money which is involved in this suit was received by it from the proceeds of the sale of a grape crop produced from the vineyard of plaintiffs in 1931 while it was under lease to the defendant Watanuki and that the money belongs to plaintiffs as rental for the premises unless the marketing company, as plaintiffs' factor for the purpose of selling the grapes, was entitled to apply the funds under the provisions of section 3053 of the Civil Code to the satisfaction of a debt of plaintiffs alleged to have been incurred on account of money advanced

by appellant for cultivating, harvesting, and marketing a crop of grapes from the same premises in 1930 while the vineyard was leased to Young. The respondents assert that the title to the crop of grapes for the year 1930 vested in Young as the lessee of the premises, that the appellant was not their factor, and that no indebtedness was incurred against them on account of money advanced by the appellant to Young for cultivating, harvesting, or marketing his crop of grapes.

The record contains a conflict of evidence, but the following statement of facts is adequately supported: The appellant is a fruit marketing corporation organized under the laws of Ohio and authorized to conduct its business in the state of California. The defendant H. M. Young was a representative of the corporation in the county of San Joaquin. The plaintiffs are husband and wife. They own a seventy-acre vineyard near Woodbridge. In November, 1929, they executed a written lease of this property to H. M. Young for the ensuing season in consideration of the payment of $2,000 cash rental due prior to October 25, 1930, and, in addition thereto, one-half of the remaining profit derived from the sale of the crop of grapes after deducting therefrom the agreed cost of cultivating, harvesting, and marketing the crop in the sum of $2,000. It was specified that the balance of the rental in excess of the original $2,000 payment should be made "as soon as all returns are received." The lessee Young immediately took possession of the land and cultivated and harvested the crop of grapes. The plaintiffs had nothing to do with the producing or marketing of the crop. The crop of grapes was marketed by the appellant pursuant to the terms of the lease, which provided in that regard: "It is mutually agreed that the crop from the above vineyard shall be marketed with The S. A. Gerrard Co., in the name of C. L. Newton, and that the parties hereto do hereby authorize The S. A. Gerrard Co. to make the payments and divisions as above mentioned."

This lease was prepared by Young, who made all arrangements with the appellant for the money which it advanced for the cultivation and harvesting of the crop. Young paid the plaintiffs the specified sum of $2,000 on account of rent. The crop was sold by the appellant at a loss of $3,684.52. Without plaintiff's knowledge or consent the appellant charged the "Newton Vineyard" with a deficit of $1,842.26.

In January, 1931, Young, who was still employed with the appellant corporation, notified plaintiffs he would not renew the lease for another season, but did procure another lessee in the person of the defendant Tom M. Watanuki, with whom the plaintiffs subsequently executed another written lease of the same premises for the season of 1931 in substantially the same language which was employed in the Young lease, except that the final clause of the Watanuki lease, which authorized the appellant to market the crop of grapes, contained this language: "It is further agreed that the party of the second part will perform all work on the place in the manner specified and directed by The S. A. Gerrard Co."

At the time the Watanuki lease was executed, without further consideration the following written agreement was signed by C. L. Newton and H. M. Young:

"It is agreed that lease, for 1930, between C. L. Newton and H. M. Young, shall be modified as follows: Wherein it is agreed in lease that a certain division of returns shall be made at the end of 1930 season, same is hereby modified, so the division shall be made at the end of the 1931 season, as far as C. L. Newton part is concerned; but that H. M. Young will settle his part in cash; and that the new lease shall run between C. L. Newton and Tom M. Watanuki.

"Signed this 20th day of January, 1931.

"(Signed) C. L. Newton

"(Signed) H. M. Young."

All of these instruments were prepared by Young, whose apparent motive in securing the leases was to obtain business for the appellant in marketing the crops of grapes. The crop of 1931 was marketed by the appellant for a net profit of $3,725.10, after paying plaintiffs the specified sum of $2,000 and all costs of cultivation and harvesting. The balance of the proceeds of the sale of the crop of 1931 was credited to the alleged indebtedness of the plaintiffs which had been charged to them by appellant without their knowledge or consent on account of the money which had been advanced to Young in the previous year for cultivating and harvesting his crop of grapes.

The plaintiffs brought this suit against both lessees and the marketing company for money had and received. The case was tried by the court sitting without a jury. Upon motion the cause was dismissed against H. M. Young. Findings were adopted favorable to the plaintiff on all the material issues. A judgment for $1,127.82 was accordingly rendered jointly against the appellant and Tom

M. Watanuki. The marketing corporation only has appealed. The problems which are involved on this appeal must be determined by a construction of the language of the Young lease and the written memorandum which was signed by Newton and Young January 20, 1931.

[1] By the terms of the lease from plaintiffs to Young, the title to the grape crop which was produced on the demised premises in the year 1930 passed to the lessee who had the exclusive right to harvest and market the fruit. Vallejo & Northern R. R. Co. v. Reed Orchard Co., 32 Cal. App. 347, 162 P. 914; 15 Cal. Jur. 671, § 80; section 1926, Civ. Code. Since, by virtue of the lease, the title to the grape crop for the year 1930 belonged exclusively to Young, the plaintiffs owned no interest therein which they could authorize the fruit marketing corporation to sell for them as their factor. Section 2026 of the Civil Code defines the term factor as "an agent who, in the pursuit of an independent calling, is employed by another to sell property for him, and is vested by the latter with the possession or control of the property, or authorized to receive payment therefor from the purchaser." No title to the crop of grapes was reserved in the lessors by the terms of the lease. The plaintiffs merely agreed that the fruit might "be marketed with The S. A. Gerrard Co., in the name of C. L. Newton." After the execution of that lease the plaintiffs had no property rights in the crop of grapes which they could authorize the appellant to sell for them, and they had no right of possession of that crop with which they could vest the appellant. In the sale of that crop of grapes the appellant therefore did not act as the factor of the plaintiffs.

It follows that the appellant therefore held no factor's lien upon the money in its hands which belonged to the plaintiffs, under the provisions of section 3053 of the Civil Code.

[2] The appellant had no legal right or authority to charge to an account against the plaintiffs any money which it advanced at the request of the lessee Young as costs incurred by him for cultivating, harvesting or marketing his crop of grapes. By the specific terms of the lease to Young, the plaintiffs demised and farm-let to him their seventy-acre vineyard at Woodbridge for the season of 1930. The lessee was granted the exclusive right to the property during the term of the lease "for his sole and proper use and benefit for and during the said term aforesaid, together with all the tenements and hereditaments hereunto appertaining." The lease also provides that the lessee shall "till and in all respects cultivate the premises above mentioned, during the term of this lease in a good and farmerlike manner." It was therefore the duty of the lessee to cultivate and farm the premises and harvest the crop at his own expense. No part of the farming of the vineyard or the harvesting of the crop was imposed upon the lessors. In consideration for the execution of this lease it was provided that the plaintiffs should be paid an aggregate sum of $2,000 as rental, prior to October 25, 1930. In addition to that definite sum of $2,000 which was to be paid as rent, the lease further provides in that regard: "Then after deducting the above payments, and all expenses necessary for the proper harvesting, shooks, materials, etc., and marketing of the said crop and the sum of Two Thousand Dollars ($2,000.00) (being the amount agreed upon for spring and summer work) has been deducted, the sum remaining over, if any, is to be divided between the parties hereto on a fifty-fifty basis, or each sharing alike. The payments for the split to be determined as soon as all returns are received."

There appears to be no ambiguity in the foregoing language. Clearly the lessors assumed no responsibility for any cost which might be incurred in cultivating, farming, harvesting, or marketing the crop of grapes. The plaintiffs were to receive the definite sum of $2,000 as rent regardless of the size of the crop produced or the proceeds received upon the sale thereof. In addition to that specific sum, the plaintiffs were also to receive as a further payment of rent one-half of the remaining net proceeds of sale, if any such existed, after "harvesting, shooks, materials, etc., and marketing of the said crop," were first paid by the lessee, which costs and expenses were stipulated and agreed to in the aggregate sum of $2,000. The language above quoted does not mean that the lessors assumed the liability of either incurring or paying such costs. It merely means that the net balance of the proceeds of sale of the fruit, after $2,000 is deducted therefrom, as the agreed cost of farming and marketing the fruit, shall be added as rental to the first definite sum of $2,000 which was specified.

Mr. Young was not authorized by the plaintiff to incur any expenses for cultivating, harvesting, or marketing the crop which should become their obligation. No money was advanced by the appellant with the authorization of the plaintiffs. The indebtedness

which was incurred on that account was solely at the request of Young. The appellants therefore had no authority to charge the "Newton Vineyard" account with any portion of the deficit which accrued on account of the marketing of the crop of 1930, so as to obligate the plaintiffs therefor.

[3, 4] Nor does the signing by C. L. Newton of the subsequent written agreement to postpone the final division of returns from the sale of that crop purport to assume liability on the part of plaintiffs for any such indebtedness, or authorize the appellant to pay any portion thereof from the proceeds of the future sale of the crop which was to be produced by Watanuki under his separate lease of the premises in the year 1931. In fact it appears that the plaintiffs did not know that any such charge had been made against them. The lease to Watanuki was separate and distinct from the Young lease. It had no connection therewith. The first lease to Young was terminated. Mr. Young had informed the plaintiffs he would not renew his lease. There was no profit from the Young lease from which a division of proceeds could be made. It is, however, true that the document dated January 20, 1931, which is relied upon by the appellant, and which was prepared by Young, stated that "It is agreed that lease for 1930, between C. L. Newton and H. M. Young, shall be modified as follows: Wherein it is agreed in lease that a certain division of returns shall be made at the end of 1930 season, same is hereby modified, so the division shall be made at the end of the 1931 season." This language merely purports to defer the time of settling the division of returns provided for in the Young lease. There were no such proceeds to divide. It does not appear that Young had any interest in the Watanuki lease. He secured no share in the profits to be derived from the sale of grapes in 1931 under the Watanuki lease. The last-mentioned instrument contains no language authorizing the appellant to apply the proceeds of the sale of grapes under the Watanuki lease to the payment of an obligation incurred by Young for farming the land under his own lease. Moreover, the written instrument purporting to defer the "division of returns" between Newton and Young was without consideration and therefore void.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

In re EMERSON'S ESTATE.

HOMEOPATHIC FOUNDATION OF CALIFORNIA v. SULLIVAN et al.

BOARD OF TRUSTEES OF LELAND STANFORD JUNIOR UNIVERSITY v. SAME.

Civ. 9414.

District Court of Appeal, First District, Division 1, California.

July 6, 1934.

As Modified on Denial of Rehearing Aug. 4, 1934.

Hearing Denied by Supreme Court Sept. 4, 1934.

1. Wills ⇐439

In construing will, testator's intention controls.

2. Wills ⇐440

Testator's intent must be ascertained from will itself.

3. Wills ⇐684(2)

Codicil to will *held* to show testatrix' intent that persons to whom it directed monthly payments of income from trust property during their lives, without providing for vesting of corpus until after their deaths, should be maintained and supported, regardless of source of funds therefor, so as to require payment of annuities from corpus where income was insufficient.

The codicil devised and bequeathed residue of estate to executors and bank in trust to pay stated monthly installments of income to named persons during their lives and balance on mortgage and after payment thereof to various institutions annually, provided that trust should cease and corpus of estate be distributed to such institutions on annuitants' deaths, directed executors to pay annuitants such monthly sums during probate of estate for their maintenance and support, and provided that realty constituting bulk of estate might be sold and net proceeds invested in government bonds so that income would always be paid monthly to annuitants.

4. Trusts ⇐267

Probate court order, requiring executors to pay delinquent installments of income from trust property to named annuitants out of corpus of estate, *held* not appealable (Probate Code, § 1240).

5. Trusts ⇐267

Appeal from order, requiring executors to pay delinquent installments of income from trust property to named annuitants from corpus of estate, decided on merits,

though order was not appealable, since question would be raised following distribution (Probate Code, § 1240).

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

In the matter of the estate of Mary T. Emerson, deceased. From an order granting the petition of Virginia Weill to require John A. Sullivan and others, executors, to pay petitioner and another delinquent installments of income from the residue of the estate, devised and bequeathed to the executors and the Bank of California in trust, out of the corpus of the estate, and requiring the executors to apply to the bank for an increased loan to pay annuities and other obligations of the estate, the Homeopathic Foundation of California and the Board of Trustees of the Leland Stanford Junior University appeal.

Affirmed.

John L. McNab and William H. Jordan, both of San Francisco, for appellant Homeopathic Foundation of California.

George J. Presley, of San Francisco, for appellant Board of Trustees of Leland Stanford University.

Robert Littler, of San Francisco, for appellant Homeopathic Foundation of California.

Charles A. Christin, of San Francisco, for respondent executors.

Percy E. Towne, of San Francisco, for respondent Virginia Weill.

Cooley, Crowley & Supple, of San Francisco, for respondent Carlo Serbolisca.

TYLER, Presiding Justice.

The question involved on this appeal is whether or not, under the will of the decedent, sums provided therein for the support of certain beneficiaries are chargeable against the corpus of the trust estate; the income therefrom being insufficient for the purpose.

Decedent died February 12, 1930, leaving a will dated December 4, 1929, and a codicil thereto dated January 31, 1930. The will and codicil were admitted to probate, and John A. Sullivan, Carlo Serbolisca, and George E. Lask were appointed executors thereof. By her will decedent bequeathed general legacies aggregating $15,500 to certain associations and employees. The residue and remainder of her estate was devised and bequeathed to trustees in trust for certain purposes. This original provision was revised under the codicil referred to. By the terms of the codicil decedent devised and bequeathed the residue to the persons named as her executors and to the Bank of California in trust as follows: To receive the interest and income therefrom and to pay the same: (1) To Carlo Serbolisca, $1,000 per month during his natural life; (2) to Virginia Weill, $100 per month during her natural life; (3) the balance of the net income to be paid annually in reduction of a mortgage held by the Hibernia Savings & Loan Society on certain real property; (4) upon payment of said mortgage the balance of the net income to be paid various institutions annually in specific proportions. The codicil further provided that upon the death of said Carlo Serbolisca and Virginia Weill the trust was to cease and the corpus of the estate was to be distributed to certain institutions in specified proportions. The codicil also contained a direction to the executors to pay to Carlo Serbolisca $1,000 per month and to Virginia Weill $100 "during the probate of my estate, which allowances are for their maintenance and support." The will provided that certain real property, which constituted the bulk of the estate, might be sold and the net proceeds invested in United States government bonds, so that the income would always be paid monthly to Serbolisca and Virginia Weill. Nothing was done by the executors under their authority to sell. The value of the property decreased steadily from the date of the death of the testatrix; rents declined, vacancies increased, and the income diminished to the extent that it was no more than sufficient to pay taxes and the interest on the mortgage. The monthly payments to the annuitants could not be paid out of the income, and Virginia Weill filed a petition for an order requiring the executors to pay the delinquent installments out of the corpus of the estate. The probate court granted the petition and made an order requiring the executors to make application to the bank for an increased loan not exceeding $10,000 for the purpose of securing funds to pay the annuities and other obligations of the estate. The amount of the mortgage held by the bank was the sum of $90,000. The bank refused to grant the increased loan, and in consequence no payment has been made to the annuitants. Nevertheless, appellant, a residuary legatee, has appealed from the order.

It is its claim that the annuities are gifts of income only, and that it was not the intention of the testatrix to invade the corpus of the trust estate to supply any deficiency of the net income to pay these annuities. In support of this contention, it is argued that there is no word or phrase indicating any intention to make their payment a charge upon the general trust property itself, or a purpose that the trustees should pay at all events, regardless of the sufficiency of the net income; but, on the contrary, the language of the will and the character of the dispositions embraced in it not only negative an intent that corpus might be used, but establish an intent that it should not be so used. In this connection appellant draws our attention to the fact the will provides that, after the payment of the annuities, the net income is to be paid to certain named institutions, and the corpus is not to be disposed of until after the death of such annuitants. The fact that there is a specific devise over without limitation is stressed as indicating that the corpus was not to be charged. We are cited to several cases in support of the construction contended for by appellant.

[1-3] In the construction of wills, the intention of the testator controls, and, as it is admitted, citation of authority is seldom useful, as the intent of a testator is to be ascertained from the will itself. It is perfectly manifest from a reading of the will and codicil that it was the main and primary concern of the testatrix to take care of the two annuitants during their respective lives. The share of the remaindermen was postponed until the annuitants had been cared for during their lives. It is clear from a reading of the will and codicil that the testatrix was more solicitous about the welfare of the two annuitants than she was of the remaindermen. Her intent in this connection is plainly indicated by the terms of the codicil, for her executors were directed to pay such annuitants the amounts provided, during the probate of her estate, for their maintenance and support. There is no provision for the enjoyment of the corpus by the remaindermen until after both these preferred annuitants are dead. In short, the entire instrument shows conclusively the intent of the testatrix was that the annuitants should be maintained and supported, regardless of the source from which the funds for that purpose should come. There was no intent indicated to keep the corpus intact for the remaindermen. Comstock v. Herron (C. C. A.) 55 F. 803; Mulcahy v. Johnson, 80 Colo. 499, 252 P. 816. The construction placed upon the instrument by the learned trial court is in our opinion correct.

[4, 5] Respondents raise the point that the appeal is not well taken, for the reason the order is not appealable, as it is not one set forth in section 1240 of the Probate Code. While we are of the opinion that there is merit in the objection, the question would be raised following distribution. For this reason we have decided the appeal on its merits.

The order is affirmed.

We concur: CASHIN, J.; KNIGHT, J.



GILLIS et al. v. PAN AMERICAN WESTERN PETROLEUM CO. et al. *

Civ. 5104.

District Court of Appeal, Third District, California.

July 16, 1934.

Hearing Granted by Supreme Court Sept. 13, 1934.

I. Licenses ⇨39

Complaint for fraud of foreign corporation and its directors inducing plaintiffs to enter into contract to buy stock of corporation which had no permit to sell as required by law *held* to state cause of action (St. 1917, p. 673, as amended; Code Civ. Proc. § 338, subd. 4).

Complaint alleged that individual defendants caused defendant corporation to be incorporated under the laws of Delaware with the plan of taking title to certain California property and to there conduct all of its business; that this was done to evade the Corporate Securities Act of California; that individual defendants were directors of corporation; that corporation, at meetings of its board of directors, ordered issued certain shares of stock and specified that stock be sold in California; that specific number of shares were sold to plaintiffs for specific sum on certain date; that corporation had no permit to sell stock as required by law; that individual directors, with knowledge thereof, authorized and aided in issuance and sale of stock; that stock bought by plaintiffs was void; that plain-

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 44 P.2d 311.

tiffs did not become aware of lack of compliance with Securities Act until certain date and until then no condition existed to put them on inquiry; that, having become aware thereof, plaintiffs immediately made inquiry; that until then they had relied implicitly upon genuineness of stocks; that plaintiffs lost their money by reason of void acts of defendants; and that there was no consideration for money paid by plaintiffs, recovery of which was prayed.

2. Pleading ⇐214(1)
On demurrer to complaint, its allegations must be taken as true.

3. Licenses ⇐39
Ordinarily, stock issued by foreign corporation without permit as required by law is not void, but stock is void if foreign corporation was organized and issued stock for purpose of evading the law (St. 1917, p. 673, as amended).

4. Licenses ⇐39
Directors, who participated in transactions resulting in completed sales of stock of foreign corporation without permit as required by law, are liable to buyers for money paid (St. 1917, p. 680, § 14, as amended).

5. Licenses ⇐39
In absence of direct showing on face of complaint to the contrary, no presumption exists that plaintiffs had disposed of their stock at time of filing of complaint for fraud in sale thereof by corporation without permit as required by law (St. 1917, p. 673, as amended).

6. Pleading ⇐236(1)
Allowance of amendments to complaint is discretionary with trial judge.

7. Pleading ⇐236(1)
Order denying plaintiffs right to file third amended complaint which was not properly before trial court *held* not abuse of its discretion.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by Hector Gillis and another against the Pan American Western Petroleum Company and others. From a judgment for defendants, plaintiffs appeal.

Reversed and remanded, with directions.

W. A. Alderson and L. Frank Ottofy, both of Los Angeles, for appellants.

Frank J. Hogan and Wellborn & Wellborn, all of Los Angeles, for respondents.

GANS, Justice pro tem., delivered the opinion of the court.

The appeal is from a judgment entered after sustaining a demurrer to the second amended complaint without leave to amend, and an order denying a motion to vacate such order sustaining the demurrer, and denying a motion for leave to file a third amended complaint.

[1] The second amended complaint alleges the following matters:

The corporate existence of one defendant, and the status of the other parties, and alleging the corporation was a Delaware corporation.

That the individual defendants caused the said corporation to be incorporated under the laws of the state of Delaware for the purpose and with the plan that it should take title to certain California property and that it should conduct all of its business affairs within the state of California with its principal place of business at Los Angeles; and that it has done its business in said city and state.

That all of this was done to evade the laws of California, especially the Corporate Securities Act of said state (St. 1917, p. 673, as amended). That the individual directors are and were directors of said corporation until after the issuance of the stocks involved in said action.

That having opened its principal place of business as aforesaid, said corporation at meetings of its board of directors in the state of California, regularly and legally held, ordered issued certain shares of its capital stock, and specified that said shares of stock, as well as other shares of said corporation stock, be sold and the same were sold, in the state of California; and certain shares of said corporation stock were ordered issued and were issued and sold to plaintiffs in the state of California; that the shares of said corporation stock so ordered to be issued and issued and sold to and purchased by the plaintiffs were shares of said "Class B" stock; then followed an itemized statement of the date of sale, the number of shares and the amount paid by plaintiffs. It further alleges: "That the total number of shares so purchased by the plaintiffs from said Pan American Western Petroleum Company, by and through its said directors as aforesaid, was twenty-two hundred shares; that the total amount which the plaintiffs paid in cash for said shares of stock was and is the sum of $3,375.50."

That at the times of the purchase of said shares of stock by plaintiffs, said corporation had not applied to the commissioner of corporations of California for a permit authorizing it to issue any of its shares of stock and had wholly failed to comply with the provisions of the Corporate Securities Act, and there had not been issued to it any such permit to sell any of its shares of stock.

That the certificates issued to the plaintiffs for said shares of stock purchased by them as aforesaid, as well as said shares of stock, were, at all times herein alleged, and are void and worthless and of no value.

That all of the individual directors, as officers and agents of the corporation and as individuals, knowingly authorized, directed, and aided in the issuance and sale of stock aforesaid, and knew then that the Corporation Commissioner had not issued any permit for the issuance of any of said shares.

That plaintiffs did not become aware of the foregoing facts, as to lack of permit or compliance with the Corporate Securities Act, until in October, 1930, and until then no condition existed to put them on inquiry as to such facts; that on or about October 10, 1930, they became informed of such lack of permit, etc., by reading an article in the newspapers; and then they made inquiry and learned the facts alleged. That up to that time they had relied implicitly upon the genuineness of the stocks and believed that a permit had issued.

That by reason of the void and illegal acts of defendants, plaintiffs were caused to lose their money; that there was no consideration for the money paid by them, and they have been damaged, and ask judgment in the full sum paid, with interest and costs.

[2] The principal question on this appeal is whether or not the demurrer was properly sustained to the second amended complaint. The substance of this pleading is given above at some length. The transcript on appeal sets up all of the prior pleadings in this case, but as to the allegations of the prior complaints we are not concerned. We are confronted by this second amended complaint alone and it must stand or fall as it is written, and its allegations must be taken as true.

[3] It is first claimed that this complaint states no cause of action because the appellants suffered no damage because the stock they purchased was valid and not void. Then it is asserted that the issuance of stock is an internal affair of a corporation and that the state will not interfere in such affairs of a foreign corporation to the extent of declaring stock issued by it void because said corporation had not procured authority from the Corporation Commissioner of California to issue the stock. Ordinarily such would be the rule, but in a case such as this where the whole organization and all the acts are made and done for the purpose of evading the provisions of the Corporate Securities Act, neither state nor court should hesitate to declare stock issued under such circumstances void.

[4] The second point against this complaint urged by respondent is that the pleading states no cause of action because the suit is on contract alone and not on tort, and the individual defendants (respondents) were not parties to the contract, and received no money from appellants. The directors and all persons who participate in the transactions resulting in completed sales without a permit contrary to law, including the corporation, are liable to the purchaser, and the money paid may be recovered. Corporate Securities Act, § 14 (St. 1917, p. 680, § 14, as amended); Minor v. Baldridge, 123 Cal. 187, 55 P. 783.

The third point is made that this complaint states no cause of action because no actionable fraud is pleaded.

The allegations charging violations of the Corporate Securities Act, sales without a permit, or even application for one, within the state of California, sufficiently allege fraud.

[5] It is also contended that the second amended complaint does not state facts sufficient to state a cause of action in that it does not allege that appellants were entitled to relief as of the time of filing of said complaint. This point rests chiefly upon a statement contained in a former pleading of this cause. That statement is no part of the present pleading, and there is nothing to indicate on the face of the second amended complaint that the plaintiffs were not entitled to relief as of the time it was filed, and in the absence of direct showing on the face of the complaint to the contrary, no presumption that plaintiffs had disposed of or did not own the stock they bought at the time of filing can be invoked.

It is next urged that the statute of limitations has run and the cause of action is barred. That not only must the pleader state when the discovery of fraud is made, but why it was not or could not have been made within the 3-year period. Code Civ. Proc. § 338, subd. 4; Lady Washington C. Co. v. Wood, 113 Cal. 482, 45 P. 809; Victor Oil Co. v. Drum, 184 Cal. 226, 193 P. 243; Montgomery v. Peterson, 27 Cal. App. 671, 151 P. 23; Se-

curity Commercial, etc., Bank v. Seitz, 43 Cal. App. 353, 185 P. 188.

There was no obligation upon appellants to make inquiry under the law, and a prudent person would not have been put upon inquiry, because the means of knowledge existed or were open to them. Nothing had occurred before to excite their suspicion or put them on inquiry. The matters of special demurrer for uncertainty are not sufficient to warrant the order sustaining the demurrer, and the demurrer should have been overruled. MacDonald v. Reich & Lievre, Inc., 100 Cal. App. 736, 281 P. 106; Boss v. Silent Drama Syn., 82 Cal. App. 109, 255 P. 225; 26 Cor. Jur. 1120.

The next point made against the pleading is that no violation of the Corporate Securities Act is shown, and hence appellants suffered no damage. Stated otherwise, the claim is that this complaint does not allege directly that the appellants purchased any stock from the defendants in violation of the Corporate Securities Act.

It may well be claimed that this complaint does state its facts in a devious and indirect way that gives rise to speculation as to why a direct and clear allegation as to the sale and purchase is not made. Examining the complaint, however, the following statements appear therein:

"That the corporation ordered issued certain shares of stock including those enumerated as purchased by the appellants; that said shares were ordered issued and sold and were sold within the state of California, and were ordered issued and were issued to the plaintiffs in the state of California; that said shares so ordered issued and sold to and purchased by appellants were class 'B' stocks, and purchased by appellants in lots as is alleged on different dates and in different amounts; that the total number of shares so purchased by plaintiffs from the corporation by and through its directors was 2200 shares.

"Paragraph IX alleges that the individual defendants as agents and officers of the corporation and as individuals knowingly authorized, directed and aided in the issuance and sale of all of said shares purchased by appellants."

This language, though devious, seems sufficiently to state that the stocks were issued and sold within the state of California by the defendant corporation aided by and through its directors, the individual defendants, to the plaintiffs, appellants herein. If so, there was violation of the Corporate Securities Act.

[6, 7] There is really no occasion to make comment upon the remaining points of appeal, namely, from the order denying appellants the right to file a third amended complaint. But disregarding the fact that this is rather a moot question now, it may be said that the right to allow further amendments is discretionary with the trial judge, and, having granted two permissions to amend, it cannot be said this discretion was abused, but, further, and still stronger, is the fact that the proposed third amended complaint was never properly before the court at the time said order was made. This disposes of the claim of abuse of discretion. The court cannot be held to have abused its discretion when it had no means of knowing what the proposed pleading would contain, or whether it could or could not state a cause of action.

The judgment appealed from is reversed, and the cause remanded, and the trial court is hereby directed to overrule the demurrer to the plaintiffs' second amended complaint with leave to defendants to answer within such reasonable time as may be fixed if so advised.

We concur: PULLEN, P. J.; PLUMMER, J.



139 Cal.App. 517

HAYWARD LUMBER & INVESTMENT CO. v. LYDERS.

Civ. 1140.

District Court of Appeal, Fourth District, California.

July 2, 1934.

Rehearing Denied Aug. 1, 1934.

Hearing Denied by Supreme Court Aug. 30, 1934.

1. Principal and agent ⇐123(8)

Evidence *held* to support judgment for materialman against landowner on quantum valebat for materials furnished for house on such land ordered by owner's agent.

2. Contracts ⇐76

Circumstance that promise to pay was based on what promisor recognized as moral obligation would amount to consideration (Civ. Code, § 1606).

3. Insurance ⇐115(2)

Materialman furnishing materials for house to landowner's agent acquired valid lien on structure for value of materials and had

insurable interest in such structure when time for filing claim of lien had not expired (Code Civ. Proc. § 1183; Civ. Code, §§ 1559, 2551, 2588).

4. Insurance ⇐115(2), 123

Holder of mechanic's or materialman's lien has insurable interest in building, and he does not lose insurance by discontinuing prosecution of lien after building has burned.

5. Insurance ⇐531

In provision of fire policy for loss payable to mortgagee "as his interest may appear," word "interest" is not mortgagee's interest in property, but interest or amount which mortgagor has appointed him to collect from proceeds of policy.

[Ed. Note.—For other definitions of "Interest," see Words & Phrases.]

6. Money received ⇐15

Action for money had and received, though technically action at law, proceeds on equitable principles.

7. Insurance ⇐580(1)

Landowner *held* not entitled to accounting of proceeds of fire policy taken out on building by materialman without landowner's knowledge, where landowner waived right thereto by commencement of action on another policy under which he warranted that building was not otherwise insured, after refusal to make proof of loss under materialman's policy.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by the Hayward Lumber & Investment Company against Eric Lyders. Judgment for plaintiff, and defendant appeals.

Affirmed.

Glassford & Smith, of El Centro, and G. H. Van Harvey, of San Francisco, for appellant.

Le Roy B. Lorenz, of Los Angeles, for respondent.

HAINES, Justice pro tem.

This action was commenced by the respondent, Hayward Lumber & Investment Company, as plaintiff, against appellant, Eric Lyders, one H. N. Stalnaker, and others, as defendants. The complaint embraced two counts, one alleging a materialmen's lien for $1,853.72 on a certain structure and the real property on which it was situate belonging to appellant, Lyders, in Imperial county, and the other seeking a recovery of the same amount on a quantum valebat for materials alleged to have been furnished to the said Stalnaker and said Lyders upon their orders. Lyders answered admitting his ownership of the land, but denying everything else alleged and later filed a supplemental answer and counterclaim alleging that pending the action the respondent company had without his knowledge insured for $2,000 the structure, referred to in its complaint, with the American Insurance Company of Newark, N. J., under a policy which made any loss payable to appellant and to respondent "under the provisions of the said policy commonly known as a mortgage clause," though respondent company had never in fact any insurable interest in the structure, that the structure had burned and that respondent company had made proof of loss and collected the $2,000 for which it had not accounted to appellant. In this pleading appellant alleges that he ratifies respondent's action in taking out the insurance and demands that respondent pay him the proceeds thereof.

Upon the trial the court found that respondent had abandoned the first count of its complaint and on the remaining issues found that appellant, through Stalnaker as his agent, some time prior to March 5, 1928, commenced the erection on his land, described in the complaint, of a ranchhouse which he completed on or about October 1, 1928; that on or about March 5, 1928, appellant contracted with respondent corporation to furnish building materials for said structure, agreeing to pay the current market price and reasonable value thereof; that the said materials were furnished accordingly and that their current market price and reasonable value was $1,853.72, all of which became due from appellant to respondent on or before October 10, 1928; that since the accrual of this obligation appellant several times and for valuable considerations promised to pay the same but has paid neither the whole nor any part thereof; that the building was wholly destroyed by fire on or about August 10, 1930, which was the cause of respondent's abandonment of its claim of lien, but that respondent continues to rely on its contractual right to recover from appellant the reasonable value of the materials furnished.

The court found that on October 15, 1928, respondent, without appellant's knowledge, procured said insurance in favor of appellant as owner of the property, and that there were attached to the policy and made a part thereof certain indorsements which the findings set out verbatim. The court found also that

after the destruction of the building respondent informed appellant of the existence of the policy and requested him to make proof of loss thereunder, but that appellant refused to do so and waived all rights under the policy, whereupon respondent made proof of loss thereunder and collected the $2,000 from the American Insurance Company. Then follows a finding, the meaning of which is not altogether clear, in the words following: "That thereafter, and prior to the trial of this cause, plaintiff assigned to said American Insurance Company its claim against the defendant to such extent as said or any claim may have existed in favor of said American Insurance Company as against said defendant, and that the said American Insurance Company thereafter, and prior to the trial of this action, reassigned the said claim back to the plaintiff herein, and that the said plaintiff is now the owner and holder thereof, if any claim there be; that said plaintiff elected not to rely upon said claim, or right of claim, if any there be, in this or any future action."

The court further found that respondent had an insurable interest in the structure when the policy was taken out; that appellant had made no valid ratification of respondent's action in taking out the policy; that no money had been had or received by respondent to appellant's use; that appellant was entitled to recover nothing from respondent but on the contrary respondent corporation was entitled to judgment against appellant for $1,852.33 (apparently intended to be $1,853.72) with interest. Judgment was entered accordingly, and this appeal followed.

[1] The two questions to be decided are, first, whether the evidence is sufficient to justify respondent's recovery on the quantum valebat when taken in connection with appellant's promise to pay the claim; and, second, whether the action of the trial court in respect of the insurance was right.

At all of the times here involved appellant, Lyders, resided in San Francisco. His Imperial county ranch was, during 1928, cultivated by one Stalnaker, who, at the outset, lived in Yuma. According to appellant, in January, 1928, Stalnaker wrote him that there was on the ranch some old lumber and asked him for leave to move it to another part of the land and build a shack with it, claiming that he could thereby save rent. Appellant also says that Stalnaker asked him for some help in buying materials and in building the structure which he declined to furnish. The record, however, shows that under date of February 2, 1928, he wrote Stalnaker saying, inter alia, "I agree with you that it would be well to build a house on the land in which I will help provided it is not going to run into too much money." Appellant says that in January or February, 1928, when he was on another place that he had near Welton, Ariz., an automobile drove up containing two men and two women, that some one handed him a card and claimed to represent the Hayward Lumber & Investment Company "and asked me if I didn't want to build a house there and I said 'No' and more likely I added to it I might some time build a house on the other piece of land I had on the other side of the Colorado River, and that is all that was said." He says that he knew nothing more about Stalnaker's building activities, except possibly to hear that he had gone on to build, as he had permission to do, with the old lumber, until the 5th or 6th of October, 1928, when for the first time he learned that Stalnaker had erected on his property an elaborate house and gotten materials for the same from respondent, for which Stalnaker claimed largely to have paid though he admitted still owing respondent. Appellant thereupon returned to San Francisco and on October 12, 1928, wrote respondent that he had discovered that Stalnaker had, contrary to directions, commenced the erection of a house on the land and was indebted to respondent to the extent of about $1,200 for materials purchased, adding, "I am at a loss to understand how you came to sell such a quantity of material to Mr. Stalnaker and would like you to give me a full account." Appellant does not dispute having subsequently promised respondent to pay the account (less 10 per cent.), even though he claims that it was contracted without his authority, as he did not want to have a building into which respondent's materials had gone, without paying for them, but claims that these promises were conditional on respondent's not pressing its claim until he was able to get rid of certain attachments levied on his property in some litigation brought against him by the Danish government, which had not in fact been dissolved when the instant case was tried. He further claims that these promises made after the building had been erected were without consideration.

Stalnaker, though made a defendant, was apparently never served, and his whereabouts are said to be unknown. At all events he was not present to testify at the trial. Appellant claimed to have a file of correspond-

ence with him which was by some error and accident not brought down from San Francisco nor made available at the trial.

As against appellant's account of what had occurred, one Becker, who was respondent's yard superintendent and auditor, testified that appellant called in January or February, 1928, at the Yuma office. Becker says that, in the absence of the manager, he waited on appellant; that "Mr. Lyders told me he had in mind the possible building of a house on the ranch and wanted some idea as to cost. I told him approximately what the cost would be." Then, according to Becker, Lyders suggested that he might also build a cabin on the Welton property. He quotes appellant further as saying that he had a man on the "ranch" (by which we take the reference to be to the Imperial county property) and as asking whether he could arrange to have his man get or order the materials and go ahead with the job. Next day, according to Becker, he happened to be at Welton and with respondent's Welton manager drove out to the nearby Lyders "experiment station," where another talk about building occurred, "and before we left Mr. Lyders told me he would not go ahead with any building on the Welton place but that he had decided he would go ahead on the Bard (i. e., the Imperial county) ranch; that his man was not ready to start at the time but would be in a position to start within a few weeks."

[2] One Simpkins, who had in 1928 been manager of respondent's Yuma office, testified that he had opened the account in Lyders' name "on the recommendation of Mr. Becker and Mr. Stalnaker and some correspondence that Mr. Stalnaker had from Mr. Lyders at that time." He exhibited various office copies of invoices made out in Lyders' name, said that the practice was to file the original in respondent's general office, a copy in the Yuma office, to send out another copy with the deliveries, and to send the final copy "to the customer at the end of the month with a statement." In this case he says that the invoices "were given to Stalnaker for his O. K. and then they were sent to San Francisco." He could not give the address, and said that he did not personally mail them, but that the bookkeeper was instructed to do so. The bookkeeper did not testify. Appellant positively denies having received any such invoices. Simpkins also testified to talking with appellant, probably in October. It was his impression that this was before the final deliveries were made, though the last delivery shown in the record appears to have been on October 1, and, as we saw, appellant's account would place any such conversation subsequent to October 12. In that conversation he claims that Lyders told him that, in lieu of Stalnaker, he had "arranged with Mr. Fisher to complete the building." Who Fisher was the record does not disclose, nor did he testify at the trial. It seems to us that the evidence recited, meager though it is, presented enough of a conflict to preclude us from disturbing the finding of the trial court to the effect that a contractual relation existed between appellant and respondent in consequence of which appellant became bound to pay respondent the reasonable value of the materials delivered. It is, indeed, urged that, even if Becker's testimony is accepted in its entirety, all that appellant's conversations with him amounted to were preliminary negotiations and not any definitive arrangement, and that such preliminary negotiations do not amount to a meeting of the minds, citing 13 C. J. 289, par. 100, and Fly v. Cline, 49 Cal. App. 414, 193 P. 615, Dillingham v. Dahlgren, 52 Cal. App. 322, 329, 198 P. 832, and Toms v. Hellman, 115 Cal. App. 74, 1 P.(2d) 31. Of the correctness of the principles laid down in these citations there is no question, but the trial court was at liberty to believe that appellant did get a figure on the materials at Yuma, that he did thereafter tell Becker that he had decided to go ahead with the building on the Bard (Imperial county) ranch, and that his man there would do the work, and this, coupled with the inquiry attributed to him by Becker whether it would be satisfactory for his man to do the ordering or get the materials, presented a situation wherein we cannot say that the trial court acted without evidence if it believed that Stalnaker, in thereupon proceeding to order the materials, was invested with at least the ostensible authority to do so. These conclusions obviate the necessity of considering the question of a subsequent ratification or whether appellant's later promise to pay the account was accompanied by a condition that never was fulfilled. So far as the consideration for it was concerned, the circumstance that it was based on what appellant recognized as in some sort a moral obligation, and what was one in fact, would, under section 1606, Civil Code, amount to a consideration.

[3] In respect of the insurance, the evidence showed that appellant had, without knowing that respondent had taken any out, himself insured the house for $3,500 with another company under a policy containing a

warranty that there was no other insurance carried, that after the loss an appraisement by the insurer had fixed the value of the house at $2,200, and that appellant brought an action to collect the same, which action was still pending at the time the case now before us was tried. The present record does not, of course, show what the outcome of this action was, but it is claimed in respondent's brief that appellant obtained judgment against his insurer for the $3,200, and that the judgment has been fully paid, and of this there is in appellant's briefs no denial. The record shows that the $2,000 insurance policy taken out by respondent purported to insure "E. Lyders" in that amount against loss or damage to said building by fire, but contained also this language, "Loss, if any, on buildings only, subject, however, to all the terms and conditions of this policy, payable to Hayward Lumber Company, Yuma, Ariz. (Mortgage clause attached)," and in addition to that it had attached to it an indorsement reading: "Loss, if any, subject to all the terms and conditions of this policy, is payable to Hayward Lumber Company." Nothing amounting in terms to a mortgage clause was either contained in the policy or indorsed upon it, but there was attached to it a further indorsement the body of which, in so far as it need be here noticed, read as follows:

"It is understood that H. N. Stalnaker (hereinafter termed Vendee) has an interest in the within described property by virtue of contract of sale from E. Lyders (hereinafter termed Vendor).

"If loss under this policy be payable to a mortgagee, trustee or beneficiary under deed of trust, the proceeds of this policy shall be first applied to the payment of such payee's interest, and the balance, if any, subject to all the terms and conditions of this policy, shall be payable to said vendor and/or said vendee in the manner hereinafter provided in paragraphs designated 'First' and 'Second' hereof. If this policy be not payable to a mortgagee, trustee or beneficiary under deed of trust, the proceeds of this policy, subject to all its terms and conditions, shall be payable to said vendor and/or said vendee as follows:

"First: To said Vendor, to an amount not exceeding the balance unpaid, at the time of loss, upon the contract of sale above referred to; and

"Second: The balance, if any, to said Vendee.

"Provided always, however, that in no event shall any of the above payments, or the aggregate thereof, exceed the amount for which this policy is written, or the amount for which this company may be liable on any loss thereunder; and provided further, that if at the time of any loss there be other insurance, whether valid or not, upon the within described property, this company shall not be liable under this policy for a greater proportion of any loss on said property, than the amount insured by this policy bears to the entire insurance covering such property, issued to or held by any party or parties having an insurable interest therein as vendor, vendee, mortgagee, trustee or beneficiary under deed of trust."

This policy also contained a stipulation that, unless otherwise provided by agreement indorsed upon or added to it, it should be void "if the insured now has or shall procure any other insurance whether valid or not on property covered in whole or in part by this policy." There is no evidence in the record that Stalnaker ever in fact contracted to buy appellant's land. It was after the present action had been commenced that the house burned. Thereupon respondent wired that it held the $2,000 insurance policy and requested appellant to make proof of loss thereunder, to which appellant replied that he could not do so by reason of holding the $3,500 policy wherein he had warranted that the building was not otherwise insured, but suggesting that respondent as the holder of an insurable interest do so, and that the matter be then taken up with the idea of obtaining some equitable adjustment of the loss as between the two insurers. Respondent thereupon made the proof of loss and collected the $2,000 from the American Insurance Company, which, treating itself as, in consequence, subrogated to respondent's rights as against appellant, assigned for collection its assumed interest in the cause of action here sued upon and in the instant case to respondent.

In the circumstances recited appellant invokes the principle laid down in Civil Code, § 1559 that "a contract, made expressly for the benefit of a third person, may be enforced by him," and the rule that "one may become a party to an insurance effected in terms applicable to his interest, without previous authority from him, by adopting it either before or after the loss has taken place," citing Hooper v. Robinson, 98 U. S. 528, 25 L. Ed. 219; Kleiber Motor Truck Co. v. International Indemnity Co., 106 Cal. App. 709, 716, 289 P. 865, and Phœnix Ins. Co. v. Han-

cock, 123 Cal. 222, 224, 55 P. 905, 906, where it is said: "Although defendant had no authority to procure insurance for the administratrix, yet she could have ratified his act, even after the occurrence of a loss."

Appellant further argues that respondent had no insurable interest in the house; that therefore, had respondent, rather than appellant, been insured in the $2,000 policy, the interest would, under section 2551 of the Civil Code, have been void, and that, since under section 2588 of the Civil Code, "when the name of the person intended to be insured is specified in a policy, it can be applied only to his own proper interest," respondent had no right to collect anything from the American Insurance Company except as insurance on appellant's interest; that respondent at best appeared in the policy merely as appellant's appointee to receive the money due to appellant as the insured to indemnify him for his loss (citing as illustrative of that situation, Williams v. North German Insurance Co. [C. C.] 24 F. 625, American Cereal Co. v. Western Assurance Co. [C. C.] 148 F. 77, and Woods v. Insurance Co., of State of Pennsylvania, 82 Wash. 563, 144 P. 650); that it follows that the money when collected was appellant's money, for which respondent was bound to account; that, on the other hand, if the American Insurance Company were not under legal obligation to pay the $2,000, then, when it did so, there came into play the rule that "the payment of a debt by a person not legally responsible for it is a satisfaction of the debt" (Martin v. Quinn, 37 Cal. 55, 58), and that "an obligation which has been extinguished by payment cannot be subsequently transferred" [Wright v. Mix, 76 Cal. 465, 18 P. 645, 646; Merner Lumber Co. v. Brown, 218 Cal. 136, 21 P.(2d) 590]; that no subrogation can result from a voluntary payment (Holmes v. Hughes, 125 Cal. App. 290, 14 P.(2d) 149); consequently that no cause of action against appellant has survived, which could have either been assigned or have inured to the benefit of the American Insurance Company, or have formed any proper subject for a reassignment or any assignment at all, for collection or otherwise.

[4, 5] While it is true that a general creditor of one who owns a building has no insurable interest in the building, it is the law that not only has the holder of a mechanic's or materialman's lien thereon, by virtue of such lien an insurable interest therein (26 C. J. 27, and cases cited under note 97), but also that he does not lose his insurance by discontinuing the prosecution of the lien after the building has burned (Royal Ins. Co. v. Stinson, 103 U. S. 25, 26 L. Ed. 473). If it be true, as the trial court must necessarily have decided and as we have upheld it in deciding, that Stalnaker had from appellant either the actual or ostensible authority to order the materials that respondent furnished and that undoubtedly went into the burned structure, than these were furnished to "a person acting by" appellant's "authority," and we think that, regardless of whether the authority was actual or ostensible, either would be sufficient to meet the requirements of section 1183 of the Code of Civil Procedure (Mammoth Mining Co. v. Salt Lake Foundry Co., 151 U. S. 447, 14 S. Ct. 384, 38 L. Ed. 229, affirming same case in 6 Utah, 351, 23 P. 760), and therefore that respondent, upon furnishing the materials, acquired a valid lien on the structure for their value. No proof of the filing in the recorder's office of respondent's claim of lien was offered, possibly because, as a result of the burning of the building, respondent had at the trial abandoned the first count of its complaint. But on October 15, 1928, the date that the $2,000 policy was issued, the time for filing such claim of lien had not yet expired, so that at that time the lien was alive regardless of what happened to it afterward. At least in taking out the policy, then, respondent had an insurable interest in the structure insured, and the trial court's finding to that effect is sustained by the evidence. But, though respondent had such insurable interest in the house, it must be conceded that the policy does not purport to insure its interest, but does purport only to insure Lyders and that the only mention of respondent either in it or in the indorsements upon it is in the loss payable clauses that we have quoted, and that these clauses mean merely that respondent is made appointee to recover money otherwise payable to appellant. This is the result of the cases to that effect cited by appellant, including a full discussion of such a situation in Woods v. Insurance Co. of State of Pennsylvania, supra. Nor would it have changed the situation had a clause "loss, if any, payable to Hayward Lumber & Investment Company, mortgagee, as its interest may appear" been indorsed on the policy, for, as was said in Delaware Ins. Co. v. Greer, 120 F. 916, 919, 57 C. C. A. 188, 61 L. R. A. 137, cited in the Woods Case: "The true construction of the clause 'Loss, if any, payable to ———, mortgagee, as his interest may appear,' or of words of similar import, when attached to policies of fire insurance, is, and

has been for more than 40 years, that the mortgagee is thereby made the simple appointee of the mortgagor, and that his indemnity is at the risk of the acts and omissions of the latter which would avoid, terminate, or affect the mortgagor's insurance under the original policy"—citing American Cereal Co. v. Western Assurance Co., supra.

[6, 7] The "interest" of the mortgagee referred to in such a clause is not his interest in the property insured, but the "interest" or amount which the mortgagor has appointed him to collect from the proceeds of the policy. If, then, we are to look for the refutation of appellant's claim to an accounting for the $2,000 policy, it must be found elsewhere than in the contention that in obtaining the insurance in that amount respondent was insuring its own interest in the house. But, for all of that, we are of the opinion that the record does supply such a refutation. Appellant has, by the warranty to which he became a party to his own $3,500 policy, represented to his insurer that he held no other insurance than that issued by it; and reciprocally, as we saw, the $2,000 policy is, by its terms, void if other insurance is carried. In these circumstances the insistence, in his action against his own insurer, on the collection from it of the amount of the loss must be held to be a waiver of any claim to anything from the proceeds of the $2,000 policy. Certainly he could not in the circumstances have collected any part of the $2,000 from the American Insurance Company direct. What he seeks to do is indirectly to accomplish that result by compelling respondent to account to him for its collection of that amount. To do so, whether by way of an offset in the action against him, or, more directly, by his own counterclaim in the present action, he is compelled to rely on the principle of money had and received. An action for money had and received, though technically an action at law, proceeds upon equitable principles. In Fontaine v. Lacassie, 36 Cal. App. 175, 178, 171 P. 812, 814, the court quotes Lord Mansfield in Moses v. MacFerlan, 2 Burr, 1005, as follows: "'If the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract. * * * This kind of equitable action, to recover back money which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, ex æquo et bono, the defendant ought to refund. * * * In one word the gist of the action is that the defendant upon the circumstances of the case is obliged by the ties of natural justice and equity to refund the money.'" See, also, Spitzer v. City of Oakland, 32 Cal. App. 748, 163 P. 1044. Appellant here is in the peculiar position of having to rely on a doctrine conceived in abhorrence of unjust enrichment at another's expense in order to obtain double insurance for a single loss. The law will hardly stultify itself by countenancing that sort of a perversion. Appellant's communication to respondent refusing to make proof of loss under the $2,000 policy may well be held to have effected a waiver of any claim to benefit from the proceeds of that policy notwithstanding the suggestion therein that respondent make such proof. But whether the communication had in itself any such effect or not, it took on that complexion when followed by appellant's action on his $3,500 policy, with respect to which there is nothing in the record to show that he abated anything in consequence of the $2,000 policy. With the commencement of that action, if not before, the waiver must be holden to have become complete. In the circumstances, the attempted ratification in the supplemental answer and counterclaim of respondent's action in taking out the $2,000 policy must be holden ineffectual.

If it be still urged that, notwithstanding these considerations, appellant's debt to respondent, having been paid by the American Insurance Company, is forever dead and incapable of revivor, the answer is furnished by appellant's own argument already dealt with. There is nothing in the record to indicate that the American Insurance Company paid the $2,000 voluntarily or otherwise than under the impression that it was legally bound to do so under the policy that it issued. The record does not show what knowledge it had or did not have about the $3,500 policy. It is not the usual course of business for insurers to voluntarily make payments that they do not believe themselves legally bound to make, and we cannot presume that this was done in this instance. Respondent's collection of the $2,000 was in contemplation of law, not for its own account but for appellant's account, and appellant turns out to have had no right to it. Had he gotten any part of the money, he would, upon the doctrine of money had and received to the use of the American Insurance Company, have been bound at the latter's suit to return it. By the same token the law will compel him to forego any credit to which, if he had any right to the money, he would

have been entitled by reason of respondent's collection of it, provided his deprivation of the credit inures to the benefit of the American Insurance Company, to whom the money rightfully belongs. The record shows that arrangements have been effected whereby it will so inure. In these circumstances the insurance complication ought not to be held a bar to plaintiff's recovery.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.



139 Cal.App. 706

COUTS v. SAN DIEGO COUNTY et al.

Civ. 1131.

District Court of Appeal, Fourth District, California.

July 14, 1934.

1. Action ⇐6

Although county road superintendent appointed by board of supervisors had acted for only one month and adoption of new county charter had superseded board's action, action seeking to have appointment of road superintendent declared void would not be dismissed as involving a moot question, in view of possibility that an act committed by superintendent during his month's tenure might come in question or some claim for compensation be made in future (St. 1933, p. 2821, § 16).

2. Counties ⇐47

While jurisdiction of boards of supervisors is confined within statutory limits, it includes not only powers expressly enumerated, but also those implied powers which are necessary to exercise of powers expressly granted, except where such implied power is expressly or impliedly prohibited.

3. Highways ⇐95(1)

Statutes providing that board of supervisors should have general supervision over roads in county, and dividing county into road districts with a supervisor to act as road commissioner in his particular district, did not prevent employment by board of single road superintendent with broad powers to function in all districts where neither board nor individual member intended to abdicate respective functions (Pol. Code, §§ 2639, 2641).

4. Officers ⇐1

Term "office," as relates to public office, implies delegation of portion of sovereign power to person filling office, whereas under an "employment" person acts only on behalf of his principal whose sanction is generally necessary to give acts performed power of law.

[Ed. Note.—For other definitions of "Employment" and "Office (Public or Private Employment)," see Words & Phrases.]

5. Highways ⇐93

County board of supervisors' engagement of road superintendent with broad powers to function in each road district subject to general direction of board, and to direction of each supervisor in his respective district, *held* valid employment, and not an appointment to office (Pol. Code, §§ 2639, 2641).

6. Highways ⇐95(1)

Where it was not claimed that county highway system as a whole, or even major part of it, was constructed or repaired under specific highway act, county board of supervisors' employment of superintendent whose duties extended to entire system would not be legalized if otherwise illegal, by authorization contained in that act, since where substantial part of duties agreed to be performed were contracted for in violation of law, contract being entire, whole contract would be void (St. 1907, p. 635; Pol. Code, § 2646; Civ. Code, § 1608).

Appeal from Superior Court, San Diego County; Harry R. Archbald, Judge.

Action by Cave J. Couts against the County of San Diego and others. From an adverse judgment, defendants appeal.

Reversed.

Thomas Whelan, Dist. Atty., and Edward W. Goodman, Deputy Dist. Atty., both of San Diego, for appellants.

Clark & Hopkins, of San Diego, for respondent.

HAINES, Justice pro tem.

In the early part of June, 1932, the board of supervisors of San Diego county undertook to appoint one J. W. Cole as county road superintendent, at a salary of $3,600 per year, such duties and salary to begin as of July 1, 1932, and on June 6, 1932, adopted a resolution in the words and figures following:

"In the Matter of the County Road Superintendent:

"Resolution Defining Duties of County Road Superintendent.

"Whereas, the Board of Supervisors has heretofore determined to employ a registered engineer as County Road Superintendent, and has selected J. W. Cole as such road superintendent and fixed his salary at $3,600 per year, payable monthly, and has determined that said employment shall begin with the next fiscal year.

"Now, therefore, on motion of Supervisor Hornbeck, seconded by Supervisor McMullen, it is hereby resolved as follows:

"1. That before entering upon his duties, said road superintendent give a surety company bond to the County of San Diego, to be approved by the Chairman of this Board, in the sum of $5,000 Dollars, the cost of said bond to be paid by the County of San Diego.

"2. That under the supervision of this Board and of the road commissioners of the respective districts, said road superintendent shall have charge of the maintenance of all County highways.

"3. That unless otherwise ordered by this Board, engineering work upon county highways shall be under the direction of the County Surveyor, subject to the approval of the road superintendent.

"4. That unless otherwise ordered by this Board, construction work on County highways done by contract shall be under the direction and shall be inspected by the County Surveyor as has been the procedure heretofore. Provided, however, it shall be the duty of the road superintendent to supervise generally all contract work.

"5. Said road superintendent shall maintain his office in the City of San Diego at such place as this Board may designate.

"6. Said County road superintendent shall organize his department substantially as set forth in report prepared for this Board by J. W. Cole and filed with the Clerk of this Board.

"Provided, however, that final plans for the organization of the department shall be submitted to this Board for approval before being put into effect.

"7. The Statistical Department heretofore maintained by this Board shall be transferred to the department of the road superintendent and shall be under the direction of the road superintendent from and after July 1st, 1932.

"8. Beginning July 1st, 1932, said road superintendent is allowed one stenographer at a salary of $100 Dollars per month.

"9. Subject to the approval of this Board, said road superintendent shall employ such assistants, foremen and laborers as may be necessary to carry on the work of the department in an efficient and economical manner.

"10. Said road superintendent shall perform such other and further duties as may from time to time be required of him by this Board and the respective road commissioners of the County.

"11. Disagreements between the superintendent and any of the road commissioners shall be submitted to this Board for adjustment—the decision of the Board shall be final."

Thereafter, on July 19, 1932, plaintiff and respondent Cave J. Couts, as a resident and taxpayer of the county, brought the present action naming as defendants the members of the board of supervisors of said county, the county auditor, and the county treasurer, who constitute the appellants here, asserting the illegality of the board's action and seeking to have the said resolution of June 6 adjudged void, and the auditor and treasurer respectively enjoined from issuing or paying any warrants for compensation thereunder. Appellants demurred to the complaint and also filed an answer admitting the action of the board alleged but setting up more fully what they claimed their position to be. In this pleading it was among other things alleged: "That prior to the employment of the said John W. Cole as road superintendent, it had been the custom and practice of the several supervisors of the county of San Diego, in their capacity of ex officio road commissioners, to conduct the work of maintaining, repairing and improving the roads of their respective districts as separate units; that under the system as heretofore conducted, it has been necessary to have an independent office and bookkeeping system in each Supervisorial district. The statistical records required to be kept by the board of supervisors under the provisions of Political Code, § 2655a being picked up by the statistical department from the reports of the several road commissioners and from the county auditor's records; that under the proposed system, all bookkeeping will be done at the office of the road superintendent in the court house; that under the proposed system, the ministerial work of supervising all road maintenance work in the county will be concentrated under the road superintendent; that for the fur-

ther purpose of unifying the road work within the county, to the end that the same and the necessary bookkeeping and statistical work might be conducted more efficiently and economically, the said board of supervisors employed the said John W. Cole as such road superintendent."

It was also alleged in the answer that a large portion of the roads and public highways in the county of San Diego had been constructed under the provisions of the "Improvement Act of 1907." The reference seems to have been taken by the trial judge to be to the Act of March 21, 1907, known as the "Road District Improvement Act of 1907" (Stats. 1907, p. 806). We think, however, that the context shows it to have been to the Act of March 19, 1907, commonly known as the "Good Roads Act" (Stats. 1907, p. 635), in connection with which the answer sets up that the employment of a road superintendent by the board, to have charge of the repairs and maintenance of roads so improved is expressly authorized by section 2646 of the Political Code. There is annexed to the answer an extended schedule of roads within the county stated to have been constructed or improved "under the provisions of the act of 1907 above mentioned".

The demurrer to the complaint was overruled and the case tried upon its merits, affidavits by consent or otherwise having been apparently used as evidence; whereupon, without filing any findings of fact or conclusions of law, the court entered judgment granting the injunction prayed, and from this judgment the present appeal is taken.

There is printed in respondent's brief a memorandum opinion of the trial judge in initially rendering the judgment, and a further memorandum opinion by him on denying a motion to enter a different judgment and a motion for a new trial. The reason given for the decision is in brief that the action complained of amounted in reality to an unlawful delegation of duties imposed under section 2641 of the Political Code upon the several members of the board as ex officio road commissioners within their respective districts to a single person not appointed by them as individuals but by the board, whereby the board undertook to place said appointee "in charge of the maintenance of all county highways." The reason given for not making findings was that the trial judge deemed the issue one of "law alone."

[1] So far as the instant case is concerned, the questions involved have become pretty largely moot, inasmuch as Cole could not have acted as road superintendent for any longer period than that which intervened between July 1, 1932, when his duties were to begin, and July 30, 1932, when the judgment was entered enjoining further proceedings under the board's resolution, and since then the whole situation has been changed by the adoption of the county charter of San Diego county, effectual July 1, 1933 (Stats. 1933, p. 2814 et seq.), by section 16 of which the county surveyor is made ex officio road commissioner, so that, at all events for the future, the board's action has been thus superseded. We should, therefore, dismiss the present appeal as having become of merely academic importance were it not for the possibility that some act done between July 1, 1932, and July 30, 1932, by Cole while undertaking to act under the board's appointment may hereafter come in question or some claim for his compensation be made. Since, however, the record does not exclude this possibility, we feel constrained to decide the case on its merits. The absence of findings leaves it in a somewhat peculiar position. The language of the resolution of June 6, 1932, above quoted, makes it plain that the board had taken some sort of previous action, the substance of which this resolution purports to recite. The resolution of June 6 is mainly concerned with defining the duties of a road commissioner purporting to have been previously appointed. The answer has set up minutes of the board of supervisors of June 2, 1932, authorizing the employment of Cole in that capacity. The taking of the action recited is, of course, deemed denied, and there is no finding that it was taken. Since, however, appellants were entitled to have a finding made on the subject, it is perhaps fairer to assume, for the purpose of determining whether the present judgment can stand, that they either did prove or would have been able to prove the allegations of their answer, so far as these were allegations of fact, including the authorization of Cole's employment. This leaves it still necessary to determine whether his employment in such circumstances as are recited in the resolution of June 6 was, together with the further provisions made in that resolution itself, a matter within the power of the board.

[2, 3] There is no question, of course, as said in 7 California Jurisprudence 449, § 41, cited for appellants that "boards of supervisors are creatures of the statute and the authority for any act on their part must be sought in the statute," but it is equally true, as there said, that "while their jurisdiction is

confined within the statutory limits, still it includes not only the powers expressly enumerated but also those implied powers which are necessary to the exercise of the powers expressly granted except in the instances where such implied power is expressly or impliedly prohibited." See particularly County of San Joaquin v. Budd, 96 Cal. 47, 52, 30 P. 967. It is laid down in terms in section 2639 of the Political Code that "the boards of supervisors of the several counties of the state shall have general supervision over the roads within their respective counties. * * *" It is true that under section 2641 each county is to be divided by the board into suitable road districts and each supervisor is required ex officio to act as road commissioner in his particular supervisorial district, one of his duties, however, being to "see that all orders of the board of supervisors pertaining to the roads in his district are properly executed." By the further provisions of the section he is allowed traveling expenses within limits therein prescribed, but this does not mean that he is charged with more than the general oversight of what goes on there. Manifestly in a large county he must confide to others the exercise of such detailed oversight. It does not seem to us, in view of the powers and duties thus respectively conferred upon the board as such and upon the supervisors as individuals within their respective districts, that there is any more inherent reason why a single road superintendent may not be employed to function in all of the districts at once, subject in each respective district to the direction of the supervisor who constitutes the road commissioner for that district, than there would be to preclude employment by the board or a particular supervisor of a road foreman to function within a particular district; nor is the circumstance that a stenographer is allowed such single superintendent any more an anomaly than as though one had been allowed to each road foreman in each several district, if the duties lawfully confided to him by the supervisor to whom he looked for directions properly involved the services of such stenographer. If there is one thing manifest in the resolution of June 6, 1932, it is that in spite of the broad powers given to the road superintendent it was the intention of the board that no one of its members should abdicate his individual functions within his individual district, nor the board abdicate the more general functions intrusted to it by section 2639, and we think that that circumstance is decisive of the case.

[4-5] In our opinion the employment of the road superintendent did not in this case purport to be the appointment to an office nor did the action of the board in creating the position of road superintendent undertake to create any office. So far as we can see it was an employment pure and simple, and an employment incidental to powers which the supervisors were charged with exercising. In this we are confirmed by the view taken in Skidmore v. West, 186 Cal. 212, 199 P. 497, 502. This case, moreover, is instructive not only on the proposition of the general power of the board to perform such acts as are incidental to its statutory functions, but also on the further proposition that the board has the power to obtain such information as is reasonably necessary to the proper discharge of its functions, and, therefore, that the statistical information which it was made part of the duty of the road commissioner to gather is such information as the board might properly employ some one to compile. As contradistinguished from such an employment as that here involved, a public office is essentially an exercise in some sort of the state's sovereignty, and as was noted by our Supreme Court in Patton v. Board of Health, 127 Cal. 388, 394, 59 P. 702, 704, 78 Am. St. Rep. 66, quoting from the opinion of the judges given to the governor in the appendix to 3 Me. 481: "The term 'office' implies a delegation of a portion of the sovereign power to, and possession of it by, the person filling the office; and the exercise of such power, within legal limits, constitutes the correct discharge of the duties of such office." The opinion further elaborates the subject as follows:

"'The power thus delegated and possessed may be a portion belonging to some one of the three great departments, and sometimes to another; still it is a legal power, which may be rightfully exercised, and in its effects it will bind the rights of others, and be subject to revision and correction only according to the standing laws of the state. An employment merely has none of these distinguishing features. A public agent acts only on behalf of his principal, the public, whose sanction is generally considered as necessary to give the acts performed the authority and power of a public act or law. And, if the act be such as not to require such subsequent sanction, still it is only a species of service performed under the public authority and for the public good, but not in the execution of any standing laws, which are considered as the rules of action and the guardians of rights.'"

It is manifest that the powers conferred upon the road superintendent as set out in the

resolution of June 6, 1932, were not of this character, but that such superintendent was a mere subordinate in some respects of the board as a whole and in some respects of individual supervisors, and it seems to us in these circumstances that the situation was strictly that of an employee and not of an officer at all.

In our view this case is in no way analogous to Forward v. County of San Diego, 189 Cal. 704, 209 P. 993, 994, strongly relied on by respondent. It was there holden to be a violation of section 9, article 11, of the State Constitution as it existed prior to the amendment of 1924, and also of section 5 of said article, as it then existed, to provide for an advisory board to co-operate with the county assessor in making the annual appraisement of property for assessment purposes. The gist of the decision is that since under section 4290, Political Code, it was enacted that, "The salaries and fees provided in this title shall be in full compensation for all services of every kind and description rendered by the officers named in this title either as officers or ex officio officers their deputies and assistants, unless in this title otherwise provided, and all deputies employed shall be paid by their principals out of the salaries provided in this title, unless in this title otherwise provided," that it was "obvious that to relieve the officer of the obligation to pay extra deputies and assistants, is to increase his salary to that extent (in violation of said section 9), irrespective of the question as to whether in that particular county he is given a lump sum from which he is to secure his own remuneration and pay all deputies or assistants, or whether he is given a fixed salary and a certain number of deputies and assistants, also at fixed salaries, and is also required to pay additional deputies and assistants from his own salary." The act purporting to authorize the supervisors to appoint at their discretion such advisory board was also held to violate said section 5 providing for the regulation of the compensation of county officers by the Legislature, in undertaking in the case of the assessor to delegate that function to the supervisors. Obviously, the reasoning is inapplicable to the compensation of the supervisors themselves, whose salaries are not provided for with any fixed relation to work to be done under their supervision, and whose essential duty, in contradistinction to most county officers, is to supervise work rather than to do it, all of which is recognized by language used in the later part of the opinion.

[6] If it be true, as appellants claim, that a substantial part of the county highway system was constructed or improved under the Act of March 19, 1907 (as to which there are again no findings), it would evidently follow, as they assert, that the board was entitled to employ a superintendent to care for the maintenance and repair of these particular parts of the system under the express provisions of section 2646 of the Political Code. That, however, would hardly strengthen their position in the instant case, for, since it is not claimed that the highway system as a whole, or even the major part of it, was constructed or repaired under the provisions of said act, and since the duties of the superintendent extended to the whole system and not merely to any part of it, it would necessarily follow that unless the board were entitled to employ him (in subordination to themselves and the respective road commissioners) to have charge of it all, the case would be governed by such authorities as Humboldt County v. Stern, 136 Cal. 63, 68 P. 324, and Teachout v. Bogy, 175 Cal. 481, 486, 166 P. 319, illustrative of the general principle noted in the dissenting opinion in Skidmore v. West, supra, that "where a substantial part of the duties agreed * * * to be performed were contracted for in violation of the law, the contract being entire, the whole contract is void." Civ. Code, § 1608. In the view, however, that we have taken of the employment here involved as a whole, we need not consider that situation, for it is our opinion that the arrangement was one of employment and that, so far as its nature can be gleaned from the record, it was a proper one.

The judgment is reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

139 Cal.App. 652

MANN v. CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 9167.

District Court of Appeal, First District, Division 2, California.

July 12, 1934.

Automobiles ⇨63

Under charter of city and county of San Francisco providing that Public Utilities Commission should have charge of management and control of city's utilities, commission *held* to have power to discontinue or abandon bus line which was part of municipal transportation system, and commission was not first required to obtain ordinance of board of supervisors determining that public interest or necessity demanded such abandonment.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Proceeding for a writ of mandate on the petition of W. E. Mann against the City and County of San Francisco, the Public Utilities Commission of the City and County of San Francisco, and others. Judgment for respondents, and petitioner appeals.

Affirmed.

Howard M. Jones, of San Francisco (Louis R. Mercado, Jr., of San Francisco, of counsel), for appellant.

John J. O'Toole, City Atty., and Dion R. Holm, Asst. City Atty., both of Los Angeles, for respondents.

SCHMIDT, Justice pro tem.

In 1933 appellant as a taxpayer filed in the superior court "his petition for writ of mandate" in which he set forth, among other things, that in 1918 the respondent city and county of San Francisco inaugurated as part of its municipal transportation system an autobus service known and designated as "bus line No. 2," describing its route, claiming that he was a patron thereof, and that said bus line furnished sole and exclusive means of transportation and public conveyance to petitioner and other residents in the city and county of San Francisco. The area described provided the sole and exclusive transportation upon and along the ocean beach in said city and county of San Francisco; that said bus line was necessary to the public convenience; that on the 3d day of January, 1933, the respondents Public Utilities Commission and respondent Cahill, the duly appointed manager of public utilities in the city and county of San Francisco, "wholly discontinued and abandoned the bus line transportation service in the area * * * described, discontinuing and abandoning part of the public utility system owned by the City and County of San Francisco and although often requested to continue and/or to replace said transportation service * * * ever since have refused and now refuses to operate busses or any other instruments of transportation over that part of the utilities system or upon the route hereinabove designated 'bus line No. 2'." The prayer of the petition was for an alternative writ to issue directing the commission to restore the municipal transportation service designated as bus line No. 2 or show cause at a specified time why they had not done so. To this petition respondents interposed a general demurrer which the court sustained without leave to amend and entered judgment for respondents, from which judgment appellant appeals. The petition does not charge that the commission acted arbitrarily nor does it allege any fraud.

The single question for decision is: Do the powers conferred and the duties imposed upon the Public Utilities Commission of the City and County of San Francisco by its charter authorize and empower that commission to discontinue or abandon part of its transportation service? The freeholders' charter of the city and county of San Francisco after providing for a Public Utilities Commission by section 121 provides "general powers and duties of the commission" as follows: "The public utilities commission shall have charge of the construction, management, supervision, maintenance, extension, operation, and control of all public utilities and other properties used, owned, acquired, leased or constructed by the city and county, * * * for the purpose of supplying any public utility service to the city and county and its inhabitants. * * * The commission shall locate and determine the character and type of all construction and additions, betterments, and extensions to utilities under its control, and shall determine the policy for such construction or the making of such additions, betterments and extensions from the public funds under its jurisdiction * * *."

It is true, as contended by appellant, that Hunt v. Boyle, 204 Cal. 151, at page 152, 267 P. 97, 98, is authority that the several radiating railway lines constituting the municipal transportation system of the city and county of San Francisco, although built at different

times, "constitute in actual operation and practical effect but one municipally owned and operated railway system." We cannot agree with his argument that by reason thereof the Public Utilities Commission could not abandon or discontinue a portion of that transportation system as it did, for by the assumption of the power to abandon a portion of that system it in effect was the assumption of the power to abandon the whole of that system. Nor do we agree with his contention that before an abandonment is had it will be necessary for the board of supervisors by ordinance to determine that the public interest or necessity demanded such abandonment. The case of Hunt v. Boyle, supra, is quite analogous to the case under consideration, in this, that it also involved a portion of the transportation system of San Francisco, namely, the Judah street and Duboce Tunnel addition, which will be referred to hereafter as the addition. That at the time of the facts involved the then charter of the city and county of San Francisco gave to the then board of public works, with reference to municipally owned public utilities, substantially the same powers as are now by section 121 of the 1932 charter given the Public Utilities Commission. In Hunt v. Boyle, supra, the question was raised as to whether said addition was a new utility which would require, as provided by the charter, an ordinance of the board of supervisors determining that the public interest and necessity demanded the construction of this addition as an additional public utility or was it merely an "extension" of the system already owned and operated. The Supreme Court held that it was merely an extension.

Another question presented in that case was: Did the board of public works act within its powers when it proceeded to let a contract for the work of said addition without first obtaining an ordinance of the board of supervisors providing for the work or some authority from the board of supervisors to proceed to construct such addition? The Supreme Court held that inasmuch as it was merely an extension it was within the power of the board of public works to provide for the work and let a contract therefor and that there was not needed any ordinance or authority from the board of supervisors.

We believe that when the people of the city and county of San Francisco by the aforementioned section 121 of their charter conferred upon the Public Utilities Commission the "management, supervision, maintenance, extension, operation and control of all public utilities" and "the commission shall locate and determine the character and type of all * * * extensions to utilities under its control and which determine the policy for * * * the making of such * * * extensions from the public funds under its jurisdiction," they intended to give to such commission the sole and exclusive "control" and "management," including the power to abandon any portion of such utility. The words used in such section 121 are certainly broad enough to carry such interpretation.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

139 Cal.App. 682

SEARS v. WHISTON et al.

Civ. 1276.

District Court of Appeal, Fourth District, California.

July 13, 1934.

Hearing Denied by Supreme Court Sept. 11, 1934.

1. Parent and child ⇐12

In action for balance of wages for drilling oil well, evidence sustained finding that son was agent of his father when he hired laborers, and that labor was performed for benefit of father who owned oil lease.

2. Evidence ⇐408(2)

In action for balance of wages for drilling oil well, evidence to contradict receipts of payment of wages in full *held* admissible, since receipts are subject to explanation.

3. Payment ⇐74(2)

In action for balance of wages for drilling oil well under agreement that laborers should receive $2 per day and additional sum if producing well was brought in, evidence sustained finding that receipts, given for balance due under $2 per day schedule and reciting payment in full, were not intended to cover additional sum for bringing in producing well.

4. Principal and agent ⇐145(4)

Request by plaintiff that clerk enter default of agent in action against principal and agent for wages for services rendered to each and at request of each *held* not to release principal, since request was an election to hold principal alone liable.

5. Appeal and error ⇐173(12)

Point, not raised in trial court, that principal was released by request by plaintiff

that clerk enter default of agent in action against principal and agent, *held* waived.

6. Work and labor ⇐24(1)
Variance between pleading which alleged reasonable value of services sued for and proof which showed agreement to pay specified wages *held* not fatal, since agreement was evidence of reasonable value of services.

7. Appeal and error ⇐1033(9)
Appellant cannot complain that evidence justified larger judgment for respondent than was awarded.

8. Work and labor ⇐28(4)
Evidence sustained finding that $4.50 per day was reasonable value of services for drilling oil well.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Herbert P. Sears against Raleigh Whiston, also known as R. Whiston, and another. From a judgment in favor of plaintiff against named defendant, he appeals.

Affirmed.

John B. Haas and John D. Home, both of Los Angeles, for appellant.

Brittan & Mack, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

The plaintiff brought this action against the two defendants, who are father and son, to recover a balance claimed to be due upon three claims for labor alleged to have been performed by plaintiff's assignors for and at the request of the defendants. The labor in question was performed in connection with the drilling of an oil well on a lease owned or controlled by the defendant Raleigh Whiston. The defendant H. L. Whiston defaulted, and the defendant Raleigh Whiston answered, and the trial proceeded upon the issues thus raised. A number of witnesses testified at the trial that at the time the plaintiff's assignors went to work the defendant H. L. Whiston agreed with them that he would pay them $2 a day in cash as the work progressed and that, in the event a producing oil well was brought in, they would be paid the balance of the regular wages which Whiston had theretofore been paying. The main contention of the defendant Raleigh Whiston at the trial was that the debt, if any, was that of his son, H. L. Whiston; it being claimed that he had entered into a contract with his son whereby he was to pay the son $10,000 and the son was to pay for all material and labor used in drilling the well. The court found in all respects in favor of the plaintiff and entered judgment in his favor for $604.37, from which judgment the defendant Raleigh Whiston has appealed.

[1] The first point raised is that a finding to the effect that H. L. Whiston was the agent of R. Whiston and that these services were rendered for the benefit of R. Whiston is not sustained by the evidence. While both father and son testified to the existence of a contract between them whereby the son was to furnish all labor and material and the father was to pay him $10,000 for drilling the well, their testimony was none too convincing. The father testified that the contract was not in writing; that he did not know when it was made; that no one was present when it was made except himself and his son; that he agreed to pay his son $10,000; that he had paid him in full; that this amount was not all paid direct to his son but part of it was paid for outstanding bills; that he had not figured out what part he had paid in outstanding bills and what part he had paid to his son; that, while he did not owe his son anything, the amount he had paid did not amount to exactly $10,000; and that he owned the drilling outfit and other equipment used in drilling this well. The son testified that he was to furnish the labor and material, while his father was to furnish the derrick and other equipment and pay him $10,000 for drilling the well, that he had no credit and the arrangements for securing the material which he had agreed to furnish were in fact made by his father, and that this material was charged to and paid for by his father. His testimony was impeached by evidence of a statement he had previously made, under oath, to the effect that at this time he was working for his father under an arrangement whereby his father paid the living expenses of his family and that he had no source of income from salary or otherwise from this well. There was also evidence that the father paid many of the bills for labor, including what had previously been paid to respondent's assignors; that on at least one occasion he gave instructions to these laborers as to how the work should be done; that he told one of the respondent's assignors to go to the lease and go to work; that he told all of respondent's assignors, as a group, that, if they would wait a few days, they would get their money; that at various times, as the

work progressed, he paid respondent's assignors the amounts then due them at $2 per day; and that in a telephone conversation at a time when the wages then earned were unpaid he told one of the respondent's assignors the following:

"* * * He told me then that if I was in Los Angeles he would pay me in full; that he had the money in his pocket and if I was going to get so hard about collecting my wages I could get off the lease and stay off the lease.

"Q. Did he say anything about future employment, or anything of that sort? A. Yes, he said you will never work for me again."

While the evidence is conflicting, the portions to which we have referred, with the reasonable inferences therefrom, is sufficient to support the finding attacked.

[2, 3] A second contention is that each of the respondent's assignors, after a producing well was brought in, signed a receipt acknowledging that he had received from R. Whiston a certain amount, and that these receipts are conclusive against the claims involved in this action. One of these receipts contained the clause "Wages in full on Dowd lease," another, "All labor in full to date on the Dowd lease," and the third, "All labor in full on the Dowd lease." The three receipts were dated September 26, 1932, October 4, 1932, and October 5, 1932, respectively. In each instance the receipt was for the balance of the amount earned by one of the assignors under the $2 per day schedule. It is conceded that a producing well was brought in and that no payment of the balance of the wages furnished has ever been made. There is no pretense that these receipts covered anything other than the $2 per day, which was to be paid in any event. There is some testimony that a producing well was brought in during the latter part of August of that year, but that the same was sanded up and further work was done upon the well in September. Not only is there no evidence that respondent's assignors knew, or should have known, that the well had been completed and was producing at the time the receipts were given, but the appellant himself testified as follows:

"Q. When did you finish this well? A. I think it was in September.

"Q. In 1932? A. Yes.

"Q. And since that time it has been producing? A. Not all the time.

"Q. Well the majority of the time? A. Well, about six weeks it didn't produce anything; the first six weeks."

It is well settled that a receipt is always subject to explanation, and it was a question of fact for the trial court whether the explanation here made was sufficient under the circumstances. It thoroughly appears that at the time these receipts were given they were not intended by either party thereto to cover the claims which are here involved, and we think the testimony and the explanation made is sufficient to sustain the court's finding. Brown v. Crown Gold, etc., Co., 150 Cal. 376, 89 P. 86.

[4, 5] The appellant next contends that, assuming that his son was his agent, the respondent released him from liability by requesting the clerk to enter the default of the agent, H. L. Whiston. In support thereof the case of McDevitt v. Corriea, 70 Cal. App. 245, 233 P. 381, is cited. It becomes immediately apparent that the facts in the case before us fail to bring it within the rule there laid down. The complaint herein alleged that the services in question were rendered to each of the defendants and at the request of each. The default of H. L. Whiston was entered by the clerk about five months before the case came on for trial. After the trial, and no doubt in view of what was there developed, judgment was entered against Raleigh Whiston and no judgment was entered against H. L. Whiston. Judgment was thus entered against the principal alone, and there is small room for contention that any other election was required. A further consideration is that this point was waived by the appellant, since the same was not raised in the trial court by demurrer, motion or otherwise. Klinger v. Modesto Fruit Co., Inc., 107 Cal. App. 97, 290 P. 127; Fleming v. Dolfin, 214 Cal. 269, 4 P.(2d) 776, 78 A. L. R. 585; Craig v. Buckley, 218 Cal. 78, 21 P.(2d) 430.

[6-8] It is finally urged that there is no specific testimony as to the reasonable value of the services rendered by the respondent's assignors, that the testimony ranges from $4 to $10 per day for different kinds of work, and that in fixing the reasonable value of the services the court arbitrarily fixed the amount at $4.50 per day. It appears from the findings and judgment that the court adopted a wage scale of $4.50 per day and credited the amounts paid on this sum, giving judgment for the balance. While the complaint alleged the reasonable value of the services and there was proof of an agreement to pay the wage scale previously paid, the variance between the pleading and the proof

was not fatal. Umphray v. Hufschmidt, 73 Cal. App. 140, 238 P. 749. Not only was the agreement to pay the former wage scale some evidence that this scale was the reasonable value of the services, but there is considerable evidence in the record both as to what the former wage scale was and as to what was usually paid for work of this nature. There is considerable evidence that the wage scale formerly paid was $4, $4.50, $5, $5.50, $6, $6.50, $7, and $10 per day for various kinds of work, and that respondent's assignors performed several of these kinds of work. At least two witnesses testified that H. L. Whiston paid $4.50 a day, plus transportation, for similar work on previous jobs on which some of these men had worked. H. L. Whiston himself testified that he was or had been paying $4, $4.50, and $5 per day, plus transportation, for this kind of work. While the evidence would have justified a much higher judgment against the appellant, he is in no position to complain in this regard. Moore v. Borgfeldt, 96 Cal. App. 306, 273 P. 1114. There is some evidence to justify the exact amount found and it may not be said that this amount was arbitrarily fixed by the court.

The judgment is affirmed.

I concur: JENNINGS, J.

MARKS, J., being absent, does not participate in this opinion.

FRASER v. PAYNE, County Auditor, et al.*

KELLER v. SAME.

Civ. 9233.

District Court of Appeal, Second District, Division 1, California.

July 16, 1934.

Hearing Granted by Supreme Court Sept. 13, 1934.

1. Counties ⇐83

County treasurer may be required to pay out moneys belonging to county only when expressly or impliedly authorized by statute.

2. Counties ⇐164

Superior court's order, requiring county auditor to issue warrant on county treasury for cost of daily transcript of proceedings in criminal case, wherein there was no appeal, and which transcripts serve no purpose other than as a convenience to counsel, *held* not expressly or impliedly authorized by statutes (Code Civ. Proc. §§ 269, 274, 274a; Pen. Code, § 1246; Rules of Supreme Court and District Courts of Appeal, § 7).

3. Courts ⇐26

Act is not within court's inherent powers, unless its right to function in constitutional manner or degree or efficiency in administration of justice will or may be restricted or seriously impaired, if divested of power to do such act.

4. Mandamus ⇐141

Superior court's order, requiring county auditor to issue warrant on county treasury for cost of daily transcript of proceedings in criminal case, wherein there was no appeal, *held* not justified as within court's inherent powers.

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Proceedings by Stanley Fraser and Marie Keller, respectively, for writs of mandate requiring the Superior Court in and for the County of Los Angeles to order H. A. Payne, as auditor of such county, to issue his warrant to H. L. Byram, as treasurer of such county, to pay the cost of a daily transcript of the proceedings in a criminal case. From judgments or orders granting the writs, respondents auditor, treasurer, and county appeal.

Reversed.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard and Fred M. Cross, Deputies Co. Counsel, all of Los Angeles, for appellants.

McAdoo & Neblett, of Los Angeles, for respondents.

Buron Fitts, Dist. Atty., and A. H. Van Cott, Deputy Dist. Atty., both of Los Angeles, amici curiæ.

HOUSER, Justice.

The issue involved in this appeal from each of three orders or writs of mandate relates to the asserted right of the superior court in and for the county of Los Angeles, on the trial of a criminal action therein, to order and to require the county auditor to issue his warrant on the county treasury in payment of the cost of a daily transcript of the "voir dire" examination of both prospective and retained jurors, and the proceedings generally, including the oral testimony of witnesses and the exhibits, if any, introduced on the trial of the action. Or, as stated by appellants in a

more restricted form, but as applied more particularly to the facts in the instant matter, the question is "whether the superior court may order a daily transcript in a criminal case at the expense of the county, the transcript being for use solely during the trial and there being no appeal in the case."

[1] It is a rule of universal application that a county treasurer, as such, legally may be required to pay out moneys that are the property of the county when authorized so to do by the provisions of statute only. In the case of Irwin v. County of Yuba, 119 Cal. 686, 690, 52 P. 35, 37, claim was made by a supervisor of a county for expenses incurred by him in his attendance upon a conference with representatives of other counties of the state for the purpose of considering the subject of flood protection. In terms, no statute expressly authorized such expenditure. With reference thereto, in part, the court said: "It may be safely stated as a rule that one who demands payment of a claim against a county must show some statute authorizing it, or that it arises from some contract, express or implied, which itself finds authority of law. It is not sufficient that the services performed, for which payment is claimed, were beneficial."

To the same effect, see Gibson v. County of Sacramento, 37 Cal. App. 523, 525, 174 P. 935; Woods v. Potter, 8 Cal. App. 41, 45, 95 P. 1125.

[2] From the fact that the attention of this court has been directed to no statute by the provisions of which either the preparation of a daily transcript of the testimony and proceedings in a criminal action on trial, or the payment of the cost thereof, is expressly authorized, it safely may be assumed that no statute so provides. If statutory authority exists for the outlay of county moneys in that behalf, it must arise from powers impliedly conferred. In that connection, the only statutes which appear to have any direct bearing upon the situation are sections 269 and 274 of the Code of Civil Procedure. Both of such statutes are a part of title 4 of part 1 of said Code, suitably arranged under chapter 3 thereof which purportedly deals with the general subject of phonographic reporters. Section 269 is entitled "Phonographic reporters for superior courts, their appointment, and duties." Following a provision therein whereby a judge of the superior court is authorized to appoint such a reporter, the duties of the reporter are stated in detail, including the direction that, "if directed by the court, or requested by either party, (he) must, within such reasonable time after the trial of such case as the court may designate, write out" his phonographic notes, etc. Section 274 is entitled "Fees"; and concerns the compensation to which the reporter shall become entitled for performing each of his several duties. As far as any provision of such statute is claimed to be pertinent to the instant matter, it is that "in criminal cases * * * the fees for reporting and for transcripts ordered by the court to be made must be paid out of the county treasury upon the order of the court. * * *"

Appellants point to the language of section 269 by which, "if directed by the court," the reporter is required, within a reasonable time "after the trial," to transcribe his phonographic notes; and contend that nothing therein contained authorizes an order by the court to the reporter to make a daily transcript of such notes. On the other hand, by respondents herein, as well as by the district attorney of Los Angeles county, who appears on this appeal as "a friend of the court," it is conceded that the language of said section 269 imports no statutory authorization to the judge, or to the court, to order that a daily transcript of the proceedings generally on the trial of an action be made. Indeed, it is freely admitted by such counsel that the provisions of section 269 relate solely to the duties of the reporter, and that the purported authority of the court in the premises is not derived therefrom. But it is urged that the language of section 274 of the Code of Civil Procedure to which attention hereinbefore has been directed, although containing no express authorization to the trial court to order a daily transcript of the trial proceedings, carries with it an implied authorization so to do. In that connection (perhaps outside the record, but nevertheless an undisputed fact), appellants direct attention to the condition, that during the fiscal year last past, the cost to the county of Los Angeles for having criminal cases reported and the testimony therein transcribed was more than $141,000, and that a large portion of such cost represented daily transcripts (such as those in the instant case), in which no appeal was taken from the judgment rendered in the respective actions, and which transcripts (again like those herein) served no use or purpose other than as a convenience to respective counsel during the course of the trial. Without meaning either to charge, to insinuate, or even to suggest the possibility of the existence of any sinister intention, or lack of good faith, on the part of any one, either in the instant case, or in either or any of those in which daily transcripts were so ordered, neverthe-

less it should be apparent that a recognized legal practice in that regard would open the door to future "raids on the treasury" that might become unduly burdensome, if not intolerable.

Reverting to the language of section 274 of the Code of Civil Procedure, it will be noted that it contains no direct, or any, authorization to the trial court to order a daily transcript in any action or proceeding. It relates solely to compensation to which "in criminal cases," etc., a reporter may become entitled for "transcripts" ordered by the court. By the terms of the following section (274a) of the same Code, "judges of the superior court" specifically are authorized to have various and sundry actions and proceedings "taken down in shorthand and transcribed by the official reporter of such court"; which work includes the furnishing by the reporter of a transcript of the testimony received in an insanity proceeding, a proceeding relative to an alleged feeble-minded person, or a proceeding in which the custody or the support of minor children is involved. But, with reference to appeals in criminal cases, section 1246 of the Penal Code provides that: "The record on appeal shall be made up and filed in such time and manner as shall be prescribed in rules to be promulgated by the judicial council. * * *" And in that regard only, the rule promulgated by the judicial council (section 7 of Rules of the Supreme Court and of the District Courts of Appeal) makes provision for an order by the trial court by which the reporter is directed "to transcribe such portion of his notes as in the opinion of the court may be necessary, * * *" etc. And it may be that there are statutes which specifically provide that, after the trial of an action, "transcripts" be made of the phonographic notes taken in such proceedings; but no direct mention is made, either in section 274 or elsewhere, of "daily transcripts"; nor is any particular reason apparent, either in the language of any statute to which attention has been directed, or otherwise, for assuming that "daily transcripts" were intended to be included in those transcripts which the trial court is expressly authorized to have made.

As hereinbefore has been indicated, public funds properly may be disbursed only on statutory authorization so to do.

In the case of Mattingly v. Nichols, 133 Cal. 332, 65 P. 748, it appears that by means of a writ of mandate the petitioner sought to compel a county auditor to issue a warrant in pursuance of an order made by a justice of the peace for the payment of the transcription of phonographic notes taken at a preliminary examination of a defendant in a criminal action then pending in the court over which such justice of the peace presided, and at which preliminary examination the defendant therein was ordered discharged from custody. Other facts therein analogous to those herein are that no appeal was (or could have been) taken from the judgment, and the transcript of the phonographic notes served no useful purpose other than possibly for convenience of respective counsel at the hearing, or for the purpose of keeping a record of the proceedings. The writ was denied and the applicant therefor appealed from the ensuing order to the Supreme Court. On such appeal the appellant contended that as section 871 of the Penal Code made it the duty of the magistrate to indorse, in writing, his order of discharge upon the "depositions" taken, authenticated, and certified in the manner prescribed in section 869 of the Penal Code, and as section 883 of the Penal Code required that the "depositions" so taken should be filed with the county clerk in all cases, whether the defendant was discharged or held to answer, it necessarily followed that the shorthand notes of the testimony received at the preliminary examination should have been transcribed, as otherwise the order of discharge of the defendant could not have been indorsed upon the "depositions." With reference thereto, in part the court said: "This contention is, we think, erroneous. * * * If it was the intention of the legislature to require the reporter's notes to be transcribed and filed with the original notes in cases where the accused is discharged, as well as in cases where he is held to answer, it would have been easy to say so. No distinction whatever would have been made. It is not material to inquire whether the transcribed notes could or would have been of any use. The question * * * is whether appellant is entitled to pay, having performed the service upon the demand of the accused and under the order of the examining magistrate. But neither the state nor the county can be charged with a liability unless it is authorized by law. No discretion is vested in the justice of the peace in the matter. His authority must be found in the statute, if he has it, and we do not find any."

In the case of Richards v. Superior Court, 145 Cal. 38, 78 P. 244, 245, based upon the provisions of section 269 of the Code of Civil Procedure, on behalf of a defendant in a criminal action a writ of mandate was sought to compel a judge of the superior court to order a transcription of certain testimony received

at the trial of such action. After reciting law to the effect that in a criminal action the defendant therein is "exempted from bearing all or any part of the costs of his trial," in part the court said: "But each and all of these exemptions are matters of express statutory enactment. Where the Codes are silent, the costs are still thrown upon a defendant in a criminal case, as well as upon a defendant in a civil case. * * * The construction contended for by petitioner would lead to unbearable abuses and untold extravagance. It would result that in every criminal case in which a conviction was had, by the mere request of the defendant, he could cause every word of the proceedings to be transcribed, and the cost of the transcription made a burden upon the county. * * *"

The case of Fox v. Lindley, 57 Cal. 650, was an appeal from a judgment made on application for a writ of mandate to compel the treasurer of the county of Los Angeles to pay to the respondent reporter "certain fees for taking down the testimony and proceedings in a criminal proceeding before a justice of the peace, pursuant to the provisions of section 869 of the Penal Code as amended March 3rd, 1881." In reversing the judgment the court discussed the lack of express statutory authority for the payment of the services rendered by the reporter, and closed its observations with the following statement: "In the absence of any law prescribing the fees which the respondent was entitled to charge for his services, the certificate of the magistrate that the services were rendered did not constitute a demand upon the county treasury which the treasurer was bound in law to pay."

Gallagher v. Boyle, 58 Cal. App. 571, 209 P. 82, was an appeal from a judgment rendered by a superior court, by which an application for a writ of mandate was denied. By his application for such writ, the petitioner therein sought to compel a county auditor to issue his warrant upon the county treasurer for the payment to the petitioner of a sum of money claimed to be due to him for the transcription of certain testimony taken by him as a reporter at a preliminary examination of a defendant in a criminal action then pending in a police court; and in which action the defendant therein was ordered to be discharged from custody. The transcription of said testimony was made upon an order of the superior court, entered in another criminal case in which the defendant in the action in the police court did not appear to have been a party. On the appeal, the Supreme Court held that, in the absence of statutory provision therefor, the judge of the superior court was without authority to order payment for the transcription of the testimony.

In the instant case, in accord with the principle announced in the foregoing authorities, it is concluded that by neither express, nor by implied, statutory provision was the order here in question authorized.

[3, 4] However, by the respondents, as well as by the "friend of the court," it is contended that for the making of such order no statutory authority was required; but that the order was made in pursuance of the inherent power of the court. Concretely, the question of what is inherent in or to the court is often difficult of determination. The dictionary definition of the word is general, abstract, and of little assistance; but in each of several different cases on appeal where the question has been involved in a determination of the respective issues, the court of last resort has given its interpretation of the word.

The case entitled In re Waugh (1903) 32 Wash. 50, 72 P. 710, was an original disbarment proceeding in the Supreme Court of the state of Washington, in which the respondent therein was charged with having perpetrated a fraud upon the court in the matter of his admission to practice law. By his demurrer to the petition, the respondent raised the question of the jurisdiction of the court to try the action. Relative to the inherent power of the court in the premises, the Supreme Court of the state of Washington said: "It is contended by the relator that this court has inherent power to protect itself from fraud, and will exercise summary jurisdiction over its attorneys, who are in a sense officers of the court. The inherent power of a court is an unexpressed quantity and an undefinable term, and courts have indulged in more or less loose explanations concerning it. It must necessarily be that the court has inherent power to preserve its existence and to fully protect itself in the orderly administration of its business. Its inherent power will not carry it beyond this."

In Fuller v. State (1912) 100 Miss. 811, 57 So. 806, 807, 39 L. R. A. (N. S.) 242, Ann. Cas. 1914A, 98, the question involved was whether, after a defendant in a criminal action had been sentenced, the trial court had power to suspend execution of such sentence. With reference thereto, in part the court said: "Power to suspend the execution of its sentence has not been conferred upon any court in this state by our Constitution or statutes, and consequently, if such power exists at all, it must be one of the inherent powers of courts, or be derived from the common law.

The inherent powers of a court are such as result from the very nature of its organization, and are essential to its existence and protection, and to the due administration of justice. Watson v. Williams, 36 Miss. 331; In re Waugh, 32 Wash. 50, 72 P. 710; 8 Am. & Eng. Ency. Law, 28; 4 Words and Phrases [First Series], 3605. It cannot be said that power to suspend the execution of a sentence is essential to the existence or protection of a court, or that it is essential to the due administration of justice, and consequently it has no such inherent power."

In the case of State v. Superior Court (1931) 39 Ariz. 242, 5 P.(2d) 192, 194, it appeared that certain attorneys who then represented a person who theretofore had been arrested, and who thereafter became a defendant in a criminal action, procured an order from a judge of a court of record in which said action thereafter was filed, and by which order leave was given to inspect the premises in and about which the crime of which the defendant was charged was alleged to have been committed. Through the medium of a writ of certiorari, the prosecuting attorney raised the question of the power of the court to make such order. In considering the question of the inherent power of the court in the premises, the court said:

"We consider next whether the order can be justified under the inherent powers of the court. * * * These inherent powers may be defined as such powers as are necessary to the ordinary and efficient exercise of jurisdiction. Hale v. State, 55 Ohio St. 210, 45 N. E. 199, 36 L. R. A. 254, 60 Am. St. Rep. 691. These powers do not depend upon constitutional grant or in any sense upon the legislative will, and are undefined and probably undefinable as to their exact extent. For instance, the power to maintain order; to secure the attendance of witnesses; to enforce process; the arrangement for a proper place and conveniences for the meeting of the court—all these powers must inhere in every court, or the purpose of its creation fails, and such being the case, they need not be given expressly by the Constitution or statute, and cannot be taken away by the latter. There is, however, one important and indeed vital limitation on these powers. They must be such as are necessary for the ordinary and efficient exercise of jurisdiction, and therefore exist only when the jurisdiction to maintain which they are necessary is first established.

"In considering, therefore, whether the court has the inherent power to do any particular thing, we must first ask: 'Has it jurisdiction over a certain matter or question?' If that be answered in the affirmative, then, and not until then, the second question may be asked: 'Is the power invoked necessary for the ordinary and efficient exercise of that jurisdiction?' * * *"

Other cases contain similar declarations concerning the inherent, or what may be termed the natural, power of the court; but from the excerpts of those which have been cited herein and which appear fairly to reflect the meaning which should attach to the term "inherent," it may be deduced therefrom that unless the questioned act be of such character that, if the court be divested of its power to exercise it, or without its exercise, the court will, or may be restricted in its right to function in a constitutional manner or degree, or, in the administration of justice, by reason of such deprivation of power the efficiency of the court will, or may, be seriously impaired, such act may not be said to be of or within the inherent powers of the court. Thus tested, in the instant matter the practical question arises as to whether, in a criminal action, should the trial court be dispossessed of its assumed power to order a daily transcript of the testimony, etc., taken or received therein, and to require the payment by the county treasurer of the cost of such daily transcript, the existence of such court, or the exercise of any of its proper functions, would be threatened; or, if not entailing such dire consequences, would the administration of justice materially suffer by reason thereof? In response to such question one need consider only the operation of trial courts as ordinarily conducted. For many generations last past courts not only have responsively functioned under their constitutional powers, but ordinarily have done so most efficiently, without either a daily or any transcript having been made of the phonographic notes of their procedure. Indeed, in a large percentage of civil cases no phonographic notes are taken of testimony received on the trial thereof; and in the absence of statutory or other requirement so to do, in criminal cases undoubtedly the same situation might prevail. At most, a daily transcript of the testimony is for convenience only. That it may be of great assistance to respective counsel may not be denied; but ordinarily its usefulness to the judge of the trial court is negligible. It is even questionable whether the existence of a daily transcript on the trial of an action

tends to the efficiency of the court. It may well be that, in a majority of the cases, its presence therein retards, rather than aids, in the dispatch of business. Used as a reference to the testimony given by witnesses, for the purpose either of cross-examination or of impeachment, although frequently beneficial, in the aggregate and considered as an entirety, its usual effect is but to prolong the trial of the action, without any adequately compensating result. At any rate, it is the opinion of this court that on the trial of an action the lack to the respective counsel therein of such an assumed convenience as a daily transcript of the testimony of witnesses, etc., does not present such a situation that therefrom it will necessarily follow either that in any respect the existence of the court. as such, will be seriously, or at all, threatened; or that the efficiency of the court, as an institution of government, in the exercise of any of its several lawful functions, will be even adversely affected, much less essentially impaired.

Counsel who represent the "friend of the court" urge the point that the act of the court in ordering a daily transcript of the testimony, etc., was judicial in its nature. However, they fail to argue, or to present any authority to show what, assuming the correctness of that position, should be the consequence thereof. To this court, as far as concerns a determination of the issue herein involved, it seems immaterial whether it was a judicial act, or whether it was ministerial, or even legislative in character. No matter how it may be denominated or classified, if it was an act which was unauthorized in law, and consequently one which neither the county auditor nor the county treasurer in his official capacity was legally required to respect, the fact that in legal nomenclature it properly may bear a fancy or high-sounding designation or name, will not place it in a category where it will be "lese majeste" either to criticize it, or lawfully to test its binding force and effect. And since, as hereinbefore has been made to appear, the order in question was justified neither by the express, the implied, nor the inherent powers of the court, the suggested point relative to the nature of the act becomes unnecessary of discussion or determination by this court.

It is ordered that the judgments or orders which are the foundation for the instant appeal be, and each of them is, reversed.

We concur: CONREY, P. J.; YORK, J.

HARTFORD ACCIDENT & INDEMNITY CO. v. DEPARTMENT OF INDUSTRIAL RELATIONS et al.

Civ. 9438.

District Court of Appeal, Second District, Division 1, California.

July 10, 1934.

Hearing Denied by Supreme Court Sept. 7, 1934.

1. Master and servant ⇐362

That assumed employer was a religious and charitable corporation was not determinative of question whether injured person performing services in exchange for clothing was an employee and entitled to compensation even though work done was casual if it was done in course of trade of assumed employer (St. 1931, p. 2068, § 8 (b).

2. Master and servant ⇐361

Any valuable consideration is sufficient to create relation of employer and employee within Compensation Act, and money consideration is not necessary (St. 1929, p. 306, § 7; St. 1931, p. 2068, § 8).

3. Master and servant ⇐361

That worker received clothing rather than money for services did not preclude creation of relationship of employer and employee within Compensation Act (St. 1929, p. 306, § 7; St. 1931, p. 2068, § 8).

4. Master and servant ⇐417(7)

Finding by Industrial Accident Commission whether employment contract has been entered into based on substantial evidence may not be disturbed on review.

5. Master and servant ⇐361

Charitable corporations or organizations whose sole aim is benevolent in nature are not within the Compensation Act, even though persons receiving charitable aid render some service in return therefor (St. 1929, p. 306, § 7; St. 1931, p. 2068, § 8).

6. Master and servant ⇐361

Charitable corporation whose sole purpose was charitable *held* not liable for compensation for injuries to relief applicant exchanging services for clothing, notwithstanding that in return for relief applicant did a certain amount of work at a fixed rate (St. 1929, p. 306, § 7; St. 1931, p. 2068, § 8).

Proceedings under the Workmen's Compensation Act by Edward Whalen, opposed by the Hartford Accident & Indemnity Company, insurer. To review an award of compensation by the Industrial Accident Commission, the insurer petitions for a writ of review.

Award annulled.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

George L. Greer, of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco, for respondent Industrial Accident Commission.

L. Lee Bernstein, of Los Angeles, for respondent Edward Whalen.

HOUSER, Justice.

The pertinent facts upon which a decision by this court depends are substantially that Volunteers of America is a religious and charitable corporation having all the powers of a natural person "to do any and all things which a natural person might do necessary or desirable for the general purpose for which the corporation is organized"; that in the performance of its several activities Volunteers of America sold for cash to the public certain "rehabilitated" shoes and other articles; besides which, frequently, it freely bestowed charity, sometimes in cash but more generally in merchandise, upon assumedly worthy individuals. However, ordinarily when the applicant was able to work he was required to do so in payment for the articles of clothing or merchandise for which he made application. It also appears that on a certain day one Whalen applied to Volunteers of America for material assistance in the way of certain articles of clothing which he desired. In accord with its usual custom in such circumstances, prior to the delivery of such articles of clothing to Whalen, he was set to work by Volunteers of America at miscellaneous small jobs, such as sweeping the premises, bundling papers, sorting clothing, etc., which occupied his time for a period of approximately two days. The rate of compensation for such services was fixed at 25 cents per hour. Having received the articles of clothing for which he had applied, but at a time when he still was upon the premises occupied by Volunteers of America, Whalen sustained certain injuries on account of which he later made application to the respondent Industrial Accident Commission for compensation which, by order of the respondent, was awarded to him. Whereupon, in due course, at the instance of Hartford Accident & Indemnity Company, which is the insurer of Volunteers of America, a writ of review of the proceedings had before the respondent commission was issued from and out of this court for the purpose of determining the legality of the said order.

[1] The first point presented by the petitioner for the consideration of this court relates to the question whether, within the meaning and intent of the provisions of the Workmen's Compensation Act, at the time when the injury was suffered by Whalen he was an employee of Volunteers of America. In that connection, at the outset it should be noted that on the date when the accident happened which resulted in the injuries to Whalen, the Workmen's Compensation Act did not contain the provision that is now included therein, by the terms of which "any person or persons who perform services in return for aid or sustenance only, received from any religious, charitable or relief organization," apparently are excluded from the benefits which under the provisions of the act accrue to employees in general. St. 1933, p. 2613. To the contrary, by no provision of the act then in force was any religious, philanthropic, or eleemosynary organization or corporation specifically exempted from the binding force of the statute as it affected either corporations or individuals. Indeed, in terms, the act defines an employer as "* * * all public corporations and quasi-public corporations and public agencies therein, and every person, firm, voluntary association, and private corporation, including any public service corporation, who has any person in service under any appointment or contract of hire, or apprenticeship, express or implied, oral or written, and the legal representative of any deceased employer." In addition thereto, an "employee" is defined as "every person in the service of an employer as defined by section 7 hereof under any appointment or contract of hire or apprenticeship, express or implied, oral or written * * * but excluding any person whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer * * *." And that "the phrase 'course of the trade, business, profession or occupation of his employer' shall be taken to include all services tending toward the preservation, maintenance or operation of the business, business premises or business property of the employer. The words 'trade, business, profession or occupation of his employer' shall be taken to include any undertaking actually engaged in by him with some degree of regularity * * *." Sections 7 and 8, Workmen's Compensation Act (St. 1917, p. 835, as amended by St. 1929, p. 306, and St. 1931, p. 2068). In consideration of such language, together with the presumption (ordinarily) that any person who renders services for another is an employee (section 8(b), Workmen's Compensation Act; Hillen v. Industrial Accident Comm., 199 Cal. 577, 580, 250 P. 570), ordinarily it would seem clear that the mere fact that the assumed employer herein was a re-

ligious and charitable corporation in itself would not be determinative of the question here involved, nor adversely affect the right of recovery of compensation by one of its employees who sustained an injury arising out of and in the course of his employment. And even though the work that was performed by Whalen in a sense was "casual," if it was in the "course of trade," that is to say, if the work done included an "undertaking actually engaged in by him (it) with some degree of regularity," ordinarily it should follow that the relationship of employer and employee was established.

Regarding the question of the existence of such a relationship, in view of the important fact that the employer was a religious and charitable corporation and the employee was an applicant for material assistance, in the case of Gilroy v. Mackie, et al. (Leith Distress Committee) 2 B. W. C. C. 269, it was held that where under an unemployment workman act a "distress committee" provided temporary work for an applicant therefor, a contract of employment was created; and on account of an injury suffered by such applicant in the course of such employment he was entitled to compensatory relief. And in Porton v. Central Unemployed Body for London (1908) 100 L. T. 102; 2 B. W. C. C. 296, it was held that the Central Body under the Unemployed Workmen Act were "employers" within the meaning of the compensation act; and that a workman who was employed by such body, having been killed in the course of and arising out of his employment, his widow was entitled to compensation. See, also, Burns v. Manchester & Salford Wesleyan Mission, 1 B. W. C. C. 305; MacGillivray v. Northern Counties Institute for the Blind, 48 Scotch L. R. 811, 4 B. W. C. C. 429.

With relation to whether the work that the applicant herein performed for Volunteers of America was "in the course of trade" of the employer, the case of Walker v. Industrial Accident Commission, 177 Cal. 737, 171 P. 954, L. R. A. 1918F, 212, is decisive. It was there held (syllabus): "Evidence that a lodging-house keeper was in the habit of employing someone to help out the chambermaid in taking up carpets and matting, and cleaning walls, transoms, windows, and curtains, warranted the conclusion that the person employed was engaged in the usual course of business of the employer, covering the normal operations which formed part of the ordinary business carried on by the lodging-house keeper, and that the person so employed, though only casually employed, was not excluded from the benefits of the Workmen's Compensation Act by section 14, which excludes from its benefits any person 'whose employment is both casual and not in the usual course of the trade, business, profession, or occupation of his employer.' "

That decision, together with the plain language of the statute, leaves no room for doubt regarding the fact that the services rendered by the applicant were "in the course of trade" of his employer, if there was a relationship of employer and employee as contemplated by the Workmen's Compensation Act.

[2-4] In several different cases it has been decided that a money consideration for the services performed was not a deciding factor in the question of whether the status of employer and employee existed. As to the essential element of consideration required to pass from employer to employee, it is sufficient if it be of that character usually denominated as "valuable." In that connection, see Gabel v. Industrial Accident Commission, 83 Cal. App. 122, 125, 256 P. 564, and authorities there cited; also, Western Ind. Co. v. Pillsbury, 172 Cal. 807, 810, 159 P. 721; New York Ind. Co. v. Industrial Accident Commission, 80 Cal. App. 713, 252 P. 775; Hillen v. Industrial Accident Commission, 199 Cal. 577, 250 P. 570. In the instant case, it therefore becomes obvious that, stated in its reverse form, the fact that, in effect, for the services performed by Whalen he received clothing, rather than money, presents no obstacle to a determination that a "contract of hire" or employment existed between the immediate parties to the transaction. In addition thereto, repeatedly it has been held that when the subject of dispute is whether a contract of employment has been entered into, a finding made thereon by the commission based upon substantial evidence may not be disturbed by a reviewing tribunal. 27 Cal. Jur. 277, 575; and 1932 Supp. to same, 1108. Going further, in the case of Hillen v. Industrial Accident Commission, 199 Cal. 578, 250 P. 570, 571, it was held that, even when the question of the relationship between the parties constituted a *mixed question of law and fact*, it was to be proved "like any other question," and that a finding of the commission "in effect, that the relation existed * * * is binding on this court." Since it is evident that as to whether Whalen was an employee at most is "a mixed question of law and fact," very properly the question might here arise, if the principle of the decision in the case just cited is sound and is to be relied upon, whether that does not end the matter as far as further consideration by this court is concerned.

However, on the other hand, in the case of McBurney v. Industrial Accident Commission (Cal. Sup.) 30 P.(2d) 414, 416, it was held that an indigent person who, pursuant to the provisions of the statute (St. 1901, p. 636, as amended, see Deering's Gen. Laws, Act 5814), was entitled to receive, and was receiving, aid in various ways, including "relief work," or "made work," from the county welfare department of Los Angeles county, was not an employee within the meaning of the Workmen's Compensation Act. Apparently the decision therein is based upon the reasoning that since by statute the county was compelled to " 'relieve and support * * * indigent persons,' * * * to supervise by periodic visitation every person receiving such relief, to devise ways and means of bringing such persons unable to maintain themselves to self-support," etc., the applicant became "in a sense a ward of the county"; and notwithstanding the fact that "he would receive the relief whether he worked or not," and that if he chose to work "he might not be paid at all, or might be paid a nominal sum, or he might be paid a substantial sum, even the equivalent of a going wage," still "the transaction thus far is in the field of public welfare, and the essential characteristics of a contract of hire are not present." In other words, although the applicant for aid was not compelled to work, if he chose to do so, and the arrangement or understanding between him and the county was that for such work he was to receive a definite wage, nevertheless he was not an employee. To the contrary of such declaration of law is the principle announced in the case of California Highway Commission v. Industrial Accident Commission, 200 Cal. 44, 251 P. 808, 49 A. L. R. 1377. In the well-reasoned opinion therein it is ruled that (syllabus): "A convict engaged in the performance of labor on the state highway, under the provisions of chapter 316 of the Laws of 1923, is an employee within the meaning of the Constitution and the Workmen's Compensation Act."

However, in cases in which similar facts and circumstances were involved, the McBurney decision is well supported, especially in each of several of our sister states. Basham v. Kanawha County Court (W. Va. 1933) 171 S. E. 893; In re Moore (Ind. App. 1933) 187 N. E. 219; Vaivida v. City of Grand Rapids (1933) 264 Mich. 204, 249 N. W. 826, 88 A. L. R. 707. But neither in the McBurney Case nor in either of the cases hereinbefore cited as authority for the decision therein were the circumstances like those herein involved. In each of such cases the applicant for aid was legally entitled to receive it. Especially in the McBurney Case, by the terms of the statute the county was required to support the applicant. Whether he worked or not, either as a direct payment for the supplies furnished him, or at a stipulated wage, was entirely optional with him. However, in each of certain other decisions cited as persuasive precedents in the McBurney Case, a situation is presented analogous to that herein, and in which cases the principle is announced that the relationship of employer and employee was not established.

In the case of Stiles v. Des Moines Council Boy Scouts of America (1930) 209 Iowa, 1235, 229 N. W. 841, it appeared that at the request of staff officers of the organization of Boy Scouts, a boy, who had attained the rank of "Eagle" in such organization, went to a proposed summer camp with the understanding that he was to help prepare such camp for the use of young boys (who paid for their accommodations), and that in payment for such services by the "Eagle scout" he was to receive his board and lodging; and it was held that he was not an employee and consequently, on account of an injury received by him in the course of and arising out of his "employment," he was not entitled to compensation under the provisions of the Workmen's Compensation Act.

Likewise, in Blust v. Sisters of Mercy (1931) 256 Mich. 1, 239 N. W. 401, it was held that a young woman, who was injured while performing domestic duties in return for "normal training" in an academy for the purpose (in accord with statutory requirements) of qualifying her as a teacher in the public or in the parochial schools of the state of Michigan, was not an employee within the meaning of the statutory provisions contained in the Workmen's Compensation Law of said state.

But in its facts, the case of Thurston County Chapter, American National Red Cross v. Department of Labor & Industries, (1932) 166 Wash. 488, 7 P.(2d) 577, more closely resembles the instant case. In the cited case it appears that Red Cross, like Volunteers of America in the instant case, is "a purely charitable organization"; that in the course of its activities Red Cross, like Volunteers of America, solicited and collected from various and sundry sources sums of money to be used in ministering to whose who were destitute and in need of aid; that in pursuance of its policy in that regard, "Red Cross furnished each man performing a day's labor groceries, clothing, or medical services to the value of $2.50"; but that the services so rendered by

such applicant were performed, not directly for Red Cross, but for some local municipality "in repairing, reconstructing and maintaining roads and streets," etc., therein. It was held that it was not the legislative intent that charitable organizations such as Red Cross should be within the operation of the Workmen's Compensation Act. However, attention is again directed to the fact that in the cited case the work performed by the applicant was not in and about, or in connection with, the operation of the organization itself, as was the work performed by the applicant in the instant case. But with regard to the liability of a charitable corporation for damages that result from its assumed negligence in the operation of its business, it has been held that no cause of action accrues to an injured employee and that the provisions of workmen's compensation laws are inapplicable to charitable corporations, unless such laws specially so provide. Zoulalian v. New England Sanitorium, etc., (1918) 230 Mass. 102, 119 N. E. 686, L. R. A. 1918F, 185, and authorities there cited. See, also, Dillon v. Trustees of St. Patrick's Cathedral, (1922) 234 N. Y. 225, 137 N. E. 311.

[5, 6] From a consideration of the American authorities on the subject, and especially the case of McBurney v. Industrial Accident Commission, to which reference hereinbefore has been had, it becomes clear that the trend of the decisions, notwithstanding the broad general terms expressed in the various statutes by which compensation is provided, as applied to "all" corporations and "public agencies" for injuries sustained by workmen in their employ arising out of and in the course of their employment, is toward a construction that, in the exercise of their charitable functions, in effect exempts charitable corporations from the operation of the law as applied to individuals, or to the ordinary business corporations. The reasons usually assigned for such conclusion are that by common law no liability existed; that the Legislature presumably was aware of such state of the law; and that in the absence of special language by virtue of which such liability was created, the presumption must be that the legislature intended that the exemption that existed at common law should not be disturbed. Moreover, that the plain intent of the Workmen's Compensation Act was to impose upon industry alone the burden of adequately remunerating and caring for its injured employees and their dependents; and that charitable corporations or organizations whose sole aim is benevolent in its nature, purpose and effect should not be so taxed, in favor of persons receiving charitable aid or relief, even though they render some service in return therefor.

In accord with the authorities to which attention hereinbefore has been directed, it is ordered that the award of the respondent commission be and it is annulled.

We concur: CONREY, P. J.; YORK, J.



139 Cal.App. 768

PEOPLE v. ASELTINE et al.

Cr. 2544.

District Court of Appeal, Second District, Division 2, California.

July 18, 1934.

Hearing Denied by Supreme Court Aug. 16, 1934.

1. Criminal law ⇐1069(5)

Where seven weeks after sentence was imposed upon plea of guilty accused moved to vacate judgment and set aside plea, which motion was denied, notice of appeal would be construed as referring to order which court made on date of denial of motion where notice designated judgment as being entered on such date, and hence would be considered by reviewing court notwithstanding no appeal was taken from judgment of conviction in manner prescribed by statute (Pen. Code, § 1239).

2. Criminal law ⇐274

Where, on account of duress, fraud, or other fact overreaching free will and judgment of defendant, he is deprived of right of trial on merits, court in which he was sentenced may after judgment and after time for appeal has passed, if properly supported motion is seasonably made, grant withdrawal of plea of guilty, but such remedy applies only upon strong showing of deprivation of legal rights by extrinsic causes.

3. Criminal law ⇐274

That a defendant, knowing his rights and consequences of his act, hoped or believed or was led to hope or believe that he would receive milder punishment by pleading guilty than if he were tried by jury presents no ground for exercise of discretion to permit plea of guilty to be withdrawn.

4. Criminal law ⇐274, 998

Motion to vacate judgment and to set aside plea of guilty upon ground of fraud and duress *held* properly denied, where de-

fendant was sufficiently intelligent and experienced to fully apprehend nature of proceedings and effect of his actions and his plea of guilty upon five counts was entered in expectation of escaping prosecution on remaining nineteen counts.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

E. P. Aseltine and Frank E. McCabe were convicted of grand theft. From an order denying his motion to vacate judgment and to set aside plea of guilty, upon which sentence had been imposed, Frank E. McCabe appeals.

Order affirmed.

Samuel S. Adler and Louis P. Russill, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

SCOTT, Justice pro tem.

The defendant McCabe was charged with one count of conspiracy to commit grand theft and twenty-three counts of grand theft. Upon arraignment, he pleaded not guilty, but on the date of trial withdrew that plea as to five counts and pleaded guilty as to them. He applied for probation, which, at the time of the hearing, January 19, 1934, was denied. Sentence was thereupon imposed as to each of the five counts, to run consecutively, and the remaining nineteen counts were dismissed. Seven weeks thereafter, on March 9, 1934, defendant filed his "motion to vacate judgment and set aside plea of guilty" on the grounds of fraud and duress. At the hearing on the motion on March 20th affidavits and oral testimony were presented supporting and opposing the motion, and it was denied.

[1] There appears in the clerk's transcript of the proceeding in the court below, dated March 24, 1934, what purports to be a notice of appeal to this court "from the judgment therein entered in the superior court on the 20th day of March, 1934, from an order denying defendant the right to change his plea and from the order denying the setting aside of reopening and rehearing on probation." It does not appear that any appeal from the judgment was taken by defendant in open court in the manner prescribed by section 1239 of the Penal Code, at the time the judgment was rendered or by filing a written notice of appeal within two days thereafter. If this were an attempt to appeal from the judgment of the lower court, it would be ineffectual and would be dismissed. Since the notice designates the "judgment" as being entered March 20, 1934, it will be construed as referring to the order which the court made on that date denying defendant's motion to set aside the judgment and to reopen probation.

Appellant contends that the court abused its discretion in denying his motion, urging that, although innocent, he was induced by fraud, duress, and coercion to plead guilty.

In his affidavit defendant sets out that four days before the trial date his bondsmen surrendered him to custody; that he was visited in the county jail by one Wittler, unknown to defendant, purporting to come from the office of defendant's attorney and accompanied by two relatives of a codefendant, and was urged by Wittler to plead guilty, and was assured that, if he did so, the district attorney's office would see to it that he got probation immediately or with a short jail term; that on the day of trial defendant's attorney came to him in the anteroom adjoining the courtroom and urged him to plead guilty; that the deputy district attorney suggested he plead guilty to five counts, and stated to defendant that he could not promise any immunity or reward nor that he would receive probation; that the court bailiff came in and told defendant he was foolish to not plead guilty and that he would get the best of it if he did; that his attorney told him repeatedly that he was a fool for not pleading guilty, and, if he persisted in his refusal, that he (the attorney) would turn him over to the public defender; that thereupon defendant pleaded guilty to five counts; but that he nevertheless was at all times innocent.

Defendant's affidavit and testimony on the hearing on the motion were contradicted by opposing affidavits and testimony in the matters material to the determination of the motion by the lower court. The record of defendant's testimony shows him to be a man of sufficient intelligence and experience to fully apprehend the nature of the proceedings and the effect of his actions with reference thereto. He stated that he had taken $64,000 from investors in Southern California, but that, if released, he could make restitution this year or by the end of 1936; that his "proposition" was secret or mysterious; that "it is not anything that can be sold," but "there is a cotton machine mixed in with it, the development of cotton." From his testimony the lower court might well have concluded that defendant's plea of guilty to five counts had been entered in the expectation, which was realized, of

escaping prosecution on the remaining nineteen counts.

[2, 3] It is well settled in this state that, where on account of duress, fraud, or other fact overreaching the free will and judgment of a defendant, he is deprived of the right of a trial on the merits, the court in which he was sentenced may after judgment and after the time for appeal has passed, if a properly supported motion is seasonably made, grant him the privilege of withdrawing his plea of guilty and of reassuming the situation occupied by him before a plea of any kind was entered. This exceptional remedy applies only upon a strong and convincing showing of the deprivation of legal rights by extrinsic causes. People v. Schwarz, 201 Cal. 309, 257 P. 71. The fact that a defendant, knowing his rights and the consequences of his act, hoped or believed or was led by his counsel or others to hope or believe that he would receive a milder punishment by pleading guilty than that which would fall to his lot after trial and conviction by a jury, presents no ground for the exercise of the discretion necessary to permit a plea of guilty to be withdrawn. People v. Manriquez, 188 Cal. 602, 206 P. 63, 20 A. L. R. 1441.

[4] While the granting or denying of permission to withdraw a plea of guilty and to substitute a plea of not guilty is in many cases a matter within the sound discretion of the trial court (People v. Bostic, 167 Cal. 754, 141 P. 380), there is nothing in this case to permit the exercise of such discretion; under the authorities cited, the court could not have done otherwise than order the denial of the motion to set aside the judgment.

The order appealed from is affirmed.

We concur: CRAIG, Acting P. J.; DESMOND, J.



139 Cal.App. 693

LEVIN v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 9816.

District Court of Appeal, Second District, Division 2, California.

July 14, 1934.

1. Mandamus ⇐16(1)

Where application for issuance of commission to take deposition of witness outside state is made at date so late before trial that deposition desired cannot be taken in time to be used, law will not compel issuance of commission (Code Civ. Proc. §§ 2020, 2024).

2. Depositions ⇐39

Where application for commission to take deposition of witness outside state is made so near date of trial that deposition cannot be taken in time and applicant has been negligent and rights of others would be prejudiced by continuing trial, court would be justified in refusing such continuance, and under such circumstances issuance of commission would not be matter of right (Code Civ. Proc. §§ 2020, 2024).

3. Mandamus ⇐40, 45

In husband's divorce action, where wife's delay in applying for commission to take her deposition outside state was not due to her negligence and plaintiff would not be prejudiced by delay necessitated by taking of deposition, wife *held* entitled to writ of mandate directing that trial be continued and that commission be issued (Code Civ. Proc. §§ 2020, 2024).

Proceeding for writ of mandate by Anna Levin against the Superior Court of the State of California in and for the County of Los Angeles and another.

Writ granted.

Friedman & Katzev, of Los Angeles, for petitioner.

Everett W. Mattoon and S. V. O. Prichard, both of Los Angeles, for respondents.

CRAIG, Justice.

The petitioner is a resident of the state of Massachusetts and the wife of the plaintiff in an action for divorce commenced in this state. Her answer and a cross-complaint were filed and the cause set down for trial on May 17, 1934, on which date her counsel were for the first time able to make service of an order to show cause why attorneys' fees, costs, and alimony pendente lite should not be allowed. A motion for a continuance was interposed, supported by the affidavit of petitioner's counsel to the effect that all witnesses by whom she intended to disprove the plaintiff's allegations resided in Massachusetts, that it was necessary to a proper presentation of her case that the depositions of herself and of said witnesses be taken there, and that she was wholly without funds with which to pay therefor. A continuance was granted, notice of motion for a commission was filed, and after hearing the motions for expenses and

alimony pendente lite and for the commission to take the testimony of such witnesses were denied. It was stipulated that the question of attorneys' fees and costs should be held in abeyance until the time of trial. Thereafter the motion to take petitioner's testimony was removed from the calendar, the cause was again continued, and on the 4th day of June said motion was denied and the date of trial was reset.

It is alleged that petitioner has no plain, speedy, or adequate remedy at law, that her testimony is necessary and material, and that without the same she will be unable to present her cause. The foregoing embraces practically all that is made to appear by the petition and the answer thereto. None of petitioner's allegations is denied.

This proceeding is founded upon sections 2020 and 2024 of the Code of Civil Procedure, which authorize the taking of testimony by deposition outside the state on application of either party, and upon the case of San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 99 P. 359, 360, 17 Ann. Cas. 933. In like proceedings to obtain the testimony of a witness not a party in an eastern jurisdiction, for use on a second trial but pending appeal, it was said in the cited case: "What, then, is the proper construction of sections 2020 and 2021 of the Code of Civil Procedure which prescribe the time for taking depositions? They say in plain terms that the deposition of a witness out of the state, in all cases and of a witness in the state in certain enumerated cases, may be taken in an action at any time after the service of the summons or the appearance of the defendant. This language is very sweeping and comprehensive, and clearly includes, if taken literally, all the time that an action is pending, that is to say, all the time from service of summons or the appearance of the defendant until 'its final determination upon appeal or until the time for appeal has passed unless the judgment is sooner satisfied.' Code Civ. Proc. § 1049." In that behalf it was further said: "As to the question of remedy, we think the petitioner is entitled to the writ of mandamus. That would be the only remedy for the refusal of a commission in a proper case before judgment, and there can be no doubt that it would lie, because it does not rest in the discretion of the trial court or judge to refuse a commission in the cases defined by the Code. Conceding that, in cases such as this, the order denying the application for a commission is appealable, that does not seem to be a sufficient reason for holding that remedy exclusive."

A writ of prohibition to restrain the issuance of an order to take testimony of a party outside the jurisdiction of the courts of the state of Washington was denied upon the authority of several decisions. Upon a petition wherein it was alleged that the superior court was about to issue such order it was said: "The precise question seems not to have been heretofore brought directly to the attention of this court, yet our cases, in so far as we have noticed the question, support the position taken by the trial judge." State ex rel. James D. Lacey & Co. v. Superior Court, 161 Wash. 467, 297 P. 164, 166.

[1, 2] Although the Code provisions include all of the time from the service of summons until final determination of a suit, and in general the issuance of the commission is a matter of right, as applied to a particular case this must be taken with such qualification as the facts of such case may demand. The law does not require an idle act. It would not compel the issuance of a commission if the application were made at a date so late before the trial that the deposition desired could not be taken in time to be used. At least to the extent, therefore, that the trial court may properly consider the claims of the party seeking a commission to take a deposition for a continuance of trial date in order that the deposition may be used, discretion exists to refuse an application for a commission. If it appears that the applicant has been negligent in applying for the commission and that the rights of others would be prejudiced by continuing the trial, the court would, of course, be justified in refusing such continuance, and without a continuance the taking of the deposition would become useless. Hence an issuance of the commission would not, under such circumstances, be a matter of right.

[3] But in the instant case there is nothing to suggest how the plaintiff in the divorce action would be prejudiced by such a delay as would be necessary for the taking of the defendant's deposition and its use at the trial. The delay in applying for the commission does not appear to have been due to negligence on the part of petitioner, and so we think that she has a right to have it issue. The law always favors the determination of cases on their merits. However desirable it may be that litigation be determined promptly, it is even more to be desired that when lawsuits are ended justice be done, and to that end that all reasonable opportunity be afforded the parties to present a legitimate claim or defense if one exists. This is especially true

in a divorce case, where the state is interested in the marital status of the parties. We think the trial should be continued to such a date as will permit the deposition sought to be taken, and that the commission should be issued.

Let the writ issue as above indicated.

We concur: STEPHENS, P. J.; SCOTT, Justice pro tem.



139 Cal.App. 766

Ex parte GLANCY.

Cr. 2576.

District Court of Appeal, Second District, Division 2, California.

July 18, 1934.

1. Habeas corpus ⇐29, 50

Judgment of justice's court imposing sentence of six months for disturbing peace, for which maximum legal sentence was 90 days, *held* not void so as to permit release of prisoner by habeas corpus before he had served 90 days.

2. Criminal law ⇐258(2)

Where judgment of justice's court did not mention fine, written direction of justice to sheriff that prisoner be imprisoned until fine named in judgment was paid was a nullity.

Application by Luther Glancy for a writ of habeas corpus.

Writ discharged, and prisoner remanded.

Alexander L. Oster, of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., and A. H. Van Cott, Deputy Dist. Atty., both of Los Angeles, for respondent.

STEPHENS, Presiding Justice.

[1] Luther Glancy was convicted in a justice's court of disturbing the peace and sentenced to the county jail for six months. While confined therein, and before the expiration of 90 days, the maximum legal imprisonment for such offense, he petitions, through his attorney, in habeas corpus to be released on the ground that the judgment is void. But the judgment is not void and habeas corpus will not assist him until the legal time has been served. In re Morck, 180 Cal. 384, 181 P. 657; In re Rosencrantz, 205 Cal. 534, 271 P. 902, and Id., 211 Cal. 749, 297 P. 15. Counsel for petitioner argues that the cited cases arose from judgments under the indeterminate sentence law. He also argues that no intendments arise from judgments of justice courts. We think these points make no difference in the problem.

[2] The written direction of the justice to the sheriff states that Glancy is to be confined in the county jail until the fine named in the judgment is paid. Since no fine is mentioned in the judgment, this may be regarded as a nullity.

Writ discharged, and the prisoner remanded.

We concur: CRAIG, J.; DESMOND, J.



139 Cal.App. 729

PEOPLE v. MAINARD.

Cr. 2529.

District Court of Appeal, Second District, Division 1, California.

July 17, 1934.

Criminal law ⇐1159(3)

Judgment of conviction based on conflicting evidence will not be disturbed by reviewing court.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

La Rone Mainard was convicted of robbery, and assault with caustic chemicals, and he appeals from the judgment following his convictions and an order denying his motion for a new trial.

Judgment and order affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

HOUSER, Justice.

Defendant appeals from a judgment which followed his conviction of each of the crimes of robbery and assault with caustic chemi-

cals. He also appeals from an order by which his motion for a new trial was denied. The action was tried before the court sitting without a jury.

Notwithstanding that which is palpable error in the statement made by appellant regarding the specification of alleged error upon which he relies for a reversal of the judgment and the order herein, it will be assumed that in reality his point is that the evidence adduced on the trial of the action was insufficient to sustain the judgment. In that regard, it is manifest that no useful purpose would be served by a recital herein of such evidence. Suffice it to say that the complaining witness testified to facts which, if believed by the judge of the trial court, were sufficient to sustain the judgment of conviction of defendant. But that was not all of the evidence upon which the conviction of defendant depended. In several important particulars the testimony given by the complaining witness was corroborated by other independent evidence. The fact that defendant denied his guilt and that both he and other witnesses contradicted much of the testimony given by the witnesses for the prosecution has the effect only of presenting a conflict in the evidence adduced by the respective parties to the action. In such circumstances, the rule is well established that an appellate tribunal will not interfere with the judgment rendered by the lower court.

The judgment and the order by which defendant was denied a new trial are affirmed.

We concur: CONREY, P. J.; YORK, J.



139 Cal.App. 724

LILLIE v. WARNER BROS. PICTURES, Inc., et al.

Civ. 7835.

District Court of Appeal, Second District, Division 1, California.

July 16, 1934.

1. Torts ⇐8

Exhibition of scenes of motion picture, in which actress appeared, as short subject, was not tortious invasion of actress' right of privacy, where only right of actress to prevent exhibition of scenes as short subject was based upon specific provision of contract of employment.

2. Libel and slander ⇐68

Where motion picture actress' contract of employment provided scenes in which she appeared would not be exhibited as short subject, and scenes in which she appeared were exhibited as short subject, proper remedy was action for breach of contract and not action for damages for libel, where only right of actress to prevent exhibition of scenes as short subject was based upon specific provision of contract.

3. Contracts ⇐332(1)

Complaint which did not contain usual allegations with respect to breach of contract and an action based thereon and did not allege that plaintiff had performed covenants on her part to be performed under contract and that defendants had violated their contract did not state cause of action for breach of contract.

HOUSER, J., dissenting.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Beatrice Lillie against Warner Bros. Pictures, Inc., and others. From a judgment dismissing the action, plaintiff appeals.

Affirmed.

Roger Marchetti and Benjamin S. Crow, both of Los Angeles, for appellant.

Freston & Files, of Los Angeles (Ralph E. Lewis, of Los Angeles, of counsel), for respondents.

CONREY, Presiding Justice.

This is an appeal by the plaintiff from a judgment of dismissal of the action, following upon the court's order sustaining the several demurrers of the defendants to the third amended complaint.

This appeal is presented on the judgment roll. If the complaint stated a cause of action, the judgment should be reversed. Relying upon the authority of Westwater v. Rector, etc., of Grace Church, 140 Cal. 339, 73 P. 1055, respondents contend that the action sounds in contract and not in tort, and that as an action for breach of contract it did not state a cause of action. Appellant apparently concedes that, if the action is necessarily founded on a breach of contract, there is no right of action shown by the allegations of the complaint. Appellant contends, however, that by her third amended

complaint she stated a cause of action for libel, committed by wrongful and unauthorized publication of a picture of appellant, whereby she was misrepresented in her professional character as an actress, with resulting injury to her professional reputation.

By a contract in writing, defendants engaged the services of appellant to appear in a Vitaphone Talking Production which they were producing under the temporary title of "Show of Shows." In the contract it was provided as follows: "It is understood, that for her services in this production, Miss Beatrice Lillie will receive a flat sum of $15,000, payable in two weekly instalments. It is understood that the one scene, which we supply her with, will not run less than six minutes or more than seven minutes, and the other scene is to run between two and three minutes. It is understood, that you are not required to do more than the above two scenes for the above amount, and that the two above scenes are only to be used in connection with this revue, and not to be used in 'Shorts.' * * * It is also understood and agreed, that Miss Lillie will do two Specialty Numbers in this production for us, one which we will furnish, and the other the material for which she will furnish if so desired by us. It is understood and agreed, that Miss Beatrice Lillie will be given featured billing in this production in the same size type as any other member of the cast, it being understood that this is an all-star production, in which all players are being equally billed."

Those provisions of the third amended complaint which constitute the alleged cause of action are as follows: "II. That plaintiff is an actress by profession, and at all times herein mentioned, and for a long time prior thereto was engaged in acting upon the stage and in moving pictures and talking motion pictures; that she is an actress and public performer of great artistic ability and accomplishments with a wide reputation among producers, other members of the theatrical profession, and the public as one habitually associated with and taking part only in acts and performances of major importance as the star or featured performer at a high remuneration therefor, so that appearance by plaintiff in an act or performance of minor importance, or which taken from its original context appeared to be of minor importance, would impair her standing as a star or feature player, and would lessen her importance in the estimation of producers, other members of theatrical profession and the public, and would thereafter impair her ability to command as high a remuneration, or as important engagements as theretofore, all of which facts were, at all times herein mentioned, well known to defendants and each of them."

Paragraph III states the pleader's construction of the contract, and makes the written contract itself a part thereof.

The complaint continues:

"IV. That at the time of the making of said contract, and at all times thereafter, each of the parties hereto well knew that the exhibition in motion pictures of plaintiff's part in said production separate and apart from those parts of the said motion picture contributed by said other stars and that the billing and/or advertising of plaintiff's performance in said part as a separate production and not in connection with the main play entitled 'Show of Shows' would impair and damage plaintiff's prestige and reputation as a star or feature performer. It was therefore expressly understood that the defendants should have no right, privilege or license to publish and exhibit a reproduction of plaintiff's said acted part except as a part and portion of said major all-star production and except that the same be expressly advertised as such.

"V. That upon the making of the said contract plaintiff took part and appeared in said all-star production and her acted part was therein filmed by the defendants in connection with the said motion picture film of 'Show of Shows.'

"VI. That plaintiff is informed and believes and upon such information and belief alleges that after the making of the film of the said 'Show of Shows,' including the said acted part of plaintiff, defendants, having secured the reproduction of plaintiff's said acting in connection with said all-star major production and under said contract, without any privilege, permission or authority from plaintiff, and against her will and consent, wrongfully, unlawfully, wilfully, maliciously and fraudulently and in violation of plaintiff's right of privacy, did subtract and separate from the film and records of said all-star production those portions thereof reproducing plaintiff's said acted part and did present and exhibit said portions so separated in various theatres and at various public performances before large audiences of people as a 'short' or performance of short duration and inconsequential importance, and not in connection with or as part of the said major production and not in connection with the work of said other stars and in such manner

as to present plaintiff to said audiences as a performer who could be and had been engaged in the production of a 'short' or brief and minor production, and did thereby present and show plaintiff to said audiences and the theatrical world as a cheap and inconsequential performer, to the actual damage of plaintiff in the sum of fifty thousand ($50,000.00) dollars."

The decision in Westwater v. Rector, etc., of Grace Church, 140 Cal. 339, 73 P. 1055, 1056, relied upon by respondents herein, presents a contrast as well as a similarity to the case at bar. There the plaintiff was a vocalist in the defendant's choir under a contract which provided that she should not be dismissed without six months' notice. In violation of the contract she was dismissed without notice. The Supreme Court said: "The action is not for a tort, nor is it for slander or libel. Therefore the question is one arising by reason of a breach of the contract." Treating the case therefore as an action for breach of contract, upon examination of the complaint it was found that it did not state facts sufficient to constitute a cause of action. It showed a breach of the contract, but failed to show or state facts showing any damage to the plaintiff by reason of the breach.

[1-3] Appellant claims that respondents have invaded a right which belongs to her independent of the contract. Did she have any right to prevent the exhibition of the picture as a short, which was not based upon the specific provisions of the contract? If it be true, as respondents contend, that, in the absence of such specific provision, an exhibition of the picture as a short or otherwise would have been justified as an exercise of the producer's property right in the picture, then it follows that such exhibition of the picture by the defendant gives to the plaintiff no right of action other than for breach of the contract. We think that this is the actual situation. By the contract respondent acquired a full ownership in the picture, subject only to the limitations contained in the contract. This ownership included the right to use the picture publicly in any form of exhibition, except as such right is limited by the terms of the contract. It seems clearly to follow that the exhibition of the scene as a short would not be a tortious invasion of the plaintiff's right of privacy. If wrong at all, it necessarily was only a breach of the contract.

The admissions made by counsel for appellant exclude any contention that the complaint stated a cause of action for breach of contract. They themselves point out that their complaint does not contain the usual allegations with respect to a breach of contract and an action based thereon, that it is not alleged that the plaintiff has performed the covenants on her part to be performed under the contract, and it is not alleged that the defendants violated their contract. Appellant rests her case upon her contention that the gist of the action is an unauthorized and unprivileged publication; in other words, an action to recover damages for libel.

As it appears that the complaint did not state a cause of action on any theory applicable to the facts of the case as alleged, it follows that the court did not err in sustaining the demurrer.

The judgment is affirmed.

I concur: YORK, J.

I dissent: HOUSER, J.



139 Cal.App. 715

LESLIE v. CITY OF MONTEREY et al.

Civ. 8119.

District Court of Appeal, First District, Division 1, California.

July 16, 1934.

Hearing Denied by Supreme Court Sept. 13, 1934.

1. Negligence ⇐2

Negligence can exist only if there is some duty or obligation, which must be performed by party charged with negligence, in favor of injured party.

2. Negligence ⇐2

Party charged with lack of due care cannot be held negligent as to injured party unless it appears that party charged with negligence owed to injured party duty of care.

3. Negligence ⇐32(1)

Owner of property owes to trespasser or licensee no duty to keep premises in safe condition.

4. Electricity ⇐15(1)

Electric company which under franchise was permitted to maintain wires at time and place where accident occurred owed no duty to trespasser or licensee except to refrain from such acts or conduct as might result in willful or wanton injury, but company owed

to invitee duty to keep premises in safe condition.

5. Electricity ⇐15(2)

Contractor's employee engaged in installing fence and backstop for baseball park *held* not "invitee" of electric company maintaining wires over place where fence was being installed so as to render company liable for employee's injury sustained from electric shock when pole, which was being put in ground, came in contact with high voltage wires.

[Ed. Note.—For other definitions of "Invitee," see Words & Phrases.]

6. Electricity ⇐15(2)

Electric company *held* not liable for injury from electric shock sustained by employee of contractor engaged in erecting fence and backstop for baseball park because of company's reclosure of circuit breakers without investigating as to location of trouble, where employee was trespasser, and there was no evidence that company had actual knowledge of employee's peril.

Appeal from Superior Court, Santa Cruz County; H. C. Lucas, judge.

Action by Lawrence J. Leslie against the City of Monterey and others. From a judgment for plaintiff, the Coast Valleys Gas & Electric Company and another appeal.

Reversed.

Thomas J. Straub, John C. Wood, and W. R. Dunn, all of San Francisco, for appellants.

Snook & Snook & Chase, of Oakland, and Stanford G. Smith, of Santa Cruz, for respondent.

Brobeck, Phleger & Harrison, of San Francisco, for California Oregon Power Co.

Roy V. Reppy and E. W. Cunningham, both of Los Angeles, for Southern California Edison Co., Limited, as amici curiæ in support of appeal.

JOHNSTON, Justice pro tem.

This action was brought by Lawrence J. Leslie against the city of Monterey and certain of its officers, Coast Valleys Gas & Electric Company, a corporation, and Pacific Gas & Electric Company, a corporation, for damages which he received for personal injuries on February 12, 1928, at the baseball park in the city of Monterey, Cal. Judgment of nonsuit was granted in favor of the city of Monterey and its officers. Appellants herein also made a motion for nonsuit but the same was denied by the trial court. The interest of the appellants being identical, the jury rendered a verdict in favor of the plaintiff and against the appellants in the sum of $75,000, which, upon motion for a new trial, was reduced by the court to the sum of $50,000.

At the time of the accident, the city of Monterey owned and operated a baseball park bounded on the east by Figueroa street, on the west by Adams street, on the north by Franklin street, and on the south by Pearl street. As a certain coast league baseball team was coming to Monterey to start its practice season, the city of Monterey adopted plans and awarded a contract for the erection of a fence and a backstop surrounding the said baseball park. The contract to erect the fence and the backstop was awarded to Fred McCrary, a contractor, in whose employ the plaintiff was when the accident occurred. The fence on the east side of the ball park had been moved five feet onto Figueroa street from the property line, and directly under certain power transmission wires of defendants carrying 22,000 voltage. After the fence had been completed, a backstop was erected along it consisting of wire netting and steel pipes forty-six feet long and four inches wide. Holes six feet deep had been dug, in which the pipes were to be inserted. At the time of the accident, the first of the steel pipes was being erected on Figueroa street on the southwest corner of the ball park. Steel pipes had been erected previously on the same day on Adams street, or the west side, where there were no wires. At the time of the accident, the workmen were pulling up the first pole by means of rope running through a block and tackle attached to the pole and attached at the other end to a truck; the hole for the same having been already dug. The ground was moist and a pile of dirt was located near the hole from which it had been removed. As the steel pole was being raised, Manuel Rogers, another man employed in the construction of the fence and backstop, was at the top of the scaffolding for the intended purpose of guiding the pipe at the top, and another man was directly below him to assist therein. Joe Doug, the foreman, whose duty it was to wire the pipe to the fence as soon as it was in position, was on the top of the fence below the two last-mentioned men. Plaintiff Leslie, one Fancher, and Charles Tibbs were on the ground to guide the pipe at the bottom, and when the same was in a perpendicular position they were to lift it over the pile of dirt and into the hole. Plaintiff claims that he knew nothing about

electricity, nor that the wires above him were high tension wires, nor had anyone given him any warning or instructions regarding the same, and defendant Pacific Gas & Electric Company, a corporation, is not shown to have had any control or direction in such construction. Both plaintiff Leslie and Fancher had hold of the pipe near the bottom as it neared a perpendicular position. As the bottom of the pipe reached the pile of dirt located nearby, it was necessary for Leslie to release his grip on the pipe and walk around Fancher to assist him in placing the pipe in the hole. Plaintiff Leslie was directly behind Fancher, and Tibbs was a little to one side. Fancher still had hold of the steel pipe. Just as Leslie released his grip on the pole, the pipe came in contact with the second 22,000-volt line, and as the pipe was grounded at the bottom a tremendous short circuit occurred. A wire cable, to be used for suspending the wire netting, was attached to the pipe at the top and was coiled at the base of the pipe near the pile of dirt.

As soon as the pipe came in contact with the wire, a big burst of flame came out of the bottom of the steel pipe and the pipe seemed to vibrate. Fancher stiffened up and apparently was killed instantly. As Fancher appeared to be stepping back when he was stiffening up, plaintiff Leslie put out his left hand to protect himself. Both fell to the ground. Fancher was still in contact with the coiled wire, which was emitting sparks along its entire length. In addition to this, both were in contact with the damp ground. Just as Rogers and Doug jumped to the ground, what seemed to them to be a second shock came through the wires and pipe. The shocks were alleged to have been caused by an employee at the defendants' substation in Salinas reclosing the circuit. At least two reclosings of the circuit are claimed to have taken place, and the current of electricity had been driven through Fancher's body twice before he and plaintiff Leslie fell to the ground. The men on the scaffolding and Doug jumped to the ground. Doug grabbed Leslie's hand to pull him but, realizing everything was wet, let go just as another report came. The current apparently threw Doug to the ground. After the shock, one of the men got a board and held up Leslie's arm. Doug threw a rope over his arm and pulled him loose. Leslie, who was believed by the workmen to be dead, was taken to the hospital, where he remained in a very painful and critical condition for several weeks.

[1, 2] Among other things, appellants argue that their motion for nonsuit should have been granted because they cannot be held legally responsible for the injuries received by plaintiff Leslie, for the reason that the latter was a trespasser as to them. It is a well-settled principle of law that negligence can exist only if there is some duty or obligation, which must be performed by the party charged with negligence, in favor of the injured party. Schmidt v. Bauer, 80 Cal. 565, 568, 22 P. 256, 5 L. R. A. 580; Jacobson v. Northwestern Pacific R. R. Co., 175 Cal. 468, 472, 166 P. 3; Smelser v. Deutsche Evangelische, etc., 88 Cal. App. 469, 475, 263 P. 838. Moreover, the party charged with lack of due care cannot be said to have been negligent as to the injured party unless it appears that the party charged with negligence owed to the injured party a duty of care. Dahms v. General Elevator Co., 214 Cal. 733, 737, 7 P.(2d) 1013.

[3] It is also a well-settled principle of law that the owner of property owes to a trespasser or licensee no duty to keep the premises in safe condition. Grundel v. Union Iron Works, 141 Cal. 564, 566, 75 P. 184; Means v. Southern Cal. Ry. Co., 144 Cal. 473, 77 P. 1001, 1 Ann. Cas. 206; Giannini v. Campodonico, 176 Cal. 548, 550, 169 P. 80; Roberts v. Pacific Gas & Electric Co., 102 Cal. App. 422, 429, 283 P. 353; Brust v. C. J. Kubach Co., 130 Cal. App. 152, 19 P.(2d) 845; Hall v. Southern California Edison Co. (Cal. App.) 30 P.(2d) 1013.

[4] It appeared from the evidence that the appellant Pacific Gas and Electric Company, a corporation, owned a franchise, and under such franchise was permitted to maintain its wires at the time and place mentioned in the pleadings, and that as such owner and possessor of such franchise owed no duty to a trespasser or licensee save and except it must refrain from such acts or conduct as might result in a wilful or wanton injury to a trespasser or licensee. On the other hand, the property owner or owners of the franchise owe to an invitee the duty to keep the premises in a safe condition. Consequently it becomes important to determine from the facts which were developed by the evidence, whether it can be said that a jury could have properly found that plaintiff was an invitee.

[5] We think it must be conceded that, as to the appellants, plaintiff had not been expressly or impliedly invited to enter upon their property. There is no evidence which in the slightest degree indicates that there was an express invitation, nor is there any evidence that there was an implied invitation. The plaintiff was employed by a con-

tractor and not by the appellants. The work upon which he was engaged cannot fairly be said to have been beneficial to the appellants herein, or to have been done at their request. It was beneficial only to the city of Monterey and to the contractor who performed the work. The appellants were not at all interested in the construction of the said fence and backstop, nor was there any contractual relation between the appellants and plaintiff, or plaintiff's employer. We think, therefore, the evidence clearly indicates that the work on which plaintiff Leslie was engaged at the time the injury occurred, bore no relation to the business of the appellants, nor were they interested therein. Aguilar v. Riverdale C. C. Ass'n, 104 Cal. App. 263, 285 P. 889; Hall v. Southern California Edison Co., supra.

Under the authority of the case of Hall v. Southern California Edison Co., supra, it follows that the trial court erred in denying appellant's motion for nonsuit.

[6] Respondent further claims in support of the judgment that, regardless of whether plaintiff was or was not injured by the first shock, defendants were guilty of negligence by reason of the wanton reclosure of the circuit breakers without any investigation having been made and without any attempt to determine the reason and location of the trouble. Plaintiff being a trespasser, and there being no evidence to show that defendants had actual knowledge of plaintiff's peril, no liability on the part of the defendants could possibly arise under the contention.

For the reasons stated, the judgment is reversed.

We concur: TYLER, P. J.; CASHIN, J.



139 Cal.App. 671

RICHERT v. BENSON LUMBER CO. et al.

Civ. 1129.

District Court of Appeal, Fourth District, California.

July 13, 1934.

1. Appeal and error ⇐1024(3)

Where there was conflict of evidence, determination that defendant had not been served with process would not be disturbed.

2. Judgment ⇐346

Court's authority to vacate judgment not void on face of judgment roll, but void in fact for want of jurisdiction of person of defendant, exists independently of statute (Code Civ. Proc. § 473).

3. Judgment ⇐346

At common law, court's authority to vacate judgment not void on face of judgment roll but void in fact for want of jurisdiction of person of defendant ceased with ending of term at which judgment was entered.

4. Judgment ⇐346

In California where there are no terms of court, court's authority to vacate judgment not void on face of judgment roll but void in fact for want of jurisdiction of person of defendant must be invoked within reasonable time from rendition of judgment.

5. Judgment ⇐386(1)

"Reasonable time" within which court has authority to vacate judgment not void on face of judgment but void in fact for want of jurisdiction of person of defendant *held* to be time specified in statute authorizing court to allow defendant not served with summons to answer on merits (Code Civ. Proc. § 473).

[Ed. Note.—For other definitions of "Reasonable Time," see Words & Phrases.]

6. Judgment ⇐386(8)

Defendant's filing of notice February 4, 1930, that he would move court February 10, 1930, to vacate judgment rendered February 5, 1929, and entered February 6, 1929, on ground he had not been served with summons did not constitute filing of motion to vacate judgment within time specified in statute which by analogy governed time limit within which such motion must be filed (Code Civ. Proc. § 473).

7. Motions ⇐54

In absence of statute making notice of intention to move equivalent to motion, motion does not relate back for its date to service or filing of notice.

8. Stipulations ⇐14(1)

Stipulation, in respect to continuance, that rights of parties were same as if motion to vacate judgment had been made on named day, preserved to moving party same rights he would have had had motion been made on named day, so that where day named was too late for making of such motion, motion itself was made too late (Code Civ. Proc. § 473).

9. Judgment ⇐386(7)

Where process server's affidavit of personal service is willfully false or made with

reckless disregard for truth, judgment in such case is procured by extrinsic fraud practiced upon court, so that motion to vacate is not limited by statute which by analogy governed time limit within which motion to vacate must be brought (Code Civ. Proc. § 473).

10. Judgment ⇐386(7)

Where process server's affidavit of personal service is not true because of honest mistake of identity or for some reason compatible with good faith, judgment in such case is not procured by extrinsic fraud practiced upon the court, so that motion to vacate is limited by statute which by analogy governed time limit within which motion to vacate must be brought (Code Civ. Proc. § 473).

11. Judgment ⇐386(1)

Where nothing was said in motion to vacate judgment on ground defendant had not been served concerning fraud in procurement of judgment, and where most that could be charged to process server, upon whose affidavit of service judgment had been obtained, was that he might have made mistake in identity, time within which motion to vacate could be made was limited by statute which by analogy governed time limit of motion (Code Civ. Proc. § 473).

12. Constitutional law ⇐315

Refusal of motion to vacate judgment obtained against defendant who had not been served, made more than year after entry and rendition of judgment, would not deprive defendant of his property without due process of law where defendant had not been prevented from seeking reasonable relief in equity.

Appeal from Superior Court, San Diego County; T. I. Fitzpatrick, Judge.

Action by J. J. Richert against Benson Lumber Company and others; Donald G. Ingersol, respondent, for whom was substituted the Union Trust Company of San Diego. From an order vacating final judgment, plaintiff appeals.

Order reversed.

Herbert C. Kelly, of San Diego, for appellant.

H. Pitts Mack, Stearns, Luce & Forward, and Fred Kunzel, all of San Diego, for respondent.

HAINES, Justice pro tem.

Plaintiff and appellant, J. J. Richert, claiming to own an undivided half interest in certain real property situate within the city of Oceanside in San Diego county, filed in this action a complaint in which he alleged that the defendant G. H. Jones was owner of the other undivided half interest therein, and sought partition of the property. Numerous other persons and corporations, including respondent Donald G. Ingersoll, were made parties defendant under the allegation that they wrongfully claimed some interest to the property adverse to appellant and defendant Jones. Jones answered admitting all the allegations of the complaint. The summons was returned and filed with the affidavit of one C. J. Brackett attached thereto, purporting to show personal service of the same with a copy of the complaint, by said Brackett, upon respondent Ingersoll within said county of San Diego on December 22, 1928. Respondent not having appeared, his default was entered by the clerk on January 23, 1929. Thereafter, on February 5, 1929, there was signed and filed an interlocutory judgment in partition determining appellant Richert and said Jones to be the owners in undivided half interests of the particular lot here in controversy, being part of the property described in the complaint, and appointing a referee to make partition of the same between them. This judgment also determined that the other defendants, including respondent Ingersoll, had no interest in said lot and undertook to quiet the title of appellant Richert and said Jones to it as against them. The judgment was entered on February 6, 1929. On February 13, 1929, there was signed and filed, and on February 16, 1929, entered, a court order reciting that both Richert and Jones having conveyed their respective interests in the lot to one H. G. Belshe, partition of the same had become unnecessary and that, therefore, the interlocutory judgment should stand as the final judgment in the case.

On February 4, 1930, there was filed on behalf of respondent Ingersoll a notice that on February 10, 1930, respondent would move the court to vacate the said judgment on the ground that respondent had never been served with summons or complaint in the action. This notice was accompanied by respondent's affidavit that he had never been served with summons or complaint in the case and that he had stated the case to his counsel and been by them informed that he had a complete defense on the merits, and by a verified answer and cross-complaint asserting respondent's ownership of said lot. Thereupon it was, on February 9, 1930, stipulated between counsel for appellant and respondent that the motion so noticed for February 10 should be continued

for hearing on March 3, 1930, "and the rights of all parties shall be deemed the same as if said motion had been made and presented on February 10, 1930." Various other affidavits were filed on behalf of the respective parties as to whether or not Ingersoll had actually been served, and the motion to vacate the judgment continued from time to time by agreement until, after presentation and argument, it was finally taken under submission by the court on July 23, 1930, and granted by a written order dated and signed on July 29, 1930, and entered on July 30, 1930. From this order the present appeal is taken. During the pendency of the appeal Union Trust Company of San Diego has succeeded to the rights of Ingersoll and has been substituted as respondent in his stead.

[1-8] Since the affidavit showing presented a conflict of evidence as to whether respondent Ingersoll had been served with process or not we could not disturb the trial court's determination of that phase of the case had the matter been properly before it for determination whatever might be our feeling with respect to the weight of the evidence. As it vacated the judgment that court must necessarily have decided that he had not been served. The court's authority to vacate a judgment not void on the face of the judgment roll but void in fact for want of jurisdiction of the person of the defendant exists independently of the provisions of section 473 of the Code of Civil Procedure or of any other statutory provisions. Norton v. Atchison, etc., R. R. Co., 97 Cal. 388, 30 P. 585, 32 P. 452, 33 Am. St. Rep. 198; Mott Iron Works v. West Coast Plumbing Supply Co., 113 Cal. 341, 45 P. 683; Waller v. Weston, 125 Cal. 201, 57 P. 892; Smith v. Jones, 174 Cal. 513, 163 P. 890; George Frank Co. v. Leopold & Ferron Co., 13 Cal. App. 59, 65, 108 P. 878. At common law the court's power to set aside such a judgment on motion ceased with the ending of the term at which it was entered. As we have no terms of court in this state the limitation on the exercise of such authority here is that unless the judgment is void on the face of the judgment roll the court's action to set it aside must have been invoked within a reasonable time (Smith v. Jones, supra [page 515 of 174 Cal., 163 P. 890]; Norton v. Atchison, etc., R. R. Co., supra [page 392 of 97 Cal., 30 P. 585, 32 P. 452]; George Frank Co. v. Leopold & Ferron Co., supra [page 62 of 13 Cal. App., 108 P. 878]), or else the right is lost. The question of what is a reasonable time originally evoked considerable discussion. In Hanson v. Hanson, 3 Cal. Unrep. 66, 20 P. 736, strongly relied upon by respondent, the Supreme Court upheld such relief though both asked and granted more than a year after the entry of the judgment which the lower court had set aside; and in George Frank Co. v. Leopold & Ferron Co., supra, the District Court of Appeal for the First District held that neither Norton v. Atchison, etc., R. R. Co., supra, nor People v. Temple, 103 Cal. 447, 453, 37 P. 414, had actually decided that the limit of a reasonable time for a motion to vacate a judgment for want of personal jurisdiction not apparent on the judgment roll was limited by the analogy of section 473 of the Code of Civil Procedure, but that in the absence of statutory regulation the matter "should be largely left to the discretion of the trial court." But in Smith v. Jones, supra, it was in such a case laid down (page 516 of 174 Cal., 163 P. 890, 891) that while "this motion is not made under * * * section 473, it has, nevertheless, been the long-settled rule in this state that in determining whether a motion to set aside a judgment, decree, or order made independent of said section is presented within a reasonable time, the period fixed in said section within which motions under it may be made is the standard or criterion in all cases. And so as to motions such as the one here made, based on the ground that no service of process was made on the defendant, it is expressly held that in no case can the time of making them be extended beyond the time limit specified in section 473 for making similar motions under that section," citing Estate of Eikerenkotter, 126 Cal. 54, 58 P. 370; Norton v. Atchison, etc., R. R. Co., supra; People v. Temple, supra; People v. Dodge, 104 Cal. 487, 38 P. 203; Young v. Fink, 119 Cal. 107, 50 P. 1060; Canadian, etc., Trust Co. v. Clarita, etc., Inv. Co., 140 Cal. 672, 74 P. 301; and in view of the decision in Smith v. Jones, supra, it was in effect stated in Vaughn v. Pine Creek Tungsten Co., 89 Cal. App. 759, 265 P. 491, that Hanson v. Hanson, supra, must be treated as overruled, nor can we see the matter in any other light. Moreover, whatever is said in George Frank Co. v. Leopold & Ferron Co., supra, which is not in accord with Smith v. Jones, supra, must yield to the authority of that case. See, also, Wheeler v. Craig, 206 Cal. 221, 223, 273 P. 558. The period after the rendition of a judgment within which the court has power under section 473 to vacate it on motion "for any cause" as e. g., in case of service by publication "the summons and a copy of the complaint * * * have not been personally served on the defendant" was originally fixed at six months but ever since the amendment made at the

1873–74 legislative session, has been one year. The weight of authority seems to be that in case a judgment given without personal jurisdiction when the lack of jurisdiction is not apparent from the judgment roll, the time after its rendition which a court may find reasonable for moving to set it aside is limited by analogy not to the six months' period mentioned in section 473, but to the one-year period mentioned in the same section though in Smith v. Jones, supra (page 516, of 174 Cal., 163 P. 890), it was said to be there unnecessary to determine that question. It would seem in such circumstances that the closer analogy must be to the one-year period, and such is said to be the law in Vaughn v. Pine Creek Tungsten Co., supra, in which the District Court of Appeal for the Second District appears to treat Smith v. Jones as having so decided. So, also, in Barnett v. Reynolds, 124 Cal. App. 750, 751, 13 P.(2d) 514. The one-year period, moreover, seems to be treated as the correct one in McGuinness v. Superior Court, 196 Cal. 222, 237 P. 42, 40 A. L. R. 1110, which is referred to as having so decided in Swallow v. Tungsten Products Co., 205 Cal. 207, 270 P. 366. In the case at bar, however, as in Smith v. Jones, the moving party appears to have brought himself within neither period. Though he filed his notice of motion one day before a year had expired following the rendition of the judgment, and two days before the expiration of a year from its entry, his notice was to the effect that he would actually make the motion to the court at a later date more than a year subsequent to both the rendition and the entry of the judgment. In the absence of statutory provisions making a notice of intention to move equivalent to a motion itself, such as now govern the making of a motion for new trial, it is well settled that a motion itself does not relate back for its date to the service or filing of the notice. People v. Ah Sam, 41 Cal. 645, 650; Spencer v. Branham, 109 Cal. 336, 340, 41 P. 1095; Bell v. Krauss, 169 Cal. 387, 391, 146 P. 874; In re Morehouse, 176 Cal. 634, 636, 169 P. 365; Thomas v. Superior Court, 6 Cal. App. 629, 632, 92 P. 739; Wheelock v. Superior Court, 67 Cal. App. 601, 603, 227 P. 931; Jones v. Superior Court, 78 Cal. App. 163, 165, 248 P. 292; Colthurst v. Harris, 97 Cal. App. 430, 275 P. 868; Estate of Hunter, 99 Cal. App. 191, 196, 278 P. 485. The stipulations in respect to continuance do not affect the situation. They merely preserve to respondent the same rights that he would have had had he made his motion in court on the day on which his notice said he would make it. That day being itself too late his motion was too late.

[9, 10] We have not, of course, overlooked the line of cases illustrated by Ex-Mission L. & W. Co. v. Flash, 97 Cal. 610, 32 P. 600, and McGuinness v. Superior Court, supra, in which, as is recognized in Vaughn v. Pine Creek Tungsten Co., supra, it seems to be held that when the judgment complained of was procured by extrinsic fraud practiced upon the court, the time for applying by motion to set it aside is not limited by the analogy of section 473. Neither have we overlooked the consideration given to the subject in Swallow v. Tungsten Products Co., supra, in which the Supreme Court, adopting an opinion of the District Court of Appeal for the Second District written by Mr. Justice Conrey, holds that the presentation to the court of an affidavit purporting to show personal service upon a party not actually served is extrinsic and not merely intrinsic fraud. It is to be noted, however, that Swallow v. Tungsten Products Co., supra, neither in terms overruled Smith v. Jones, supra, nor did more than incidentally refer to that case, although in Smith v. Jones there was presented exactly the situation of an affidavit of personal service made upon a party who was not, according to his showing, even within the state at the time the service was attempted. Our conclusion is that there was no intention in Swallow v. Tungsten Products Co. to modify, overrule, or affect the rule laid down in Smith v. Jones, but that what is meant is that, where an affidavit is attacked purporting to show personal service on a party who has not been served at all, the case is one of extrinsic fraud upon the court only if the affidavit was willfully false or made with reckless disregard for the truth, in which case the rule announced in McGuinness v. Superior Court, and in Swallow v. Tungsten Products Co., would apply; but that in the absence of such a showing of fraud, the mere use of an affidavit of personal service not in fact true, through some honest mistake of identity or for some reason compatible with good faith, is not extrinsic fraud, nor fraud at all, but presents the precise situation dealt with in Smith v. Jones, wherein the motion to set aside the judgment must be made within the time limited after the analogy of section 473.

[11] Turning now to the case at bar, it is to be observed that neither in the notice of motion to vacate the judgment, nor in the affidavit filed with it, is there anything said in terms about any fraud, the only claim being that respondent was not in fact served;

and that, therefore, there is strictly applicable the comment which in Vaughn v. Pine Creek Tungsten Co. the court made with regard to the inapplicability of the doctrine of the McGuinness Case to the facts before it, namely, that "no fraud having been alleged, in the notice of motion herein, to have been committed on the court or by plaintiff, that case does not determine the proposition of law considered in the instant case." It is true that in replying to the counteraffidavit filed in appellant's behalf in the case at bar there is matter set up which might be taken as in a general way intended to impugn the good faith of various persons connected with appellant in the litigation, but there is nothing in even this showing that tends to reflect on the good faith of Brackett, the process server who made the affidavit complained of, the utmost that could be claimed to be charged even by implication as against him being that he might have made some mistake in identity by serving one of respondent's teamsters instead of respondent.

[12] From what has been said it follows that the order setting aside the judgment cannot stand. There is nothing in the point that respondent will thereby be deprived of his property without due process of law. He has not been prevented from seeking reasonable relief in equity, and, had he done so, the time within which he would have been required to act would be different.

The order appealed from is reversed.

We concur: BARNARD, P. J.; JENNINGS, J.



139 Cal.App. 279

SIECK v. HALL et al.

Civ. 1040.

District Court of Appeal, Fourth District, California.

June 14, 1934.

As Modified June 25, 1934.

1. Contracts ⇐15

There is no binding contract unless minds of parties have met and mutually agreed (Civ. Code, §§ 1565, 1580).

2. Contracts ⇐9(1)

Contract which has but single object so vaguely expressed that meaning is unascertainable is wholly void (Civ. Code, § 1598).

3. Contracts ⇐28(1)

In action on contract, burden corresponding to that of proving existence of contract exists as to proof of its terms.

4. Contracts ⇐28(3)

All terms of contract need not be established out of mouth of single witness if, from all the evidence, court can find definite proposition as having been made, understood on both sides when it was made, and accepted, even though at some later time no one witness can recite it in all its particulars (Civ. Code, § 1598).

5. Contracts ⇐9(2)

Where contract was evidently made for rendition of services for some agreed compensation and services stipulated for have been performed, court should regard with caution contention that arrangement to pay for them was either so vague or so imperfectly understood as to be unenforceable (Civ. Code, § 1598).

6. Master and servant ⇐80(10)

In salesman's action on oral bonus contract, where recollection of plaintiff's witnesses as to formula agreed on for figuring the bonus was too vague to be accepted without comparison with testimony of defendant's manager, trial court could nevertheless accept as true whatever court believed that witnesses, other than such manager, did accurately recollect about the formula and thus amplify or correcting manager's account in such respect.

7. Appeal and error ⇐1011(1)

Where evidence is conflicting as to existence of agreement, trial court's finding is binding on appellate court.

8. Master and servant ⇐72

Where bonus offer was made to salesmen if, by additional efforts, salesmen should in current year produce greater gross profits than in preceding year, and salesmen thereafter frequently worked Saturday afternoons, Sundays and at night, none of which they had done before, to produce such result and spent money of their own to entertain customers and prospective customers, there was valid bonus agreement supported by consideration.

9. Master and servant ⇐72

Where, after one of salesmen left employment, offer was made to remaining salesmen to divide such former's salesman's salary for rest of year among them should they cover his territory and obviate necessity of

employing person in his place, and such salesmen did so, there was binding contract supported by consideration.

10. Evidence ⇐14

Court will take notice that persons unaccustomed to stating mathematical propositions in abstract terms not infrequently comprehend, remember, and are able to work out on paper formulæ that they are at loss to express in words.

11. Master and servant ⇐80(10)

In action by salesman on alleged bonus agreement according to which the formula for calculating bonus depended on gross profits and sales expenses of current year as compared with preceding year, evidence *held* to sustain implied finding that cost was to be determined on same basis as in preceding year, though it was actually higher.

12. Attorney and client ⇐86
Master and servant ⇐80(7)

In salesman's action against corporation and manager on bonus agreement, manager, being represented by attorney, could not make at trial any binding stipulation, but court had right to consider his attitude at trial for whatever light it might shed on what manager conceived that he had obligated corporation to under original bonus agreement.

13. Limitation of actions ⇐127(4)
Pleading ⇐237(8)

In salesman's action on oral bonus agreement, where method of computation in original complaint differed widely from that found by court to have been agreed on, but defendants were not prejudiced, case *held* not so completely altered as to preclude amendment, nor could amended complaint be considered as stating entirely new cause of action to which statute of limitations that had not run when action was originally filed would be applicable (Code Civ. Proc. §§ 469–471).

14. Appeal and error ⇐1170(3)

Where trial court properly permitted amendment of complaint to conform to testimony on which findings were based, failure to rule on defendant's alleged motion to strike the amendment *held* not to have caused such miscarriage of justice as to warrant reversal (Const. art. 6, § 4½).

15. Master and servant ⇐80(15)

In salesman's action on contract for bonus and separate contract for division of salary of another salesman who had left employment, where trial court found all allegations of amended complaint, with certain exceptions, to be true, findings *held* sufficiently definite to disclose basis of judgment.

16. Appeal and error ⇐110

Order denying defendant's new trial motion *held* not appealable.

Appeal from Superior Court, San Diego County; Dailey S. Stafford, Judge.

Action by Charles A. Sieck against Oakley J. Hall and another, copartners doing business under the firm name and style of the San Diego Marine Construction Company, the Westlands Marine Company, and the Star & Crescent Oil Company. From a judgment for plaintiff and an order denying a motion for a new trial, defendants appeal.

Appeal from the order dismissed. Judgment reversed as to all defendants other than defendant last named, and, as against such defendant, modified, and as modified affirmed.

Ralph E. Jenney, Wright & McKee, and C. M. Monroe, all of San Diego, for appellants.

Sanders & Jacques, of San Diego, for respondent.

HAINES, Justice pro tem.

This action was brought to recover compensation additional to his regular salary as a salesman of gasoline, oils, and grease, claimed to be due to the plaintiff and respondent Charles A. Sieck from the defendants and appellants under two several arrangements made in the early months of 1928. Judgment was given in favor of plaintiff and respondent against all the defendants and appellants, but respondent now concedes that it cannot be supported by the evidence as against any of the defendants and appellants other than the Star & Crescent Oil Company, so that our discussion of the case need only go to the controversy between Sieck and that corporation.

During the years 1927 and 1928 appellant Star & Crescent Oil Company was engaged in handling and selling at San Diego, Cal., the gasolines, oils, and greases manufactured by the Associated Oil Company, and was allowed to retain as compensation for so doing certain "differentials," which, for the purposes of this decision, may be taken to mean the difference between the prices at which the products were sold by appellant on the market and the prices at which they were furnished by the Associated Oil Company to this appellant. The basis on which these differentials were fixed is not disclosed by the evidence but it does appear that the basis was more liberal during the first ten months of 1927 than it was in the last two months of that year or through any part

of 1928. During all this time the appellant Oakley J. Hall, referred to in the record as "Capt. Hall," was president and manager of appellant Star & Crescent Oil Company, and at the end of 1927 and in the earlier part of 1928 it had five salesmen, that is one Miller, its sales manager, and his subordinates Hagan, Murray, Eckles, and plaintiff Sieck, engaged in selling the products referred to to the public. Each of the latter four salesmen had assigned to him a portion of the local territory in which Miller had general oversight of the sales. All five salesmen were paid regular monthly salaries, which included certain allowances for gas and oils consumed by them in covering the territory involved. Miller and Sieck had been so employed throughout 1927, Eckles from the 1st of March of that year, Hagan and Murray from some time in July and from some time in November of that year respectively, while during the first three months of 1927 another salesman named Clark had also been so employed. Besides these regular salesmen other employees were more or less engaged in making sales, that is one Bruington and one Johnson made sales for marine purposes and one Captain Spielman was utilized as a salesman "chiefly for stove distillate," but also "drummed up some oil and gasoline business." One Collins, a truck driver, and certain other truck drivers, all working on regular salaries, made certain sales.

It is, in the original complaint filed by plaintiff and respondent, asserted that while "on or about January 20, 1928," respondent, "together with four other like sales representatives," thereby referring to Miller, Hagan, Murray, and Eckles, were in the employ of defendants (appellants here) engaged in the sale of said products.

"The said defendants * * * stated to plaintiff and the other said sales representatives that in order to induce plaintiff and the other said sales representatives to expend additional efforts in increasing the sales of the said oil products of the said defendants during the ensuing year, that if the plaintiff and the other said sales representatives by their efforts should bring an increase in the gross amount of sales of the said oil products during the said year over the gross sales made in the preceding year of 1927, that the amount of increase in such gross sales over the preceding year would be divided into two portions, one of which was to be retained by the defendants, and the other portion was to be divided equally, share and share alike, among the plaintiff and the other said sales representatives, it being provided, however, that if any additional sales force were employed, that the salary of such additional sales force should be deducted from the amount of the gross sales before division was made."

The further arrangement counted on by respondent is set out by allegations in his original complaint: "That on or about April 1, 1928, one of the other said sales representatives quit his employment, to wit, Laurie Eckles, and that thereupon, the said defendants and their said agents called the plaintiff and the other three representatives together and stated that if they would divide among themselves the territory and duties of the said Eckles and carry on his work themselves, that the original agreement of January 20, 1928, would continue, and that the net salary of Eckles for the remainder of said year, to wit, nine months, would be held in a separate fund, to be divided in four equal parts among the plaintiff and the other three said sales representatives at the end of the year, irrespective of whether or not an increase in the gross sales was produced. * * *"

The complaint goes on to allege the occurrence of the conditions entitling the plaintiff to compensation additional to his salary under each of the two arrangements set up. The answer traverses the allegation of the complaint concerning each of the arrangements for additional compensation asserted, and, contrariwise, avers that "all salary, wages, commission and compensation of every kind earned by the plaintiff * * * have been paid to him by defendant, Star & Crescent Oil Co." It is on these pleadings that the trial was had.

Before the trial respondent Sieck's deposition was taken, in course of which he claimed that at the meeting when the bonus arrangement with the five salesmen was made, Capt. Hall, acting for the Star & Crescent Oil Company, had made and the salesmen had accepted a proposition described in the deposition as follows: "That the gross income of 1927 was about $136,000.00; that any income over that—provided we increased the business and there was a larger income—would be divided,—half of it to be withheld by him, the other half to be equally divided among we five salesmen; provided that, if he had to hire any additional salesmen, that the sales expense would first be deducted from the total increase, then the division made. Also, that if any salesman of we five, were to resign before December 31st, he waived all claim to any bonus which might accrue."

Sieck was asked: "Do I understand you correctly, now, that he said the gross amount

of business done in excess of the year previous would be divided in two, and half divided amongst the salesmen?" He answered: "As I outlined it there a moment ago. Yes." He was asked further: "Well, as I understand it, then, your bonus was to be figured on the sale price of these products without any reference to what the cost to the company might be?" His reply was: "Correct."

Such an arrangement, of course, would be most unlikely, since, in promising the salesmen half of the gross increase in the return from sales to be made, the Star & Crescent Oil Company would be promising to pay them not only half of any profits to be made by it on the additional products to be sold, but half also of the actual cost to it of such additional products to be resold by it.

At the opening of the trial itself respondent called Capt. Hall to the stand under section 2055 of the Code of Civil Procedure and elicited from him his account of the proposition made by him. The account which he gave seems to be correctly epitomized by counsel for appellants in their opening brief as follows: "In substance the plan was that the sales cost, which included the salaries and automobile allowances of the salesmen, would be applied to the gross profits from the sale of products in 1927. The gross profits as explained by the witness, were exactly what that term implies, viz., the difference between the cost and selling price of the product. The ratio between the sales cost and the gross profits would thus be obtained as a percentage. This percentage would be applied to the gross profits from the same business in 1928. If the per cent so obtained was more than the sales expense, then the difference would be divided amongst the salesmen as a bonus."

This, according to him, was the proposition accepted by the salesmen. The next witness called was the plaintiff Sieck, who, in the light of Capt. Hall's testimony, apparently appreciated that the account of the arrangement given in his complaint and in his deposition was inaccurate. But it is sufficiently evident from his testimony that he was, by this time, in some doubt or confusion about what the arrangement really was. When he undertook to state it on the stand his version of it was as follows:

"Mr. Hall made us this proposition; the cost factors of 1927 would obtain for 1928 * * * he was trying to make this simple when he explained it to us * * * we had five salesmen in 1928, said Hall, and as a basis of payment for salaries. * * *

"Q. You mean 1928 or 1927? A. 1927—that you—1927.

"Q. Repeat that again for the record. A. In 1927 as a basis for the salary factor, we will consider that we had five salesmen at an average salary per salesman * * * he dealt with a figure that ran something like $12,000 * * * I am giving you as near as I can recall it, his conversation. And there would be taken as an example, he said, and he went over certain methods of calculation, nothing definite, but he said 'Here is a figure of $136,000.' That was our gross or gross profit—I am not exactly certain of that term * * * that we will use as a basis to work on. * * *

"Q. For what year? A. 1928. Now—

"Q. Just a moment now. You mean used as a basis of pay in 1928? A. For giving us a bonus based on the factors of 1927.

"Q. Well, is that $136,000 the gross profits mentioned to you as the basis for 1927? A. That is for 1927—yes. Remember he is the boss making us the proposition—we did not make him any.

"Q. Go ahead then. A. That that figure, using it as a basis, that any increase showing over that gross would be divided at the end of the year, one-half to be held by him, and the other half to be divided equally among we five salesmen, after first deducting any increases that may have been occasioned in the sales department by employment of additional salesmen. That was agreed to."

In cross-examining Sieck, appellants' counsel attempted repeatedly to learn whether it was his understanding that the bonus to be paid at the end of 1928 was to be reckoned on the increase in that year of gross sales or of gross profits over those for 1927, but could get little more from him than the assertion that Hall and his auditor, Rodel, had given the salesmen this 1927 figure of $136,000 (apparently later corrected to $136,702) and that they learned from Rodel that the corresponding figure for 1928 was $157,000 and that the figure of $136,000 was to play some part in the computation of the bonus. Asked what he understood the $136,000 to be, he said at one point in his cross-examination: "I presume you would call it condensed gross income—a working factor." Referring to the corresponding 1928 figure he said: "I had only their admission that there was a $20,000.00 increase." At one point he testified as follows:

"Q. Well now, is that factor of $136,000.00 that was given you—was that given you as gross sales or as gross profits? A. Gross profits—the unit factor.

"Q. That was gross profits? A. I say the unit factor using it as a basis or a working agreement."

Elsewhere he testified:

"The agreement was based naturally on the only figures that were available, and supplied to me by Mr. Rodel: whether he used the term 'gross' only, or 'gross sales' or 'gross profits' I am not certain. * * *

"Q. You still apparently misunderstand my question—you have alleged directly in your complaint that there was an agreement to divide amongst you salesmen one-half of the increase of the gross sales; you now say that your agreement was to divide one-half of the increase of gross profits, and I wish to know which is correct and which you rely on? A. I hate to keep repeating to you that those are the only figures I had to work on irrespective of whatever term Mr. Rodel used. They admitted there was a gross increase under the schedule as outlined by Mr. Hall in the first instance, of twenty thousand and some odd dollars.

"Q. You cannot answer the question? A. As near as I can then—or put it then, it is as near as I can answer it as long as you are hinging entirely on the terms gross sales and gross profits."

The fact, as appears from Capt. Hall's testimony, was that the gross sales of the Star & Crescent Oil Company for 1927 amounted to $575,875.81, that the products sold had cost it $443,456.02, leaving a gross profit, that is a profit before taking out its own running expenses, including the salaries of its salesmen and other employees, of $132,419.79. Had the differential, however, allowed by the Associated Oil Company for November and December, remained the same as for the previous months of that year, Hall found from his auditor that the gross profit would have been $4,283 more, or a total of $136,702.79. Subsequently, on closing the books for 1928, it was found that the gross sales for that year amounted to $770,358.82, while the cost of the goods sold was $645,567.36, resulting in a gross profit of $124,791.46, or less by $7,628.33 than in 1927. Computation disclosed, however, that had the same differential allowed during the first ten months of 1927 prevailed through 1928, the gross profits of the latter year would have been higher than they actually were by $32,260.56. That is, they would have been $157,052.02, and this figure has been referred to in the record as the "adjusted gross profits" for that year.

Miller, the sales manager, said of the bonus arrangement: "Captain Hall said that he had formulated some scheme to give us a bonus instead of an increase in salary. * * * It was put up to us in a rather indefinite way whether we would be satisfied with the bonus proposition.

Thereupon the following colloquy ensued:

"Mr. Monroe (attorney for defendants): Pardon me—pardon an interruption there. If I might clear it up, do you mean that he said it was indefinite, or do you mean— A. No, I don't.

"Mr. Monroe (continuing): It was indefinite to you from what he said? A. Yes, that is right.

"Mr. Monroe: I see—thank you.

"By Mr. Sanders (attorney for plaintiff): Q. You heard his testimony this morning, did you not, Mr. Miller, about this conversation in relation to a bonus? A. Yes, sir.

"Q. Did you hear that? A. Yes, I heard it.

"Q. And does your recollection agree with him, that the bonus was to be computed * * * on the same cost basis * * * of 1927 as it was in 1928, and on the same factor of sales? A. Yes, sir."

As will be observed, there is embodied in the question last answered an assumption that Capt. Hall had testified to an agreement with the salesmen that, in figuring their bonus, the cost to the Star & Crescent Oil Company of the goods that it sold should be treated as the same in 1928 as in 1927, whereas what Hall actually testified to was not that, but rather that the ratio for 1927 between the sales cost and the gross profits would be applied to the gross profits for 1928, and if the resulting figure exceeded the actual 1928 sales expense, the salesmen would be allowed the difference, to be divided among them as a bonus.

When, therefore, Miller testified to his agreement with what Hall was assumed to have testified to, he expressed an agreement with testimony that Hall had in fact not given. Laying aside for the moment, however, the question of how, for the purpose of figuring the bonus, the "gross profit" for 1928 was to be ascertained, it is true that Miller's testimony agreed with Hall's, about the next steps to be taken in the computation. Asked what Hall had proposed "as to what basis of sales cost would be used to calculate the bonus," Miller said: "The basis was to be the gross profit, the relationship or ratio between the gross profit of 1927 against the sales cost, which included the salary of the salesmen only—the same ratio was to be adopted in 1928."

Miller, thereafter, was asked: "Have you made a calculation based upon your knowledge of the bonus agreement, using Mr. Hall's figures of those sales, to calculate what the bonus division should be?" To which he answered: "Roughly I have, yes." Thereupon, he gave the substance of a calculation made by him, based on the idea that the parties had agreed that the relationship between the cost of the goods for 1927 to the selling prices of the goods for that year should be treated as being also the relationship between the costs and the selling prices for 1928, notwithstanding that in truth the proportion of costs for the latter year was higher, owing to the lower differential then prevailing, that is, that the parties had agreed to treat the gross profits for 1927 and 1928 respectively as having been what they would have been had the differential not been lowered, and to then arrive at theoretical figures for the "adjusted" gross profits of 1927 and of 1928 respectively, and after that to figure out the ratio that the sales costs of 1927 bore to such "adjusted" gross profits for that year, and to apply that ratio to the "adjusted" gross profits for 1928, and, if the result were a greater sum than the actual sales costs of 1928 (treated by Miller for the purpose of this calculation as having in fact been the same that he claimed that they were in 1927), to divide the difference among the salesmen. He deducted from the actual sales for 1927, amounting to $575,875.81 the actual costs for that year of $443,456.02 (misstated by him as $444,456.02), which left a profit of $132,419.79. To this he added theoretical additional profit which would have been realized had the differential not been lowered for November and December of 1927, amounting to $4,283, and thus obtained $136,702.79 as the "adjusted" gross profit for 1927. He then took $13,320 as being the sales costs for that year and figured that to be .0982 of the $136,702.79. Thereupon, he deducted from the actual sales for 1928, amounting to $770,358.82, the actual cost of the goods for that year, to wit, $645,567.36, resulting in an actual profit of $124,791.46 (misstated in the transcript as $134,791.46), to which he added a theoretical additional profit for 1928 which would have been realized had the original differential remained in force, of $32,260.56 (based on the theory that a 1927 relation of .7718 between the costs and sales should be applied to the 1928 sales), resulting in adjusted gross profits for 1928 of $157,052.02 (though counsel for respondent now say in their brief that the ratio used ought to have been .76261 instead of .7718, which mistake, however, they say worked against their client). Had Miller carried out the formula by then applying the ratio .0982 to the $157,052.02 the result would be $15,422.50. Deducting from that the 1928 sales cost of $13,320, there would remain a difference divisible among the salesmen as "bonus" of $2,102.50. However, he in fact departed from his formula, for after having once, by his use of the figure $32,260.50, taken credit for 1928 for the added profits that would theoretically have resulted had the differential of the first ten months of 1927 remained in effect during 1928, he, instead actually of applying the ratio .0982 to the resulting "adjusted" gross profits of that year, proceeded first to "adjust" them a second time by figuring that, but for the drop in the differential, the cost of the goods sold in 1928 would have been only $594,543 and that the deduction of this figure from the $770,334.93 (referred to by him in that connection as $770,000) would leave a (second adjusted) gross profit of "roughly" $175,000 (actually $175,791.93) to which he applied his ratio of .0982, concluding that the "sales allowance for 1928" should be the resulting figure of $17,272. (It would really have made $17,262.76.) From his $17,272 he deducted the sales cost for that year of $13,320, and concluded that there was a difference of $3,942 (the subtraction would actually leave $3,952) "the portion gone into bonus." To this $3,942 he added $1,350, being "nine months of Eckles' salary" and thus obtained a total of $5,292 as the final amount to be divided among the remaining four salesmen additional to their regular salaries for 1928. When he had given his final result he was asked by respondent's counsel: "Now according to your understanding of the bonus arrangement that Mr. Hall entered into with yourself and the other salesmen, was that the sum that was to be divided at the end of the year?" He responded: "That was approximately the sum as I figured it, that was to be divided, plus Eckles' salary which would be included."

The following passages from Miller's testimony on cross-examination, however, undoubtedly show that he had difficulty in stating the basis proposed by Hall and on which he thinks the salesmen agreed for figuring the bonus:

"A. We was to take the ratio of sales cost, which included the salary of the salesmen, and arrive at the ratio of the total cost, and gross sales, and use that same ratio figuring the 1928 sales. That ratio, as I testified, was .0982. It is the ratio of the sales expense to the gross sales or profits, if you want to call that that * * *

"Q. Well, can you tell me what was said by Capt. Hall, did he say the ratio between the salesman's costs and the gross sales, or did he say the ratio between the salesman's cost and gross profits? A. It is impossible for me to answer that question. It is too long ago to remember.

"Q. You don't know which it was, you can't say now which it was, can you? A. I cannot say what word he used, no sir.

"Q. Well you realize with me, do you not, that there is a tremendous difference between the two terms? A. Yes, I understand the difference. * * *

"Q. So far, then, as your own independent recollection is concerned, Mr. Miller, you would not have today a sufficiently definite recollection of that conversation that you could from that recollection figure out a formula of what the bonus would or would not be? A. I could not tell you whether the word 'sales' or 'profits' was used in that meeting, but I can tell you what we understood.

"Q. Well I am not trying to get that * * *."

Proceeding, he says that in the discussion about fixing the basis for the bonus something was said about the figure of $136,000, which was discussed as "gross sales" though "using the proper definitions of sales, it was an absurdity of course." He had never heard, however, until the moment that he testified, that the $136,000 was a figure obtained by any "adjustment" whereby approximately $4,000 entered into the calculation. "That was not mentioned."

The only other witness who testified about what was said between Hall and the salesmen when the bonus arrangement was made was the salesman Murray, who simply confesses that he never did understand the basis proposed.

[1-6] There is no claim that respondent's regular salary as a salesman remains unpaid in whole or in part. The present action is brought to recover additional compensation under what are claimed to have been express agreements. There is no question of a quantum meruit involved. It is, of course, true that the consent of parties to a contract must be mutual (Civ. Code, § 1565) and that it is "not mutual, unless the parties all agree upon the same thing in the same sense" (Civ. Code, § 1580) and as was said in German Sav. & Loan Society v. McLellan, 154 Cal. 710, 716, 99 P. 194, 196, "There can be no contract unless the minds of the parties have met and mutually agreed," and a contract that has but a single object which is so vaguely expressed that the meaning is unascertainable is wholly void. Civ. Code § 1598; Sutliff v. Seidenberg, Stiefel & Co., 132 Cal. 63, 64 P. 131, 469. It is also true that "a burden corresponding to that of proving the existence of the contract exists as to the proof of its terms." 13 C. J. 757. But it does not follow that there never was a contract because the memories of witnesses have become in a degree uncertain about what were its terms, nor does it follow that all of its terms need be established out of the mouth of any single witness if, from all the evidence, the court can find a definite proposition as having been made, understood on both sides when it was made, and accepted, even though at some later time no one witness can recite it in all its particulars. Certainly, where a contract was evidently made for the rendition of services for some agreed compensation and the contract is no longer executory on both sides but the services stipulated for have been performed, the court should regard with caution a contention that the arrangement to pay for them was either so vague or so imperfectly understood as to be unenforceable. We have, of course, quoted only in part the testimony of the witnesses who heard the proposition, whatever it may have been, that Hall made to the salesmen and which, according to respondent, they originally accepted. But, even at the cost of prolonging our quotations beyond what are usual in an opinion, we have set out enough to exhibit the substance of what the trial court had before it in deciding whether the parties made any intelligible arrangement and if so what it was. In our judgment the testimony of each of the witnesses other than Hall shows beyond cavil that, by his own admission his recollection of the formula agreed on for figuring the bonus was sufficiently vague so that it would be unsafe to accept it without comparing it with Hall's testimony. It does not necessarily follow, however, that the trial court was bound to accept Hall's version in toto, or to refrain from correcting Hall's statement of the formula, in any particular in which that might seem to it to require correction, by adding, from the recollection of the other witnesses, elements on which it believed their recollection more reliable, such, for example, as the intention to apply the 1927 cost basis of goods to the goods handled in 1928.

In respect of what is counted on in the complaint as a distinct agreement to divide Eckles' salary among the other salesmen in the event they divided among themselves his work, there is a sharp conflict in the testimony. According to Sieck the original bonus

arrangement was the result of an initial conference between Hall and the salesmen in January, 1928, but was formulated and agreed upon early in February, Eckles being present and a party to it. Miller thinks that there was one talk late in January or early in February, another in the latter part of February and a third one about the middle of March, that Eckles was present at all of them and that it was at the March meeting that the bonus was agreed on. There is no dispute that Eckles left about the first of April. Sieck and Miller agree that the talk about dividing his salary occurred after that and was an arrangement wholly distinct from the original bonus arrangement and additional to it. Hall, on the other hand, says that no mention of any bonus to anybody was made until some time in April, after Eckles had left, at which time the original and only bonus agreement was made; that there never was any agreement about dividing Eckles' salary, as such, except that out of what had been his allowance for gas and oil of $65 per month it was agreed that each of the remaining four salesmen, Miller, Hagan, Murray, and Sieck, should be allowed $15 a month to cover their increased disbursements for those purposes in taking over Eckles' territory, but that all the understanding that there was about any further division of Eckles' salary was the suggestion and realization when the bonus agreement was made, that Eckles having gone, if nobody had to be employed in his place his going would curtail the sales expense and thereby automatically increase whatever bonus might be payable under the general arrangement. Murray's testimony on this phase of the case is to the same effect as Hall's.

[7] In this conflict of the evidence, if it can be ascertained from the record what the court found the fact to be about the existence or nonexistence of the separate agreement asserted by the respondent for the division of Eckles' salary, its finding on the subject will be binding on this court, and that will be so notwithstanding that it is in some sort true, as counsel for appellants say, that "had that been the plan and had the bonus been earned, the salesmen would not only have had the advantage of Eckles' salary as affecting the amount of the bonus, but would have received it again by reason of the division." As a matter of fact, however Miller, in arriving at his figures, avoided this particular duplication, for, in his deduction of the 1928 sales cost from his supposed sales allowance for that year of $17,272 he treated the sales costs as though they still included the Eckles' salary for all of that year and, therefore, refrained from increasing the bonus figure by their deduction. There is no actual doubt that the court found the arrangement to divide Eckles' salary to have been an agreement subsequent to the bonus agreement and additional to it, for it was so alleged both in the original complaint and the amendment thereto, and the court found all the allegations of the complaint as amended to be true except as it otherwise specified, and these allegations were not so excepted.

[8, 9] With respect to the bonus agreement, if it was in the form originally claimed by respondent or even in the form testified to by Hall, appellants assert that it would be a "mere promise to give a gratuity" and "void as unsupported by any consideration," and in support of that contention they rely on Russell v. Johns-Manville Co., 53 Cal. App. 572, 200 P. 668, and certain Georgia cases cited therein, and point out that there is a "distinction between an original employment by the terms of which a man is promised as compensation a certain monthly sum plus a certain interest or percentage of profits in the nature of a bonus or commission and a case * * * where during the course of the period in question there is a mere promise that if certain profits develop, a certain bonus will be paid"; that in the former class of cases, illustrated by Roberts v. Mays Mill, 184 N. C. 406, 114 S. E. 530, 28 A. L. R. 338, and Redd v. Williams Radiator Co., 112 Cal. App. 353, 296 P. 676, "the agreement to pay a commission or percentage, even though referred to as a bonus, is a part and parcel of the agreement for compensation" and good as such, whereas, in the second class of cases, being nudum pactum, the agreement "is not enforceable at law." We do not know whether they wish to be understood as going so far as to make the same contention with respect to the asserted separate agreement in the instant case to divide Eckles' salary or not. In any event, it is our opinion that the distinction, though a perfectly valid one, does not assist them in either branch of the present case. In Russell v. Johns-Manville Co., and the cases relied on therein, it does not appear that the parties claiming the right to the bonus either bound themselves to do, or in fact did, anything more than they were before the bonus was promised them bound by the terms of their employment to do, so long as they continued in the employment. As was said in Davis & Co. v. Morgan, 117 Ga. 504, 43 S. E. 732, 733, 61 L. R. A. 148, 97 Am. St. Rep. 171: "If there had been any change in the hours, services, or character of work, or other consideration to support the promise to pay the increased

wages it would have been enforceable." In the instant case, it was asserted in respondent's testimony and, in view of the decision rendered, must now be deemed true, that, following the bonus agreement the salesmen frequently worked Saturday afternoons and Sundays and at night, none of which they had done before, that they succeeded in a "gas war" "by working to eight and nine and ten at night," and that they spent money of their own to entertain customers and prospective customers. All of this counsel for appellants assert to be immaterial, citing 39 C. J. 157, to the effect that "in the absence of a special agreement therefor an employee cannot recover extra compensation for extra work performed within the scope of his employment," and citing the same work and various cases to the point that there is a presumption that "the employee volunteers such services, or that the salary or other compensation provided for in the (original) "contract is intended by the parties to compensate him also for the extra work." Of the correctness of these principles we have no doubt, but the essence of the respondent's case here is the claim, which in view of the decision below must now be deemed established, that there was precisely such a "special agreement," to the effect that, if during the unexpired part of 1928, the salesmen should, through "additional" efforts produce for that calendar year the result contemplated in the bonus offer, the bonus would be paid. The circumstance that they did not bind themselves to do so is beside the point. If the offer was made, and acted on by them while still in effect, and the results were obtained, the contractual obligation to pay the bonus follows, and is just as much in consequence of a "special agreement" as though the "special agreement" were bilateral from its inception. The same considerations are applicable to the other arrangement on which the respondent counts, to divide Eckles' former salary among the salesmen should they cover his territory and obviate the necessity of employing anyone else to take his place.

Referring to the findings and judgment appellants' counsel say: "Recovery was allowed for $1,323. No one knows how the court arrived at that figure," and that "we do not know * * * whether the trial court concluded that plaintiff was entitled to a portion of Eckles' salary or not or whether the entire amount allowed was bonus." The record, as we have recited it, leaves us in no such doubt. That the trial court accepted Miller's formula, his computations, with whatever errors there are therein, and his final figure of $5,292 as the aggregate divisible among the salesmen over and above their 1928 salaries is plain, for it awarded respondent precisely one-fourth of that sum, or $1,323.

We have hereinbefore expressed the view that the trial court's judgment cannot be sustained without in some degree accepting Hall's testimony about the bonus formula contemplated, but have pointed out that this does not mean that the trial court was not at liberty to accept as true whatever it believed that Sieck and Miller did accurately recollect about the formula, and to use that in amplifying or correcting Hall's account of the matter. The witnesses differ, however, on other matters than the formula. There is a dispute about what the 1927 sales costs were. Capt. Hall gives them from the auditor's books as $9,805.32 and those for 1928 as $11,770. For 1928 the salaries of the five full-time salesmen would have aggregated $13,320 had Eckles remained. Sieck and Miller put the sales costs for 1927 at that figure—$13,320, on the basis of Miller's testimony that there was an average of five salesmen occupied with the work in his department in that year. They make no claim that this is other than an approximation. Whether it is closer to the fact than the $9,805.32 given by Hall will depend on how much if any of such 1927 compensation as may have been paid to Bruington, Speilman, Johnson, and the truck drivers who worked part of their time in trucking jobs, is attributable to the department in which respondent worked. Assuming, however, in support of the judgment that the trial court believed the 1927 sales costs to be all of $13,320, if, to avoid duplication those for 1928 were, in accordance with respondent's procedure and Miller's plan, taken as still being $13,320 also, as though Eckles' salary were paid for the whole year, it would still follow that upon the basis of gross profits actually realized there could, upon Hall's formula, be no bonus payable because, instead of showing an increment the gross profits, as already seen, dropped from $132,419.79 in 1927 to $124,791.46 in 1928.

To show any bonus computed with relation to the gross profits to be payable, therefore, respondent must necessarily have recourse to the "adjustment" of such profits already discussed. Appellants contend that the evidence will not permit this to be done and the record must, therefore, be further considered with that question in view. Hall's statement on that subject is as follows: "Our gross profits did not increase, our gross profit was less for 1928 than it was for 1927. In explanation of that I would like to say that there was a

change of differential in the amount allowed us by the Associated Oil Company on gasoline between 1927 and 1928, *and while my agreement* with the salesmen was on the gross profit I wanted to be fair with them. There was nothing said about this at the conference, but in order to be fair with them in computing their bonus, if any, I allowed the same rate of profit for 1928 as we had for 1927. We did not enjoy it, but I allowed it so far as the calculation of the salesmen's salaries was concerned, and if that same return had been applied in 1928 that was in 1927 it would have increased our gross profits."

This was tantamount to saying that the consent by the Star & Crescent Oil Company, for the purpose of figuring the bonus, to make the "adjustment" by applying to the 1928 transactions the 1927 differentials, had nothing to do at all with the initial arrangement about the bonus and was not mentioned when the bonus was agreed on but was decided on by the company at some later time; not as anything to which the agreement gave the salesmen any right, but as a concession in the nature of a gratuity to them.

Hall otherwise expresses the same idea as follows: "There was nothing said at the time about any differentials in gasoline; I wanted to be fair, and I gave them the advantage of the gross profit that I never received at all."

[10] As against this, Sieck, when giving in his deposition his version of Hall's bonus proposition, quotes Hall as saying at the time the arrangement was made that "the gross income of 1927 was about $136,000.00," which, as we saw was in fact greatly less than the gross sales for that year but more than the gross profits were unless an adjustment for the November and December diminution in the differential were made and a very rough approximation to what such profits would have been if the adjustment were made. On the trial, as has been seen, Sieck quoted Hall as including in his proposition that the "cost factors of 1927 would obtain for 1928," and repeatedly mentioned the figure of $136,000 as gotten from Hall or "given us by Hall and Rodel," without any clear statement of what he understood that Hall meant by it. The only other direct testimony on the subject came from Miller who, as already noticed, also said that when the bonus was proposed the figure of $136,000 was discussed, though he has difficulty in saying to just what point it was mentioned, but who went on to deny that anything was then said about its being an "adjusted" figure, and to deny that anything was said about its involving an adjustment of "$4,000 approximately" and to say that he never heard of that adjustment until the morning on which he was testifying. Miller also testified, as we saw, that his computation was according to his "understanding of the bonus arrangement that Mr. Hall entered into" with himself and the other salesmen, and we will take notice of the fact that persons unaccustomed to stating mathematical propositions in abstract terms not infrequently comprehend, remember, and are able to work out on paper, formulæ that they are at loss to express in words. Miller also said that he was at some time told by Hall that the change in differential would be ignored so far as its working to the detriment of the salesmen was concerned but he cannot say when that was told him and does not claim that that conversation was any part of the bonus agreement as originally made. Hall testified that when it later came to calculating what the salesmen were entitled to be "allowed" he used in that calculation what was in fact the difference between the gross profits for 1928, adjusted for the differentials and those for 1927 so adjusted, which would in fact be the difference between $157,052.02 and $136,702.79, actually amounting to $20,349.23, but roughly referred to in the record as $20,000. And in his testimony in that connection appears also the following:

"Q. But for the purpose of calculating in this lawsuit, the bonus due, you are willing to agree to the figures $20,000.00? A. Yes, sir.

"Q. So we don't have to change that understanding with that explanation? A. No, sir."

[11, 12] It must be said that, looking at the whole record, about all that there is to support any finding by the trial court implicit in the decision that the suggestion about using the 1927 differential for 1928 was any part of the bonus agreement as originally made, is the fact that in some shape or form Hall originally mentioned the figure $136,000, together with Sieck's quotation of Hall to the effect that "the cost factor for 1927 would obtain for 1928," coupled with Miller's statement that his computation was in accordance with his "understanding of the bonus arrangement" and with Hall's admitted use of the differential adjustment in subsequent calculations and his testimony just referred to. We cannot, however, say as a matter of law that this foundation, though not a particularly strong one, is too unsubstantial to support the somewhat elaborate structure of adjustments for differentials built upon it. The differentials actually affected the cost of the goods and if the 1927 costs were to be used in 1928,

it would only be by calculating out the change in differentials. As respects Hall's statements last quoted of the figures he is now willing to accept, appellants' counsel correctly say that being represented by attorneys he was in no position to make at the trial any binding stipulation. Board of Commissioners v. Younger, 29 Cal. 147, 149, 87 Am. Dec. 164. Nevertheless, the court had the right to consider his attitude at the trial for whatever light it might think that shed on what Hall conceived that he had obligated his company to under the original bonus agreement.

We think, then, that we must uphold, as not wholly unsupported by evidence, the implied finding of the trial court, necessarily involved in its decision, that the arrangement for the adjustment of differentials was part of the original bonus agreement, that is, that even though not originally expressed, it was included in an understanding that the "cost factors" of 1927 should be applied in 1928, and that, in determining whether by the use of Capt. Hall's formula a bonus is shown to be payable, the "gross profits" must be treated as those which would appear after the adjustment for differentials. So considered, Captain Hall's formula is not different from that assumed by the witness Miller, if we eliminate Miller's mistakes in calculation and particularly his duplication in differential adjustments. Even so, as appellants' counsel point out, if Hall's figures of $9,805.32 for the 1927 sales costs were accepted, no right of a bonus would result, for it would then appear that there was such an increase in sales costs in 1928 over those for 1927 that the application of the formula would produce none. But the trial court having found, in effect, upon conflicting evidence, that the 1927 sales costs were actually $13,320, we cannot disturb that finding. On the other hand, respondent's counsel, in amending their complaint to conform to the trial court's acceptance of Miller's figures, followed Miller's calculation and alleged that the purchase price of the products upon which the profit for the year 1927 had been made, was 77.18 per cent. of the gross amount received for the sales of said products, and say now that the percentage is in error and should have been 76.261 per cent. but now express themselves as willing to waive that correction. We will take them at their word.

Computation shows, however, that Miller's use in his calculation of .0982 as the ratio between the sales costs of 1927 and the adjusted gross profits of that year was wrong and that on the basis of his own figures the ratio would be .0974. This applied to the adjusted gross profits of $157,052.02 for 1928 would produce a result of $15,296.87. The subtraction from that of the $13,320.00 taken to be the sales expense for that year, would leave $1,976.87 as the aggregate due the salesmen under the original bonus agreement after the elimination of Miller's duplication of the differential adjustment. Since we are bound to accept the view taken by the trial court that the agreement to divide Eckles' salary among the remaining four salesmen was a separate arrangement, there must, therefore, be added the resulting $1,350.00, making the aggregate to be divided among the four salesmen $3,326.87, from which it results that the respondent is entitled to one-fourth of that amount or $831.72 instead of $1,323.00, as found by the trial court.

[13] Certain other contentions for appellants require brief notice. It is claimed that the case made by the evidence was so wholly different from one alleged in the original complaint as to result in a complete and fatal variance, that, therefore no amendment to conform to the evidence was in order or should have been allowed but that the amendment in fact set out an entirely new cause of action to which opportunity should have been given for appellants to have pleaded the statute of limitations, and in support of their position counsel cite Gillin v. Hopkins, 28 Cal. App. 579, 153 P. 724, where a promise to pay $4,500 for certain services was alleged and instead a promise to deliver certain shares of stock or in default thereof pay what was their market value aggregating $4,500 was proved. In holding this a failure to prove what had been alleged the court viewed the action brought as one upon a stated indebtedness and the cause of action proved as one for damages for breach of a contract. No application to amend appears to have been made. It is manifest that the situation there was not the same as here. Here the original complaint counted on an indebtedness in money arising out of an agreement to pay a bonus and a separate agreement to divide Eckles' salary. The amendment also counts on an indebtedness in money arising out of the agreement to pay the bonus and a separate agreement to divide Eckles' salary. It may be conceded that the difference was such that the complaint as originally filed required amendment before it would support the judgment rendered. But there is a distinction between the variance that makes an amendment necessary and such a failure of proof (Code Civ. Proc. § 471) as makes an amendment improper at all. "A

plaintiff may not abandon the entire case made by his pleading and make a new and different one by way of amendment but so long as the cause of action set out in an amendment is not entirely foreign to the original action and the relief sought arises on the same general state of facts the amendment is proper and within the discretion of the court." 21 Cal. Jur., § 136, pp. 198, 199; Ford v. Ford, 44 Cal. App. 415, 420, 186 P. 164. See, also, Frost v. Witter, 132 Cal. 421, 424, 64 P. 705, 84 Am. St. Rep. 53. A greater liberality of amendment is ordinarily permitted before the trial under sections 472 and 473, Code of Civil Procedure, than at the trial where an amendment may only be allowed (Code Civ. Proc. § 470) if the variance is not material in the sense of having "actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." Code Civ. Proc. § 469; Frost v. Witter, supra, pages 423, 424, of 132 Cal., 64 P. 705. We do not think, however, that there is any indication that appellants were so misled here. In the reply brief for appellants numerous authorities from other jurisdictions are cited in the effort to show that the variance in the case at bar precluded any effectual amendment. With some of these cases we are, in respect of the situations there involved, in agreement and others are not law in California. It is true here that there is a wide difference between the manner in which the original complaint stated that the bonus was to be computed and the manner in which the trial court must be deemed to have found that it was to be figured, but that does not, in our opinion, so completely alter the case as to preclude amendment or make the complaint as amended obnoxious to a statute of limitations that had not run when the action was originally filed.

[14] The complaint is made that though appellants moved the trial court to strike out the amendment to the complaint that court, after hearing the motion, omitted to rule on it but filed its findings and entered its judgment without doing so. We find no other reference to any such motion in the record than a specification in appellants' notice to the clerk to cause the reporter's and clerk's transcripts to be prepared requesting that there be included in the latter a "notice of motion to strike the amendment." No such notice, however, is included in the transcript, nor do any minutes there appear showing that any such motion was actually made to the court. Even if it were, we cannot say that the failure to rule on it has caused such a miscarriage of justice as under section 4½ of article 6 of the state Constitution would of itself justify a reversal.

[15] Complaint is made that the findings are too indefinite to disclose what the basis of the judgment rendered by the trial court was, but they do, with certain exceptions, find all the allegations of the complaint as amended to be true and we therefore think that they are not amenable to that criticism. We have no difficulty in ascertaining what the court did.

[16] The order denying motion for new trial, not being appealable, the attempted appeal therefrom is dismissed.

As to all of the defendants other than the Star & Crescent Oil Company, the judgment is reversed, and as against that corporation the judgment is modified by the reduction of the plaintiff's recovery from $1,323 to $863.72, and, as so modified, is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

1 Cal.(2d) 325

HAPPY VALLEY WATER CO. v. THORNTON et al.

SAME v. FIDELITY SAVINGS & LOAN ASS'N et al.

Sac. 4760.

Supreme Court of California.

July 21, 1934.

Rehearing Denied Aug. 20, 1934.

1. Waters and water courses ⇐224

Contract between irrigation district bondholders and landowners for dissolution of district, transfer of its assets to bondholders, levy of charges against lands to liquidate district's obligations, organization of water company, division of its stock, and dedication of water rights to such owners, *held* legal (St. 1903, p. 3).

2. Statutes ⇐123(6)

Title of act, "An act to provide for the dissolution of irrigation districts, the ascer-

tainment and discharge of their indebtedness, and the distribution of their property," *held* to embrace establishment of water rights, imposition of water charges, and fixing of liens therefor (St. 1903, p. 3).

3. Statutes ⇐109

Details provided by statute for accomplishment of general purpose declared in title will be regarded as necessary incidents.

4. Waters and water courses ⇐224

Agreement between irrigation district bondholders and landowners for dissolution of district, transfer of its assets to bondholders, imposition of water charges against lands to liquidate its obligations, organization of water company, and division of its stock between parties, and dedication of water rights by such company to landowners agreeing to pay therefor at stated rate, rested on sufficient consideration, being supported by mutual covenants (St. 1903, p. 3).

5. Waters and water courses ⇐224

Water charges by water company organized under act providing for dissolution of irrigation districts pursuant to agreement between district bondholders and landowners *held* proper as result of express or implied contract and binding either on express consent or by acquiescence, regardless of decree confirming dissolution proceedings (St. 1903, p. 3).

6. Waters and water courses ⇐224

Statutory notice of proceedings for dissolution of irrigation district by publication for 30 days in designated newspaper *held* sufficient to give court jurisdiction of lands therein, so as to authorize decree confirming proceedings and imposing charges for water delivered after date thereof (St. 1903, p. 3).

7. Waters and water courses ⇐258

Court in which water company brought suit for delinquent water charges and foreclosure of liens therefor against landowners, not protesting against nor repudiating or disputing bills for such charges or seeking relief from Railroad Commission, acquired jurisdiction of defendants' persons (St. 1903, p. 3).

In Bank.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Consolidated actions by the Happy Valley Water Company, a corporation, against William M. Thornton and others, and against the Fidelity Savings & Loan Association, a corporation, and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Jesse W. Carter, of Redding, R. Lee Chamberlain, of San Francisco, and Arthur F. Coe, Woodruff, Musick & Hartke, C. H. Hartke, and Philip Grey Smith, all of Los Angeles, for appellants.

L. C. Smith and Carr & Kennedy, all of Redding, for respondent.

PRESTON, Justice.

The above causes were consolidated for trial, and the appeal is from the single judgment therein which forecloses liens upon certain parcels of real property for water charges for certain calendar years and grants personal judgments against owners for so much of the charges as arose during their respective periods of ownership of said property. The questions urged on appeal are common to all of the actions and all of the defendants; hence details as to the respective interests are not necessary to this decision. The following statement of facts shows the origin of the litigation:

On and for some years prior to June 27, 1925, Happy Valley irrigation district was a duly organized and existing public corporation located entirely within Shasta county and having, at all times involved herein, a large bonded debt. Early in 1925 it occurred to the electors and property owners of said district that conditions were such that a dissolution under the act of 1903 (Stats. 1903, p. 3) was in order. This act has for its title the following: "An act to provide for the dissolution of irrigation districts, the ascertainment and discharge of their indebtedness, and the distribution of their property."

Accordingly, on the 28th day of February, 1925, a majority of the electors petitioned the board of directors to invoke said statute. The bondholders, acting in conjunction with said board, devised a plan of dissolution substantially as follows: That the bondholders would take over all the assets and property of the district; that a charge of $60 per acre against first and second grade land of the district be levied, without interest, and made a lien thereon, to be amortized in thirty years at the rate of $2 per acre per annum and used to liquidate the existing obligations of said district, and that, to this end, a water corporation should be organized by the bondholders to hold said property and collect said indebtedness; that said corporation should be capitalized at 795,000 shares of class A stock and 395,000 shares of class B stock, all of a par value of $1 per share; that said bondholders should take class A stock dollar

for dollar and cancel the outstanding indebtedness against said district; that said stock should then be retired from time to time as the $60 per acre charges were paid by the landowners; that class B stock was to be divided as nearly equally as possible between the bondholders and the landowners.

At this juncture it is necessary to note particularly the further provision of this plan, which was that, as a necessary ingredient thereof, the landowners were to have dedicated to their lands from said water company a water right consisting of a minimum of 25 miner's inches of water per acre per annum, for which they were to pay 20 cents per miner's inch, consonant with a decision of the Railroad Commission of California rendered March 30, 1916. This plan was duly submitted to the electors of the district and was by them adopted without a dissenting vote. Following the election of the board of directors, said district forthwith invoked the further provision of said act of 1903 by petitioning the superior court of the county of Shasta for a decree validating and confirming the proceedings theretofore had for the dissolution of said district and for ascertainment and settlement of its indebtedness and for the distribution of its property. This decree was duly entered, although certain questions as to its validity will be hereafter referred to. So far as here material, it provided as follows:

"3. That the proceedings for the dissolution and reorganization of the Happy Valley Irrigation District are valid and conform to the provisions of the laws of the State of California. * * *

"4. That the plan for Dissolution and Reorganization of said Happy Valley Irrigation District is fair, just and equitable and is valid and conforms to the provisions of the laws of the State of California. * * *

"13. That the Happy Valley Water Company has been organized as a water company under the provisions of the act hereinabove mentioned, and in accordance with said plan to take over and operate the irrigation works of the Happy Valley Irrigation District, and the distribution system and for the sale and distribution of water to the landowners within said district, and in accordance with the plan, the landowners have agreed to take and pay for a minimum of twenty-five (25) miner's inches of water per acre per year (1.24 acre feet), for all land taking water or under cultivation for irrigation within said district, and said Happy Valley Water Company is entitled to collect and receive therefor water rates of twenty cents (20c) per miner's inch, for each twenty-four hours during irrigation season as fixed and established by the Railroad Commission in its decision No. 3212 of March 30, 1916."

The present consolidated action is to enforce a lien for these water charges for certain subsequent years against certain lands formerly in the district, and also to secure personal judgments against owners of such lands for the respective delinquent years of their ownership thereof. Plaintiff had full relief in the court below both for foreclosure of the liens for these charges and for the personal judgments in the manner and to the extent prayed for. The defendant landowners appealed. The assignments of error made by them are as follows: "I. That the Dissolution Act of 1903 gave the court no authority to make a decree imposing a charge against person or property for water to be delivered subsequent to the date of the decree of dissolution. II. That the court acquired no jurisdiction of the land, in order to make such a decree. III. That the court acquired no jurisdiction of the person of the defendants."

We shall consider these assignments in the order named.

[1-3] The argument, first, is that under the title of the act above quoted, the decree establishing the water right and the validation of the water rate and the fixing of a lien for such charge is not within the scope of the title of said act. This, appellants say, is particularly true as to the charges for the ensuing years which followed the entry of said decree.

We can see nothing illegal about the contract between the bondholders and the landowners, nor can we see why the title of the act does not embrace the matters complained of as logical details of the dissolution and readjustment plan. They seem clearly to be logical attributes of the general plan of dissolution and settlement contemplated by the act. "When the general purpose of the act is declared, the details provided for the accomplishment of that purpose will be regarded as necessary incidents." Ex parte Liddell, 93 Cal. 633, 637, 29 P. 251, 252.

[4, 5] But even if this were not true, it does not seem to us that under the record the question is really vital. The issue more properly is that of the validity of such an agreement between bondholders and landowners. The decree was deemed advantageous at the time to all parties concerned, including ap-

pellants or their predecessors. It was supported by mutual covenants and, therefore, rests upon sufficient consideration. We can see nothing illegal about it and were there no decree, under the proceedings of dissolution covering this point, we would nevertheless be constrained to hold, upon the record before us, that the charges made were proper and the result of either express or implied contract between the parties and binding either upon express consent or by acquiescence.

[6] It is next contended that the court acquired no jurisdiction of the land in order to make such a decree. This is predicated upon the alleged insufficiency of the notice provided for in the act. The act, which was literally complied with, requires that dissolution proceedings be initiated by a majority in number of the landowners, as well as a majority in value of the lands in the district, by means of a petition to the board of directors of the district summarizing the financial condition of the district as well as giving a survey of its assets. A plan of dissolution based upon the consent of creditors of the district, including a plan to settle with nonconsenting creditors, must be inaugurated and then be by the board of directors submitted to a vote of the district, upon due notice, both by posting and by publication. If the dissolution plan carries, the law then provides for the obtaining of a decree of confirmation and validation of the proceedings. Such a proceeding is in rem, and notice is conveyed by publication for a period of thirty days in a designated newspaper, which notice should describe the proceeding and authorize an appearance in opposition thereto by any interested party. It is true that the form and contents of the notice are meagerly described in the statute, but, in view of the knowledge of all parties gained from the preceding steps required in the proceeding, said notice is ample and gives to the court jurisdiction to bind all persons interested. This proceeding is similar to those sustained in earlier provisions of acts in aid of irrigation district development, such as Crall v. Poso Irrigation Dist., 87 Cal. 140, 26 P. 797, and Board of Directors v. Tregea, 88 Cal. 334, 26 P. 237. For a general discussion of the subject of service of process in in rem proceedings, see In re Estate of Davis, 136 Cal. 590, 69 P. 412; Title, etc., Restoration Co. v. Kerrigan, 150 Cal. 289, 88 P. 356, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199; and State v. Security Savings Bank, 186 Cal. 419, 199 P. 791.

[7] It is next contended that the court acquired no jurisdiction of the person of the appellants. We think this ground too is untenable. The fact is that without protest these landowners allowed these charges to stand against their lands. Bills were rendered to them quarterly and were not repudiated or disputed by any of them at any time. It therefore seems clear that an implied agreement or promise to pay these charges arose at least for the period such appellants were in possession of the lands. It seems also clear on the face of this proceeding that the plaintiff is a public utility and water rights have become dedicated to these lands, and that, in order to maintain these rights, charges should be imposed upon such lands for the privilege of using water thereon; and, if said rates were objectionable or confiscatory, it would have been in order for these property owners to seek relief from the Railroad Commission of the state of California. This decree would not render the commission powerless to change the rates where the facts justified such action.

The attacks made here are purely collateral, and, as above noted, we find no merit in any of them.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SHENK, J.



1 Cal.(2d) 331

SMITH v. FALL RIVER JOINT UNION HIGH SCHOOL DIST. et al.

SMITH et al. v. PRATT.

Sac. 4858.

Supreme Court of California.

July 21, 1934.

1. Judgment ⇐894

Where surety on bond to stay judgment paid personal injury judgment affirmed on appeal and took satisfaction and assignment of judgment, bond by which surety indemnified defendants against liability for personal injuries *held* admissible on motion to compel entry of satisfaction of judgment notwithstanding movant was not party to indemnity bond and surety paid judgment under stay bond (Code Civ. Proc. §§ 675, 942).

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

2. Contribution ⇐5

Contribution does not exist between joint tort-feasors whose concurrent negligence has made them jointly liable in damages.

3. Subrogation ⇐7(9)

Payment of judgment for personal injuries by company indemnifying two of joint tort-feasors, and which was also surety on their stay bond on appeal from judgment, constituted satisfaction of judgment barring subrogation in favor of indemnitor against other joint tort-feasor who was not indemnified and who gave no stay bond on appeal (Code Civ. Proc. §§ 675, 942).

In Bank.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Actions by California Smith, by and through her guardian ad litem, Walter B. Aldridge, against the Fall River Joint Union High School District and others; and by California Smith, by and through her guardian ad litem Walter B. Aldridge, plaintiff, and the Independence Indemnity Company, defendant, against M. D. Pratt. From an order granting a motion to compel entry of satisfaction of judgment, plaintiff and the Independence Indemnity Company appeal.

Affirmed.

For prior opinion, see 26 P.(2d) 37.

John Ralph Wilson, of San Francisco, for appellants.

Oliver J. Northup, Carr & Kennedy and A. F. Ross, all of Redding (W. C. Sharpsteen, of San Francisco, of counsel), for respondent.

CURTIS, Justice.

Plaintiff was enrolled as a pupil of the Fall River Joint Union High School District, one of the defendants herein. The school district entered into an agreement with the defendant Dave Fitzwater to transport by bus pupils living in certain territory within the district to and from the school building of said district. The defendant Fitzwater was the owner of the bus, and was paid a definite amount per month by the district for his services under said agreement. While said bus was being operated by him, it collided with an automobile driven by the defendant M. D. Pratt, as a result of which the plaintiff was severely injured. At the time of said collision the plaintiff was a passenger in said bus, and was being transported therein to said school building. Plaintiff brought this action for damages sustained by reason of her said injuries against the district and defendant Fitzwater, as the driver of the bus, and also against the defendant Pratt. She recovered judgment in the sum of $15,805 against all three of said defendants on a showing of concurring negligence on the part of Fitzwater, the driver of the bus, and defendant Pratt. The defendants appealed from said judgment, and a bond on appeal to stay execution thereof was given by the district and Fitzwater with the Independence Indemnity Company as their surety. The defendant Pratt, while he appealed from said judgment, did not give a bond to stay execution thereon. The judgment was affirmed. Smith v. Fall River Joint Union High School Dist., 118 Cal. App. 673, 5 P.(2d) 930. Upon affirmance, judgment was entered against the Independence Indemnity Company for the full amount of the judgment as the surety of the district and defendant Fitzwater. An execution was issued against the Independence Indemnity Company as such surety, and it paid to the plaintiff the full amount of the judgment. Upon receiving such payment, the plaintiff executed and delivered to the Independence Indemnity Company a satisfaction of said judgment and an assignment thereof. The satisfaction was never filed, and in due time Pratt moved the court to compel the entry of the satisfaction of the judgment under section 675 of the Code of Civil Procedure. This motion was granted by the trial court, and from that order the plaintiff and the Independence Indemnity Company have appealed. As the Indemnity Company is the only appellant interested in this appeal, we will refer to said company as the appellant.

At the time of the hearing of said motion, the respondent Pratt was permitted, over the objections of the appellant, to introduce evidence which, if admissible, supported one of the findings of the trial court reading as follows: "That it is true that the Independence Indemnity Company prior to the injury complained of in this action entered into a contract in writing with the Fall River Joint Union High School District, a body politic, and Dave Fitzwater, defendants in this action, whereby the said Independence Indemnity Company insured the said defendants against loss from any liability imposed by law upon the said insured for damages on account of bodily injury, including death at any time suffered or alleged to have been suffered by any person or persons, as a result of the ownership, maintenance, or use of the school bus mentioned in the complaint in this action and by said agreement the said Indemnity Compa-

ny agreed to pay and satisfy judgments finally establishing the said defendants' liability in an amount not to exceed $50,000.00."

[1-3] Appellant now makes the contention that the court erred in directing a satisfaction of said judgment as said judgment was paid by the surety under the stay bond given under section 942 of the Code of Civil Procedure for the other two tort-feasors, and therefore it was subrogated to the rights of the plaintiff against the defendants, including the defendant Pratt. If the appellant's sole liability to the parties herein was that incurred under said stay bond, its position is undoubtedly correct. Upon paying the judgment it could then proceed against each and all of the defendants in said action to recover the money paid to the plaintiff in satisfaction of her judgment. Having, however, indemnified the defendants, the school district and Fitzwater, against the very liability upon which said judgment was based, the appellant, of course, could not enforce payment of said judgment against said defendants. It is, therefore, necessary for us to look beyond the terms of the stay bond to determine the rights of the parties under all the facts in the case. This the trial court did when, at the hearing of the motion to satisfy the judgment, it admitted evidence of prior contract of appellant to indemnify the district and Fitzwater against all loss sustained by either of them in the operation of said school bus. There was no error, therefore, in the admission of this evidence. As appellant cannot recover from either the district or Fitzwater by reason of its indemnity bond, can it recover against the respondent whose negligence concurred with that of Fitzwater in causing plaintiff's injuries? It is well settled in this state that there is no right of contribution between joint tort-feasors whose concurrent negligence has made them jointly liable in damages. Adams v. White Bus Line, 184 Cal. 710, 195 P. 389. Therefore, had either of the two defendants, the school district or Fitzwater, paid said judgment, no claim for contribution against the respondent could have been made by the defendant making said payment. Neither could the appellant, after paying the judgment as the indemnitor of the two defendants, the school district and Fitzwater, compel contribution or recover anything from the respondent, a joint tort-feasor with the other two defendants. This was the point involved and definitely settled in the case of Adams v. White Bus Line, supra.

The further question remains to be answered and that is: Did the fact that the appellant was also the surety on the appeal or stay bond so change the situation of the parties as to give to appellant the right, not to compel contribution from respondent, but to force him to pay the entire judgment and thus relieve the appellant from all liability thereunder? Appellant contends that such changed situation gives it the legal right to make such exaction and cites LaFleur v. M. A. Burns Lumber Company, 188 Cal. 321, 205 P. 102, in support of its contention. In that action the surety upon the appeal or stay bond paid the judgment, and thereupon its principal applied to the court to direct satisfaction of the judgment under section 675, Code of Civil Procedure. While a number of collateral issues were disposed of in the court's opinion, the principal point decided, in so far as we are now interested, was that, as the surety had paid the judgment against its principal, who was also the defendant in said action, it was under section 709, Code of Civil Procedure, subrogated to all the rights of the plaintiff in said action including the right to enforce the payment of said judgment against its principal, the defendant in said action. In that case the defendant carried no indemnity insurance, and the rights of the parties under a bond of indemnity like that issued by the appellant in favor of the defendants, the school district and said Fitzwater, was not involved therein. Had the defendant in that case carried indemnity insurance in the same company which issued the appeal or surety bond, the decision therein would in our opinion have been quite different. Other authorities are cited by appellant, but they involve the rights of sureties under supersedeas bonds only. They are accordingly not applicable to the facts in this case, where the surety company is also the indemnifying company, and the liability it seeks to fasten on another is one which it is bound under its indemnifying contract to pay.

A case more in point is the case of Holmes v. Hughes, 125 Cal. App. 290, 14 P.(2d) 149, cited by respondent. In that case a judgment was recovered against the defendant Hughes in a personal injury action. Hughes carried liability insurance in a certain insurance company. The judgment was appealed, and bond to stay execution was given with another insurance company as surety. The judgment was affirmed, and the surety paid the judgment and then sought repayment from Hughes. It was shown that while Hughes was the nominal appellant he in fact knew nothing about the appeal being taken nor the surety bond being given. In fact, these acts had all been performed by the indemnity com-

pany without the knowledge or consent of Hughes, and the court held in effect that the indemnity company being liable for the payment of the judgment as originally rendered by the trial court could not avoid its liability and shift it on to the indemnitee by the subterfuge of taking an appeal therefrom and procuring some other company to act as surety on the appeal bond. We think there are some points of similarity at least between the situation existing in that case and that appearing in the present action. As we have seen, the appellant here by its written contract, or insurance policy, indemnified the school district and Fitzwater against all loss from any liability for damages suffered by any person as the result of the operation of said school bus. This contract, or insurance policy, is not before us. Certain of its terms were proved by the affidavit filed on behalf of the respondent. We assume it was in the usual and ordinary form used by companies engaged in the business of writing indemnity insurance, and that it provided that appellant at its own expense and through its own attorneys should defend any action brought against the insured by any person sustaining an injury through the operation of said school bus by the insured. We indulge in this assumption from the facts set forth in the affidavit above referred to, and from the further circumstance that no attempt was made by appellant to controvert these facts so alleged, or to produce the policy of insurance or any copy thereof. The judgment, therefore, that was rendered against the school district and Fitzwater, while nominally against them, was in its practical effect against the indemnity company, the appellant herein. Nothing was to be gained by the defendants so insured by an appeal from the judgment, as the indemnity company was legally bound to pay the same. On the other hand, it was to the interest of the indemnity company to take such appeal, and as it had entire control of the case in so far as the defense of the two insured defendants was concerned it could take said appeal without the consent of either of said defendants. The practical effect of the appeal was, therefore, as if the appellant had taken the appeal itself from a judgment against itself. By giving the bond on appeal with itself as surety, it did not in any way enlarge its liability in the premises. It was legally bound to pay the judgment before giving the surety bond. It was no more so after it had executed and delivered the stay bond. The only conceivable change in its legal status which the giving of this bond by itself might work, would possibly be in relation to its rights against the respondent herein. If appellant's contentions are to be sustained, then the indemnity company, although it had no right even of contribution against the respondent before the appeal, by taking the appeal and furnishing an appeal bond with itself as surety, created a right against the respondent, making him liable not only for contribution but for the entire amount of the judgment. We do not believe that under the laws of this state the appellant by such indirect methods can enrich itself at the expense of another. In Holmes v. Hughes, supra, in denying the surety the right to be subrogated to the rights of the plaintiff, the court said (page 295 of 125 Cal. App., 14 P.(2d) 149, 150): "However, the right of a surety to be subrogated to the rights of the original creditor as against the judgment debtor upon payment of the judgment has long been recognized and enforced in equity; * * * and, as has been said with regard to section 709 of the same Code, * * * section 1059 gives to a surety the summary remedy of using the judgment itself to enforce his rights against the judgment debtor. It is but a method of procedure based upon the doctrine of subrogation and governed by the same equitable principles. The letter of the statute will not be followed where the result of such interpretation will be absurd and unjust; it being the rule that the spirit and reason of the law should prevail."

A state of facts precisely like those existing in the present action was before the supreme court of Ohio, and it was there held that the payment of a judgment by an insurance company that was not only the indemnitor of the appellant but was also the surety on the bond on appeal from said judgment was a complete satisfaction of the judgment and that no right of subrogation existed in favor of said company against defendants, who had neither indemnity nor other insurance. In that case one Gordon was indemnified by the Royal Indemnity Company against loss by reason of claims growing out of negligence. During the time the policy was in force, one Webber sustained injuries as the result of the concurrent negligence of Gordon and two other persons named Becker. Webber recovered judgment against all three tort-feasors. Gordon appealed, and gave a surety bond to stay execution on appeal with the Royal Indemnity Company as surety. The judgment was affirmed, and the Royal Indemnity Company paid the judgment, and then sought to collect from the Beckers the amount so paid. The court held that no such right of recovery ex-

isted in favor of the Royal Indemnity Company. Its reasons for so holding are contained in the following paragraph of the opinion: "It must be concluded that Gordon would have had no right whatever to enforce contribution by his joint tort-feasors, the Beckers. In our opinion the right of the indemnity company was no greater than that of its tort-feasor indemnitee, and that the attempt to accomplish by indirection what Gordon could not have done directly must fail. The judgment was paid in full, and it is immaterial whether it was paid by Gordon or by his indemnitor, the Royal Indemnity Company. Whether it was paid by reason of its obligation as indemnitor, or as surety upon the supersedeas bond, such payment operates as a complete satisfaction, just as it would have done if payment had been made by Gordon. Where the right of subrogation exists an assignment is unnecessary, for that is supplied by equity; but here there was no right of subrogation and no additional right accrued by reason of the assignment of the judgment." Royal Indemnity Company v. Becker, 122 Ohio St. 582, 173 N. E. 194, 195, 75 A. L. R. 1481.

It seems to us that this reasoning of the Ohio Supreme Court is sound and that the rule announced by it should control the decision of the present action. We find no authorities to the contrary, and after the exhaustive examination of the law both by counsel and this court, we feel reasonably certain that none exists. The appellant, as the indemnitor of the two appealing defendants was liable for the payment of the judgment against them and such payment gave it no recourse against the respondent as the joint tort-feasor of said defendants for the amount so paid or for any part thereof. It would be most inequitable to permit the appellant to now assert that it paid the judgment as the surety on the appeal bond and not as the indemnitor, and thus by the application of equitable principles of subrogation escape the liability which, for an adequate consideration, it had undertaken to discharge, and force such liability upon another who was not a party to said appeal bond and who received no benefit whatever from its execution and delivery. Some attempt was made to show that execution had been issued and levied upon the property of the respondent and subsequently the property was released from the levy. Whatever may have been the reason for such release, it is apparent that the appeal bond given by the school district and Fitzwater would have no effect in staying the judgment against respondent, and we are unable to perceive any legal connection between the execution of said appeal bond, and the release of respondent's property from the levy of said execution.

The judgment having been paid by the appellant under the circumstances shown above, such payment operated as a complete satisfaction thereof as to the other defendant, the respondent herein. Respondent was therefore entitled to an entry of satisfaction. Adams v. White Bus Line, supra.

The order appealed from is affirmed.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; LANGDON, J.

1 Cal.(2d) 321

STAFFORD et al. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.

S. F. 15085.

Supreme Court of California.

July 19, 1934.

Rehearing Denied Aug. 16, 1934.

1. Insane persons ⇐94(1)

Where, after final judgment in marriage annulment action against incompetent, incompetent's guardian ad litem employed attorneys who moved to set aside decree and property settlement for fraud and conducted appeal from denial of motion, but court had no funds or property in its custody or control belonging to incompetent or incompetent's estate, court could not allow attorneys' fees.

2. Insane persons ⇐94(1)

In marriage annulment action against incompetent, attorneys employed by guardian ad litem of incompetent to set aside annulment decree could not proceed in such action to obtain award of attorneys' fees directly to them independently of guardian ad litem (Probate Code, §§ 1509–1511).

3. Insane persons ⇐94(1), 103

Code sections authorizing court in certain cases to approve guardian's contract for attorney's fees or fix fees payable out of funds under court's control can be invoked only by guardian or guardian ad litem; an award directly to attorney being unauthoriz-

ed under any circumstances (Probate Code, §§ 1509–1511).

4. Insane persons ⇐94(1), 103

Code provisions authorizing court in certain cases to approve guardian's contract for attorney's fees or fix attorney's fees payable out of funds in litigation and under court's control measure power of court to bind estates of insane persons under guardianship as well as estates of minors (Probate Code, §§ 1509–1511).

In Bank.

Proceeding in mandate by Harry I. Stafford and another against the Superior Court in and for the City and County of San Francisco.

Petition denied.

Prior opinion, 26 P.(2d) 679.

Edmund A. Cunha, of San Francisco, for petitioners.

Byron Coleman and Oliva & Coleman, all of San Francisco, for respondent.

PRESTON, Justice.

This proceeding in mandate involves the following facts:

Subsequent to a final judgment of the superior court in favor of S. Morton Cohn, in an action against Lillian E. Cohn, annulling the marriage contract between said parties on the ground of insanity of the wife at the time of said marriage, petitioners, who are attorneys at law, at the instance of the guardian ad litem of the incompetent, her sister, sought by motion to set aside said decree of annulment and the property settlement made in connection therewith for fraud in its procurement. This motion was denied. Petitioners conducted an appeal from the order denying said motion, prepared a record, and filed an opening brief. Pending the appeal the incompetent died. Her administratrix, another sister, realizing the change which the death had wrought in the situation, had herself made a party to said proceeding and promptly dismissed the appeal.

When said annulment decree was entered, the husband made a property settlement for the benefit of the incompetent wife, which the court directed to be paid over to her general guardian. Petitioners did not represent the incompetent during this period. At the time petitioners were employed, respondent court had not, nor has it ever since had, any funds or property in its custody or control belonging to the incompetent or to her estate. Petitioners sought in a summary hearing had in said cause to have respondent court fix their compensation for services rendered said guardian ad litem. This the court refused to do, holding that it was without jurisdiction in the premises. This proceeding was then instituted in the District Court of Appeal to compel respondent court to take jurisdiction of the application and dispose of it on its merits. The District Court of Appeal gave its decision and judgment in the matter, and the cause was later transferred to this court.

[1, 2] Notwithstanding the fact that petitioners, in good faith, rendered services of considerable magnitude, we see no way of giving relief to them in this proceeding. As the services were not rendered to secure necessities, not even an independent suit would lie against the incompetent. McKee v. Hunt, 142 Cal. 526, 77 P. 1103. It is also conceded that in this proceeding petitioners could not hold the guardian ad litem personally liable for the value of their services. Neither could the guardian ad litem successfully seek from the court in this proceeding an allowance of attorneys' fees by way of expenses incurred, as the court has no funds within its jurisdiction belonging to the ward. In this respect the case differs from the situation in Cole v. Superior Court, 63 Cal. 86, 49 Am. Rep. 78, relied upon by petitioners. We are pointed to no authority that would permit petitioners, as attorneys, to proceed in any event independently of the guardian ad litem. An award of attorneys' fees directly to them would be irregular and void. Stevens v. Stevens, 215 Cal. 702, 704, 12 P.(2d) 432. The only case where an attorney may proceed independently and maintain an action or an appeal is for services rendered during administration of an estate as provided in section 911, Probate Code, formerly section 1616 of the Code of Civil Procedure. Prior to said enactment an attorney was without independent status in this respect. In re Estate of Kruger, 143 Cal. 141, 76 P. 891; Gurnee v. Maloney, 38 Cal. 85, 99 Am. Dec. 352.

[3, 4] No authority can be found authorizing the court, in an action where no funds exist, to make an order fixing attorneys' fees to be collected from some other source. The nearest thing applicable to question before us seems to be the provisions of sections 1509, 1510, and section 1511 of the Probate Code, formerly section 1810b of the Code of Civil Procedure, where approval of a contract for attorneys' fees of a guardian is authorized, when made prior to rendition of the services,

and also where, in the absence of a contract, a judgment is recovered in favor of the ward, the court may fix an attorneys' fee to be paid out of the funds under its control.

It seems, however, that even these sections can be invoked only by the guardian or guardian ad litem, who may represent the ward. The attorney is not a party to the suit and an award directly to him under any circumstances is unauthorized. Although these Code provisions expressly mention minors and do not specifically mention other classes of wards, they are found among the general provisions applicable to all guardians, and we see no reason to hold otherwise than that they measure the power of the court to bind estates of insane persons under guardianship as well as estates of minors. Likewise we find no reason to hold that the rule respecting a guardian ad litem should differ from that respecting a general guardian.

We think that the language of 14 Ruling Case Law, § 57, p. 290, indicates the proper course in the matter before us, to wit: "If a fund is recovered for the infant by the suit, or if the infant's property is under the control of the court, it will order proper counsel fees to be charged upon it; and if not, the attorney must look to the court which has jurisdiction of the general estate of the infant." And failing to enlist the aid of such representative of the ward, a personal action against the party employing him is all that is left.

The petition is denied.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SHENK, J.



1 Cal.(2d) 313

COHN v. COHN et al.

S. F. 14880.

Supreme Court of California.

July 18, 1934.

1. Mortgages ⇐608½

In action to have deed declared a mortgage wherein interlocutory decree for plaintiff required her to pay indebtedness found due on accounting within specified period as condition precedent to reconveyance of property to her, form of final decree that defendants reconvey property subject to lien, without more, *held* not improperly drawn because not following course outlined in interlocutory decree.

2. Appeal and error ⇐1152

On appeal from judgment for plaintiff in action to have deed declared a mortgage, Supreme Court *held* authorized to modify judgment by making it more certain with respect to duration of lien, rate of interest, and means of foreclosure.

In Bank.

Appeal from Superior Court, San Francisco County; Edmund P. Mogan, Judge.

Action by Irene V. Cohn against Levi Cohn and Irving Cohn, executors of the last will and testament of Charles Cohn, deceased. From a judgment in favor of plaintiff, defendants appeal.

Judgment modified and, as modified, affirmed.

Joseph A. Brown, of San Francisco, for appellants.

Daniel R. Shoemaker and Harry I. Stafford, both of San Francisco, for respondent.

PRESTON, Justice.

Plaintiff brought this action to have a deed declared to be a mortgage, which deed, absolute in form, was made by her in the year 1917 to one Charles Cohn, now deceased, to secure an indebtedness of $5,000; also for an accounting of the rents, issues, and profits of the property in question; and for judgment awarding her the excess, if any, of rents and profits over the amount of her said indebtedness and interest thereon.

Issue was joined by the answer of defendants, who are executors of the last will and testament of Charles Cohn, deceased. Thereafter the cause proceeded to a hearing, the court made its findings and, on October 20, 1927, rendered its interlocutory decree, adjudging said deed to be a mortgage, appointing a referee to take an accounting, and providing that if plaintiff's indebtedness exceeded the amounts collected from the property, then plaintiff should have ninety days from final determination of said accounting to pay defendants the moneys found due them; that upon such payment the deed should be canceled and defendants should execute to plaintiff a reconveyance of the property. Said interlocutory judgment was affirmed upon appeal; reference is made to said decision for a fuller statement of the

facts of this case. Cohn v. Cohn, 100 Cal. App. 746, 281 P. 504.

Later the matter of the accounting was heard. The referee concluded that on April 3, 1931, the plaintiff was indebted to defendants in the sum of $2,109.90, and rendered his report to that effect, to which report defendants filed various objections and exceptions. The trial court, however, found the report and findings of fact of the referee to be correct and gave judgment confirming and approving them, further ordering that defendants execute a reconveyance of said real property to plaintiff, subject to a lien in said sum of $2,109.90. From this judgment defendants appealed.

Appellants devote considerable space to a review of the evidence taken upon the accounting in an endeavor to prove its insufficiency to support the findings of the referee, particularly with respect to the amount of rentals received from the property and the balance found to be due them. It is unnecessary, however, to here engage in a detailed discussion of this contention. The matters urged by appellants may be said at most to create a conflict in the evidence, which the court was justified in resolving in favor of respondent. The record contains ample proof to support the findings of the referee and the court.

[1] The only other contention of appellants is that the court, in the form of its judgment, should have pursued the course outlined in the interlocutory decree and ordered respondent to pay said indebtedness within a specified period after final determination of the accounting as a condition precedent to reconveyance of the property to her, instead of merely decreeing that appellants reconvey the property subject to said lien. This contention is untenable. The form of the final decree was properly drawn in conformity with the procedure suggested by recent expressions of this court on the subject. Ochoa v. McCush, 213 Cal. 426, 2 P.(2d) 357; Alamitos Land Co. v. Shell Oil Co., 217 Cal. 213, 17 P.(2d) 998.

The case of Dougery v. Bettencourt, 214 Cal. 455, 6 P.(2d) 499, 504, relied upon by appellants, is not in point. The proceeding there was of a different character and the form of judgment was controlled by section 3466½ of the Political Code (as added by St. 1921, p. 555), providing that no sale, certificate, or deed made for a valid delinquent assessment should be adjudged invalid without payment to the purchaser of the land of said delinquent assessment, penalties, interest and costs. The court said: "Obviously the giving of a lien on the property is not the payment contemplated by that statute."

[2] It is urged that in this decree there is neither a fixed period of duration of the lien, or a specification of the rate of interest or the means of foreclosure declared. But this would also be true were appellants enforcing the deed as a mortgage. However, it is within the province of this court to make the judgment more certain in these particulars.

Accordingly, the last paragraph of said judgment is stricken out and the following is inserted in lieu thereof: "It is ordered that plaintiff, within ninety days from and after the date that this judgment becomes final, pay to the defendants the sum of $2,109.90, together with lawful interest thereon from and after April 3, 1931, and, when so paid, defendants are directed to reconvey said property to plaintiff free and clear of all incumbrances made, done, or suffered by them. But in case plaintiff fails to make said payment within the time specified herein, then defendants may apply to the court below for the usual decree of foreclosure and sale applicable to such a cause."

As so modified, the judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.



1 Cal.(2d) 340

UNITED BANK & TRUST CO. OF CALIFORNIA v. HUNT et al.

Sac. 4877.

Supreme Court of California.

July 21, 1934.

Rehearing Denied Aug. 20, 1934.

1. Judgment ⇐585(3)

Judgment in action by mortgagors against mortgagee to recover damages through loss of crop because of mortgagee's failure to advance money under contract *held* not res judicata in mortgagee's action for deficiency as against mortgagors' counterclaim for breach of other provisions in same contract.

Action brought by mortgagors sought merely a recovery of damages for loss of

crop because of the mortgagee's failure to advance money under contract to do so. Counterclaim in mortgagee's action for deficiency after foreclosure of mortgages sought recovery of damages for loss of anticipated profits because of mortgagee's failure to negotiate lease and for willfully inducing owner not to enter into lease with mortgagors, damages arising from foreclosure under deed of trust in violation of agreement to withhold foreclosure for a reasonable time, and damages for foreclosing chattel mortgage and for failing to advance money which was sole consideration therefor, all in violation of same contract.

2. Judgment ⇐746

Where defendant, in action for damages for breach of contract, successfully opposed motion to amend complaint to include various causes of action for breach of same contract involved in collateral case, and successfully opposed motion to try cases together, defendant waived right to raise question of res judicata in subsequent action.

3. Judgment ⇐633

Counsel preventing consolidation of issues in two cases after opposing counsel called court's attention to pendency of other proceedings covering kindred matters cannot later be heard to object to trial of related matters on ground of res judicata.

4. Action ⇐53(1)

Rule against splitting cause of action is for benefit of defendant, who may waive it or renounce it by agreement with plaintiff.

5. Judgment ⇐633

Testimony as to what took place before court in another case relative to continuance or consolidation thereof with instant action and what was said and done by plaintiff's counsel in opposition thereto *held* admissible to determine whether defendant waived or renounced benefit of rule against splitting cause of action.

6. Judgment ⇐956(4)

Parol evidence or reporter's transcript is admissible to show what matters provable under issues of case were submitted to jury as basis for determining whether judgment in former case is res judicata.

In Bank.

Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

Action by the United Bank & Trust Company of California against A. P. Hunt and another, wherein the defendants filed a cross-complaint and counterclaim against the plaintiff. From a judgment of nonsuit on their cross-complaint and counterclaim, the defendants appeal.

Reversed, and cause remanded for a new trial.

For prior opinion, see (Cal. App.) 28 P.(2d) 386.

Francis C. Brown, of San Francisco, J. Oscar Goldstein, of Chico, and Ray Manwell, of Marysville, for appellants.

Keyes & Erskine, of San Francisco, Butler, Van Dyke, Desmond & Harris, of Sacramento, Rich, Weis & Carlin and W. P. Rich, all of Marysville, and Morse Erskine, of San Francisco, for respondent.

WASTE, Chief Justice.

This cause was taken over, upon petition, after a decision in the District Court of Appeal, Third Appellate District. Upon a reading of the record, and an examination of the authorities, we are satisfied that the opinion of that court, prepared by Mr. Presiding Justice Pullen, reached a correct conclusion upon the issue presented. We therefore adopt the following portions of the opinion of the District Court of Appeal as and for the decision of this court:

This controversy arises out of an agreement between appellants and cross-complainants, hereinafter referred to as the Hunts, and United Bank and Trust Company, now known as the Bank of America National Trust & Savings Association, a corporation, cross-defendants and respondents, hereinafter referred to as the bank.

Some time prior to April, 1924, the Hunts were the owners of an undivided one-half interest in three parcels of farm lands in Butte county and held a lease upon the other one-half interest thereof. The lands were known as the adobe ranch and referred to as parcel I in the agreement, the home place referred to as parcel II, and the upper place designated as parcel III.

In 1924 all of the property was subject to a deed of trust to secure an indebtedness to the bank of $45,000, and there were in addition, liens for water supplied for irrigation and certain unsecured notes due from the Hunts to the bank.

In April of that year the parties met and adjusted their financial relations, which resulted in the execution of the following instruments: (1) A promissory note for approximately $14,000 in favor of the bank, which

included the amounts due for water and various unsecured notes. There was also included $2,500, an agreed future advance for irrigation water, and $1,000 which the bank agreed to advance to finance the farming operations on the home place; (2) a chattel mortgage as security for the foregoing amounts covering all of the farming equipment of the Hunts; (3) a crop mortgage covering all of the crops to be grown during the season of 1924 by the Hunts on the home place, and any interest they might have in any crops grown on the adobe ranch; (4) a written agreement whereby the bank was to make the future advance referred to; to suspend foreclosure under the trust deed for a reasonable time; to negotiate a lease with C. A. Bayless as tenant on the adobe ranch on a crop-sharing basis; to protect the Hunts against foreclosure on any water liens; and to endeavor to secure for the Hunts the repayment of money expended by them for plowing on the leased premises. The Hunts on their part agreed to apply on the indebtedness all of the proceeds from the crops raised on the home place, and to execute all necessary papers to consummate the agreement.

Thereafter differences arose between the parties, principally as to a tenant for the adobe ranch, and the bank, treating the agreement as having been abrogated, caused the property to be sold under its deed of trust. The property failed to bring the full amount of the note with interest and other advances, and in March, 1925, the bank brought an action in Sacramento county against the Hunts for this deficiency in the sum of $14,378.37. This action was transferred to Yuba county, and is hereinafter referred to as the Yuba county case. To that complaint the Hunts in June, 1928, filed an answer admitting the execution of the trust deed, and a cross-complaint and counterclaim praying for judgment against the bank, alleging a claim for damages for loss of the crop on parcel II by reason of the bank's failure to advance the money for planting and water charges; a claim for damages for loss of anticipated profits from the Bayless lease on parcel I, due to the failure of the bank to complete the negotiations for the lease and for its act in willfully inducing Bayless not to enter into the lease; a claim for damages arising out of the foreclosure under the deed of trust in alleged violation of the agreement wherein the bank undertook to withhold foreclosure for a reasonable time, and a claim for damages for foreclosing a chattel mortgage after failure to advance the money which was the sole consideration thereof, all in the sum of $89,800.

In the meantime, and a few months after the bank had filed the Yuba county case against the Hunts, they, in October, 1925, filed a complaint against the bank in Butte county. In that complaint the Hunts set out in hæc verba the agreement of 1924, and alleged they had done the various acts imposed upon them by the agreement, but that the bank retook the seed rice they had obtained for cropping parcel II, refused to furnish any money to pay for the water charges upon said land or for the planting and harvesting of the crops thereon, and, in violation of their agreement, advertised the lands for sale under the deed of trust, and caused the property to be sold by the trustees in March, 1925.

The answer of the bank admitted the execution of the agreement and set up a counterclaim for $14,378.37, which it claimed was due as a deficiency under the deed of trust after it had sold parcels I, II, and III. This counterclaim was identical with the complaint filed in the Yuba county case. Nothing was done in the Butte county case until March 9, 1928, when the present attorneys for the Hunts, having in the meantime been substituted for their original attorneys, moved to file an amended complaint, which was by the court denied. The proposed amended complaint was virtually identical with the cross-complaint and counterclaim in the Yuba county case.

Upon motion of the bank and over the objection of the Hunts, the Butte county case was set for trial. In opposition to the setting of the Butte county case, it was contended by the Hunts that the action in Butte county, if based upon the original complaint, would not present all of the claims for damage which the Hunts had against the bank, and that the action in Butte county should not be tried before the Yuba county action was tried, as a judgment in Butte county might be construed as an estoppel and res judicata against the action pending in Yuba county; that the Butte county case should be consolidated with the Yuba county case, and all of the issues between the parties there determined. However, the motion to amend, postpone, or consolidate was denied, and the cause proceeded to trial, and upon appeal the Hunts were awarded a judgment against the bank for $14,132.54 (Hunt v. United Bank & Trust Co., 210 Cal. 108, 291 P. 184, 187), reference to which is made for a clear statement of the facts of that case

and the issues submitted and determined therein.

Thereafter, and in October, 1931, the Hunts caused the issues pending in Yuba county to be brought to trial, and at the conclusion of the trial, upon the issues raised by the cross-complaint, the court granted a nonsuit against the Hunts, and from that judgment this appeal is prosecuted.

[1] Upon the theory that the judgment in Butte county was a bar to the action in Yuba county, the trial court sustained objections to the introduction of the evidence submitted by the Hunts upon the cross-complaint at the Yuba trial. We believe the trial court in this was in error. The issues tried in Butte county were limited to a single issue of the damages sustained by the Hunts through the loss of the rice crop on the home place. This is apparent from the pleadings, the complaint alleging "that by said wrongful violation by defendant as hereinabove set forth and that said failure to comply with the terms thereof * * * plaintiffs were unable to farm any of said lands and were damaged in the sum of $20,000.00." It will be recalled in that connection that the only lands the Hunts were to farm according to the agreement was parcel II, the home place. And in the opinion in the case of Hunt v. United Bank & Trust Co., supra, the court said: "The result was that the Home Place was not farmed during the 1924 season and Hunt lost his rice crop. Defendant then caused the lands to be sold under its deed of trust. Plaintiffs thereupon brought this action to recover damages in the sum of $20,000 from defendant by reason of the loss of the crop." Under the agreement between the parties, the bank was obligated to advance money to farm parcel II, to negotiate a lease to Bayless on parcel I, and to withhold foreclosure on the deed of trust.

Therefore, the Butte county case having been confined to a single issue of damages arising out of the failure of the bank to advance the money necessary for planting the rice crop and for the water charges as agreed on one parcel, it does not appear that anything pertinent to the Yuba action was "actually and necessarily included" in the judgment in the Butte case.

[2] We are of the opinion that the bank waived its right to raise the question of res judicata in the Yuba county case by its opposition to the motion to amend the Butte county case to include therein the various causes of action set forth in the Yuba county case, and by opposing a motion to try the two cases together.

[3] Where counsel by timely notice call to a court's attention the pendency of other proceedings covering kindred matters and strive to have the same embraced within the scope of the inquiry, and such attempt is successfully blocked by opposing counsel, and the trial proceeds to the investigation of the specific issue before the court, counsel who were successful in preventing the consolidation of the issues cannot be heard later to object to a trial of the related matters upon the ground of res judicata. The course pursued by the court and counsel in the Butte county case was tantamount to an express determination on the part of the court with the consent of opposing counsel to reserve the issues involved for future adjudication. Asher v. G. F. Stearns, etc., Co., 241 Ky. 292, 43 S.W.(2d) 1012. Litigants cannot successfully assume such inconsistent positions.

[4] "The rule against splitting a cause of action is for the benefit of the defendant and he may waive it or renounce it by agreement with plaintiff." 34 Cor. Jur. 829.

In Southern Pac. Co. v. Edmunds, 168 Cal. 415, 418, 143 P. 597, 598, the rule is stated as follows:

"The rule undoubtedly is that a former judgment between the parties to an action is conclusive in all subsequent actions involving the same question, not only as to the matters actually decided in the former controversy, but as to all matters belonging to the subject of the controversy and properly within the scope of the issues which also might have been raised and determined; the presumption being that all such issues were presented and decided. Bingham v. Kearney, 136 Cal. 175, 68 P. 597; Rucker v. Langford, 138 Cal. 611, 71 P. 1123.

"As to matters, however, which might have been litigated and decided in a former suit as within the scope of the issues, but which were not actually or expressly in issue and adjudicated, only a presumption is indulged in that they were decided. This presumption is, however, a disputable one, and may be overcome by showing that, although a particular matter was involved in the former action, it was by consent of the parties withdrawn from consideration at the trial and did not at all enter into or constitute any part of the verdict of the jury or final determination of that action. If this is the situation here, defendant certainly cannot invoke the doctrine of res adjudicata against the assertion by plaintiff in

this action of a right to the credit claimed. He cannot assert the conclusiveness of the former judgment on that matter, if he consented with plaintiff that it might be withdrawn from consideration by the jury as an issue in the former action, and it was in fact withdrawn."

[5] The appellants therefore contend that it was error for the court to exclude the proffered testimony of witness Brown in the present case as to what had taken place before the court in the Butte case relative to a continuance or to consolidating the Butte and Yuba cases, the testimony there admitted and what was said and done by counsel for the bank in opposition thereto. We believe the evidence was proper to determine whether or not defendant had waived or renounced the benefit of the rule.

[6] It is also a general rule that either parol evidence or a reporter's transcript is admissible to show what matters provable under the issues of a case were or were not submitted to a jury as an aid in determining whether a judgment acts as a bar to another action, and for that reason also the court should have permitted the testimony of Brown to have been received. Goodman v. Dam, 112 Cal. App. 244, 296 P. 623; People v. Bailey, 30 Cal. App. 581, 158 P. 1036; Meredith v. Santa Clara Mining Ass'n, 56 Cal. 178.

The judgment of nonsuit on the counterclaim and cross-complaint of the appellants was error.

The judgment is therefore reversed and the cause remanded for a new trial.

We concur: SHENK, J.; THOMPSON, J.; CURTIS, J.



1 Cal.(2d) 298

DAUGHERTY, Commissioner of Corporations, v. RILEY, State Controller.

S. F. 15135.

Supreme Court of California.

July 17, 1934.

1. Licenses ⇐7(1)

Corporate Securities Act is sustainable only as justifiable exercise of police power (St. 1917, p. 673, as amended).

2. Licenses ⇐18½

General purpose of corporate Securities Act is to protect public against fraudulent and unlawful stock and investment schemes, and to regulate issuance of securities offered to public for purchase (St. 1917, p. 673, as amended).

3. Licenses ⇐33

Corporate Securities Act is for protection of public, and funds derived therefrom are for purpose of paying cost of regulation and not for general revenue purposes (St. 1917, p. 673, as amended).

4. States ⇐127

Statute appropriating Corporation Commission funds for construction of building to be used for housing of division of corporations and providing that rentals of portion of building not needed by division of corporations should be deposited in Corporation Commission fund *held* not unconstitutional as diverting funds not collected for general revenue purposes to other departments; Legislature presumably acting in good faith (St. 1929, p. 1683; St. 1917, pp. 683, 684, §§ 20, 21, as amended; St. 1931, p. 957, § 28; Const. art. 4, § 25, subd. 10; art. 13, § 1).

5. States ⇐127

Revenue of division of corporations, being permanently set apart for use of that department, is in nature of trust fund raised for particular purpose in exercise of state's police power and may not be diverted permanently from special purpose (St. 1931, p. 957, § 28; Const. art. 4, § 25, subd. 10; art. 13, § 1).

6. States ⇐127

Rule that revenues raised to enable state department to carry on regulatory function in exercise of state's police power may not be diverted permanently to general funds does not apply to funds raised under power of taxation (Pol. Code, §§ 444, 453a; Const. art. 4, § 25, subd. 10; art. 13, § 1).

7. States ⇐127

Legislature may transfer special fund temporarily from one purpose to another, where transfer does not interfere with objects for which fund was created; such transfer being deemed loan from special fund to be repaid when funds are available (Pol. Code, §§ 444, 453a; Const. art. 4, § 25, subd. 10; art. 13, § 1).

8. States ⇐127

Statute withdrawing money from Corporation Commission fund for usual current expenses of state for erection of building, without restricting use of addition to division of corporations, or requiring rentals to be paid to Corporation Commission fund, *held* uncon-

stitutional as diverting special fund arising from revenue imposed for purposes of regulation to other departments as general revenue funds (St. 1931, p. 51; St. 1931, p. 957, § 28; Const. art. 4, § 25, subd. 10; art. 13, § 1).

9. States ⇐127

Statute appropriating money for state office building from Corporation Commission fund not otherwise appropriated *held* ineffective, where fees paid into corporation fund were previously appropriated by statute to maintenance of division of corporations (St. 1931, p. 51; St. 1931, p. 957, § 28).

10. Mandamus ⇐100

Where Corporation Commission funds were diverted from purpose of regulation to general fund, reducing funds available to commissioner of corporation below those necessary to pay current expenses of division of corporations not in excess of budget allotment, mandamus *held* to lie to compel state controller to retransfer diverted funds and to draw warrants upon general fund to pay claims of corporation commissioner for conduct of division of corporation until money was retransferred (Pol. Code, § 677a; St. 1931, p. 51; St. 1931, p. 957, § 28; Const. art. 4, § 25, subd. 10; art. 13, § 1).

In Bank.

Original proceeding in mandamus by Edwin M. Daugherty, as Commissioner of Corporations of the State of California, against Ray L. Riley, as Controller of the State of California, to compel respondent to audit and approve certain claims in favor of the division of corporations.

Judgment in accordance with opinion.

Charles F. Johnson, of Los Angeles, for petitioner.

U. S. Webb, Atty. Gen., Robert W. Harrison, Chief Deputy Atty. Gen., and W. R. Augustine, Deputy Atty. Gen., for respondent.

O'Melveny, Tuller & Myers, John A. Powell, Paul Fussell, and Walter K. Tuller, all of Los Angeles, amici curiæ.

SHENK, Justice.

This is a proceeding in mandamus to compel the respondent, state controller, to audit and approve certain claims in favor of the division of corporations by resorting first to the Corporation Commission fund, then to the general fund in the state treasury, and for general relief. The return to the alternative writ is a general demurrer to the petition.

The budget enactment of 1933 (Stats. 1933, pp. 814, 815) provides: "Item 85—For support of Division of Corporations, Department of Investment, six hundred ninety-eight thousand six hundred seventy-four and 16/100 dollars payable from the corporation commission fund....$698,674.16." The average monthly budget authorization for the division of corporations for the current biennial period is $30,347.15. The average monthly expenses of that division for the first eight months of the current biennial period have been $28,616.63. At the close of business on February 28, 1934, there remained in the Corporation Commission fund the sum of $11,160.20. The operating expenses of said department for that month were $25,476.74, of which amount $23,824.14 was pay roll. On March 15, 1934, the date for the payment of salaries for the preceding calendar month in said department, pursuant to section 664a, of the Political Code, as added by St. 1933, p. 40, § 1, there was on hand the sum of $15,647.12, and no more.

With the foregoing condition of the Corporation Commission fund in mind, the director of finance, on March 13, 1934, issued his certificate of unavoidable necessity, purporting to act under section 5 of the 1933 budget enactment (page 840), which provides, so far as pertinent, as follows: "The officers of the various departments * * * are expressly forbidden to make any expenditure in excess of such appropriations, except the consent of the State Department of Finance be first obtained, and a certificate, in writing, duly signed by the director of said department, of the unavoidable necessity of such expenditure. * * *"

The certificate of the director of finance recited that an extreme emergency had arisen in the administration of the division of corporations, in that the receipts of the Corporation Commission fund were insufficient to cover the necessary and vital operative expenses of said division; that the expenditures of the division for the current biennial period have not exceeded the limitation fixed by item 85 of the Budget Act of 1933; that the actual appropriation for said division is the amount represented by current fees deposited in the Corporation Commission fund, and the excess of said expenses for February, 1934, over the amount in said fund at the end of that month constitutes an expenditure in excess of the appropriation for said division; that on February 28, 1934, only $11,160 in the Corporation Commission

fund against said operating expense in the sum of $25,476.74 for the month of February, 1934, are chargeable; that the nonpayment of said excess in the amount of $14,316.54 would result in seriously curtailing and crippling the operations of said division to the detriment of the public welfare; and that all of said expenditures arose and are vital and necessary to the proper functioning of said division. Following these recitals the director of finance certified to the unavoidable necessity of the above-mentioned expenditures in excess of the appropriation for the division of corporations "all as provided in section 5 of chapter 278 of the Statutes of 1933."

Under date of March 20, 1934, the commissioner of corporations presented his claim and request to the respondent state controller for a transfer from the general fund or other appropriate fund of an amount in addition to the balance in the Corporation Commission fund sufficient to meet the pay roll of the department for the month of February. The state controller refused to comply with the demand, stating that in his opinion the procedure proposed to be adopted was void and of no effect. The present proceeding was then commenced.

In order to determine whether the petitioner is entitled to any relief it is deemed necessary to consider the status of the Corporation Commission fund from the standpoint of its legislative history and administration, and to review the events which have resulted in the present admittedly unfortunate and deplorable financial condition of the department. It is insisted and not disputed that unless some relief can be granted the functioning of the department will be seriously curtailed, if not completely suspended.

The office of the commissioner of corporations was created by the Investment Companies Act of 1913. Stats. 1913, p. 715. This act was reframed and renamed the Corporation Securities Act in 1917. Stats. 1917, p. 673. The act was amended in some respects at succeeding sessions of the Legislature, preserving, however, the material objects and purposes thereof, but imposing new and onerous duties and responsibilities and expenditures on the division of corporations. The laws now in force place upon the division the administration not only of the Corporate Securities Act, but also of the Industrial Loan Act (Stats. 1917, p. 658); the Credit Unions Act (Stats. 1927, p. 51); the Personal Property Broker's Act (Stats. 1909, p. 969; Stats. 1933, p. 1396); the Bucket Shop Act (Stats. 1923, p. 449); the Community Land Chest Act (Stats. 1933, p. 1465); and the Supplement to the California Industrial Recovery Act (Stats. 1933, p. 2632).

It is unnecessary to set forth in this opinion the provisions of the foregoing acts by which succeeding Legislatures have imposed new duties and responsibilities upon the division of corporations. A reading of the several acts is a demonstration of the fact. Proceeding in the first instance on the theory of a check by the department on improvident transactions in certain lines of business, the functioning of the department has become an essential part of the transaction of businesses involving large corporate enterprises. The Corporate Securities Act alone provides in mandatory terms that permits be obtained and licenses issued before certain extensive corporate enterprises may be initiated or carried on. Financing and refinancing depend upon the authority first obtained from this department. If the department does not function, a paralysis in the business life of the state depending upon its authority to proceed is the inevitable result.

As an indication of the strangulation of this department to the point where it must cease to function properly, the following facts appear without question: From its inception the sole support of the department has been and now is the revenue from fees for permits and licenses required by law to be issued as a prerequisite to the initiation or the carrying on of business. In times of business activity and prosperity these fees have been more in the aggregate than sufficient currently to support the department. In times of depression this revenue is correspondingly diminished. Prior to 1930 and during financially active years, the department built up a substantial reserve amounting to $752,563.82. No suggestion is made that the fees as fixed by statute, the payment of which resulted in this reserve, were unduly large, taking into consideration, necessarily, the fluctuations in financial transactions in cycles of years. This comfortable reserve was subjected to two legislative appropriation enactments. In 1929, when the surplus in the treasury of the state amounted to upwards of $25,000,000, the Legislature adopted an act entitled, "An act making an appropriation for the construction and completion, equipment, and furnishing of an addition to the state office building at San Francisco, California." Stats. 1929, p. 1683. The amount of this appropriation was $330,000, and was made "out of any money in the

state treasury to the credit of the corporation commission fund." In the body of the act it was provided that this addition to the state building at San Francisco was "for the housing of the San Francisco offices of the commissioner of corporations," and it was also provided that "the director of finance may rent, lease, or allow the use of any portion of said addition, not needed for the use of the San Francisco office of the commissioner of corporations, to any of the agencies of the state government; rentals derived therefrom to be deposited in the corporation commission fund." These provisions of the act will be referred to later in this opinion.

In 1931 the Legislature, despite the still existing large general fund surplus, passed an act approved February 3, 1931, and effective immediately, as follows: "Section 1. The sum of two hundred ten thousand dollars ($210,000) is hereby appropriated out of any money in the corporation commission fund in the state treasury, not otherwise appropriated, to meet a deficiency in the appropriation for the construction and completion, equipment and furnishing of an addition to the state office building at San Francisco, California. Sec. 2. Inasmuch as this act provides an appropriation for the usual current expenses of the state, it is hereby declared an urgency measure and shall, under the provisions of section 1 of article four of the constitution, take effect immediately." Stats. 1931, p. 51. Of this appropriation the sum of $186,609.21 has been expended.

In 1933 the Legislature repealed the act of 1929 above referred to which appropriated the sum of $330,000 from the Corporation Commission fund for the construction of the addition to the San Francisco state office building, and which provided for rentals therein for the benefit of the division of corporations. Stats. 1933, p. 738. This repealing statute was passed after said appropriation had been exhausted, and no reason for its passage appears, except to relieve the director of finance from the obligation to rent the excess space in said addition to other state agencies for the benefit of the Corporation Commission fund.

The result of the foregoing appropriations and legislative manipulations has been to skeletonize the division of corporations financially, at the same time leaving the extensive duties and responsibilities of that department otherwise unaffected.

[1-3] It is the contention of the petitioner that the appropriation acts of 1929 and 1931 are unconstitutional. It is first necessary to examine into the nature of the Corporation Commission fund from which the appropriations were made. From the time of its creation the division of corporations was intended to be and has been a self-supporting state agency. The functions it performs under the authority of the Corporate Securities Act are to regulate, and thus to modify, limit, and restrain individual freedom of action. The statute under which it operates is sustainable from a constitutional standpoint only as a justifiable exercise of the police power. Hall v. Geiger-Jones Co., 242 U. S. 539, 37 S. Ct. 217, 61 L. Ed. 480, L. R. A. 1917F, 514, Ann. Cas. 1917C, 643; Caldwell v. Sioux Falls Stock Yards Co., 242 U. S. 559, 37 S. Ct. 224, 61 L. Ed. 493. Its general purpose was to protect the public not only against fraudulent or unlawful stock and investment schemes and enterprises, but also to regulate and control the issuance of securities offered to the public for purchase. Hayden Plan Co. v. Friedlander, 97 Cal. App. 12, 275 P. 253. The Corporate Securities Act is within that classification of laws passed for the protection of the public, and the funds derived therefrom are for the purpose of paying the cost of regulation and are not for general tax or revenue purposes. Van Wyke v. Burrows, 98 Cal. App. 415, 277 P. 190; 6a Cal. Jur., p. 532. Under section 20 (now section 26 [amended by St. 1931, p. 955]) of the act, the fees charged and collected pursuant to the authority of the act are paid into the state treasury to the credit of the "Corporation Commission fund"; and under section 21 (now section 28) all moneys paid into that fund are paid by warrants drawn by or under the authority of the commissioner of corporations. Section 28 provides: "All moneys which shall be paid into the state treasury and credited to the 'corporation commission fund' are hereby appropriated to be used by the commissioner in carrying out the provisions of this act." Although section 28 was amended in 1931 (St. 1931, p. 957) to include the language just quoted, such inclusion was but a re-enactment and continuation of the same provision in identical terms incorporated in section 21, in 1917, and which has at all times since the latter date been in force as a continuing appropriation for the support and maintenance of the corporation commissioner's department.

[4] In support of the contention that the act of 1929 was unconstitutional, it is pointed out that the appropriation therein made was for a capital expenditure, namely, for the construction or enlargement of a state office

building, and therefore, it is asserted, was not a proper appropriation from the special fund of the corporation commissioner, but that such an appropriation should have been made from the general fund or other tax fund, or some fund not specifically raised and especially set apart for purposes of regulation. If this be not so it is claimed that the enactment of the law imposing the regulatory fees has been and is in fact a special law for the assessment and collection of taxes in violation of the tenth subdivision of section 25 of article 4 of the Constitution, and likewise double taxation and contrary to section 1 of article 13 of the Constitution, which requires that all property in the state shall be taxed in proportion to its value.

The Legislature in 1929 undoubtedly realized the legal obstacles in the way of taking these special funds for a capital expenditure unless it should be made to appear that the expenditure of the appropriation was in reality for the benefit of the corporation commissioner's department. It therefore provided in the appropriation measure that the fund was to be used "for the housing of the San Francisco offices of the commissioner of corporations," accompanied by the provision that the director of finance might rent any portion of the improvement to be constructed not needed by the commissioner's department; such rentals to be deposited in the Corporation Commission fund. No claim is made by the petitioner herein that the Legislature was without power to use this special fund for the purpose of housing his department, nor that one branch of his department is not in fact housed in the completed structure, but it is asserted that the facts existing at the time of the appropriation and subsequent events have proved the housing and rental provisions to have been a mere gesture. This claim is fortified by the fact that the space required for the San Francisco office of the commissioner is relatively small as compared with the whole improvement constructed; that the Corporation Commission fund has received no benefit from the rentals collected by the department of finance for space occupied by other departments other than credits on rentals charged to the department of corporations for space in the Los Angeles and Sacramento state office buildings and janitor service in the San Francisco office, and that in 1933 the authorization for the collection of rentals for the benefit of the department was repealed by the act effective August 21, 1933. With the suspension of collection of rentals for the benefit of the petitioner's fund the records of the department of finance as of December 13, 1933, showed that the division of corporations was in debt to the general fund in the sum of $16,921.13 on account of charges made against it for rent and janitor service.

However, good faith on the part of the Legislature in 1929 in making the appropriation from the Corporation Commission fund for the purpose of housing the department and the collection of rentals for its benefit for space in excess of the department's requirements must be assumed. It must also be assumed that the appropriation was so made in recognition of the special fund character of the revenues coming into the Corporation Commission fund. There was therefore no fatal infirmity in the appropriation of 1929. It is subsequent acts of the Legislature and administrative departments in failing to safeguard the investment of this special fund for the benefit of the department by the collection of proper rentals that have been called into question. If the Corporation Commission fund is a special fund in the nature of a trust fund, a question which will hereinafter be discussed, good faith would also require that provision be made for the collection of rentals for space occupied by other departments, the same to be paid into the Corporation Commission fund. For present purposes we are content to hold that the appropriation act of 1929 was not unconstitutional. As to the subsequent management of the office space constructed thereby, enough has been said for present purposes.

[5, 6] The appropriation act of 1931 rests upon a different basis. This appropriation was an attempted direct withdrawal of $210,000 from the Corporation Commission fund to pay for the completion of the state office building at San Francisco, without restriction as to office space for housing the corporation commissioner's department or the collection of rental for the benefit of that department. The act directed that the appropriation be made "out of any money in the corporation commission fund not otherwise appropriated," and declared the act an urgency measure "for the usual current expense of the state," and to take effect immediately.

The petitioner urges the same objections to the 1931 act as are lodged against the 1929 appropriation act, but with more convincing force, in connection with additional objections. The 1931 act has not the earmarks of an appropriation for the benefit of the division of corporations. It appears to be an ap-

propriation for a capital expenditure chargeable only against the general fund or some other tax or general revenue fund. As has been seen, the Corporation Commission fund is not such a fund. Its revenues are impositions for purposes of regulation only. When collected, this revenue is permanently set apart under the continuing appropriation under section 28 of the Corporate Securities Act for the use of the department. In this respect the revenues are in the nature of a trust fund raised for a particular purpose in the exercise by the state of its police power. They are not state revenues in the sense that they may be used for any state purpose as long as the department is in need of them, and the justification for their collection is to make the department self-supporting. See Riley v. Forbes, 193 Cal. 740, 227 P. 768. This fund is a special fund of the same nature as the Railroad Commission fund, created as a continuing appropriation under section 85 of the Public Utilities Act for the support of the Railroad Commission. Stats. 1915, p. 169. This continuing special appropriation fund was held not affected by the adoption of the budget amendment of the Constitution or the budget bill. Railroad Commission v. Riley, 192 Cal. 55, 218 P. 415. The same is true of the special fund created for the examination and certification of nurses (Jamme v. Riley, 192 Cal. 126, 218 P. 578); the real estate commissioner's fund (Keiser v. State Board of Control, 192 Cal. 129, 218 P. 1016); the fish and game commission fund (Board of Fish and Game Com'rs v. Riley, 194 Cal. 37, 227 P. 775). Other similar special funds are the board of medical examiner's fund (Stats. 1913, p. 722); the state dentistry fund (Stats. 1915, p. 698); and the special funds in the state treasury of other self-supporting regulatory state agencies not necessary to mention. That these special funds are raised for regulatory purposes and are set apart for the exclusive use of the state departments and agencies for which they are imposed and collected cannot be doubted. That these funds may not be permanently diverted from their specific purposes and to such an extent as to render the department or agency unable to function is likewise clear. This is especially true in the present case where the Legislature has established elaborate governmental machinery the effective operation of which is essential to the transaction of business depending on its proper functioning. It would appear to be self-evident that the Legislature may not on the one hand set up a department to authorize, regulate, and supervise business transactions large and small, imposing fees upon those affected for the purpose of carrying out the purposes of the law, and on the other hand permanently divert the funds thus raised and constituting the life blood of the department to a general fund or other general tax purpose. The same rule does not of course apply to funds raised under the power of taxation.

[7] What has been said is not to deny power upon the part of the Legislature to transfer a special fund reserve temporarily from one purpose to another under the authority of section 444 of the Political Code or other authority to like effect. But when these diversions are made the transfers are under the section deemed a loan from the special fund to be returned to that fund as soon as funds are available. This right of transfer established by said section 444 is specifically declared not to warrant the transfer of any money from any fund so as to interfere in any manner with the objects for which such fund was created.

There is statutory authority for impressing a trust or special fund character on the Corporation Commission fund. Section 453a of the Political Code provides in part as follows: "Whenever any statute provides for the payment of moneys into the state treasury which have been collected or received for specific purposes by any agency of the state, and no fund has been created in the state treasury to which said moneys are to be credited, then said moneys shall be credited to the 'special deposit fund,' and the moneys so deposited shall be held subject to the right of the state agency to recover the same, on claims properly presented, for fulfilling the purposes for which said moneys were so collected or received."

[8] But the appropriation act of 1931 did not purport to make the transfer as a loan, but it boldly took from the special fund the money necessary for the support and maintenance of the corporation commissioner's department with no provision for its repayment either out of any moneys in the general fund to be thereafter available or by repayment in the way of rentals charged to other departments, or otherwise. It is suggested by the respondent that "what the legislature had the power to create, it had the power to destroy in whole or in part so long as it did not impair vested rights." The argument seems to be that as the Legislature created the Corporation Commission fund and provided for the regulatory fees to be paid into it for particular purposes, the Legislature could also appropriate the money so raised to a for-

eign purpose because neither the petitioner nor the fee payers have a vested right in the sense that they may successfully insist that the fund be devoted to the purpose for which the money was paid into the state treasury. The conclusion does not necessarily follow from the premise. Assuming that the Legislature has the power to pass laws the effect of which would be seriously to affect or practically to destroy the business and economic interests in the state, it must be said that laws having that effect, designed or not, must be within constitutional limitations. To hold that the Legislature could provide fees for regulatory purposes under the police power and then devote the money so received to capital expenditures for a foreign purpose would be to declare that the Legislature could thus raise money by a special tax in contravention of section 25 of article 4 of the Constitution. This course of legislative conduct cannot be justified.

[9] If it be urged that the appropriation act of 1931 should not be considered alone, but should be deemed but an additional appropriation for the same purpose indicated in the Appropriation Act of 1929, viz., the housing of the San Francisco offices of the division of corporations, and therefore valid, we are confronted with the further obstacle in the way of declaring the act of 1931 an effective appropriation. That act states that the appropriation therein provided for shall be out of the Corporation Commission fund "not otherwise appropriated." As noted, all fees paid into the Corporation Commission fund are under section 28 of the Corporate Securities Act continually appropriated for the support and maintenance of the division of corporations. This provision was a valid appropriation of that fund for the purpose for which it was to be used and was in effect when the act of 1931 was adopted. Said section 28 is a specific continuing appropriation and the claims of the petitioner for the support of his department are the first charges against the fund (Callaghan v. Boyce, 17 Ariz. 433, 153 P. 773); and an appropriation out of a fund, "not otherwise appropriated," must be postponed to appropriations previously made out of that fund, and are thus subordinated to the prior appropriation. Klein v. Pipes, State Treasurer, 43 La. Ann. 362, 8 So. 927; 59 Cor. Jur. 231. Since the entire Corporation Commission fund had been appropriated prior to the act of 1931, there was nothing in that fund upon which the latter act could operate.

Other points made by the petitioner attacking the act of 1931 as an emergency measure need not be passed upon in view of the conclusions reached on other phases of the controversy.

We therefore conclude: First, that the act of 1929 was valid when considered as an appropriation (a) for the purpose of construction of quarters adequate to house the San Francisco offices of the division of corporations and (b) as providing that the amount expended therefor in excess of that amount constituted a loan from the Corporation Commission fund to be repaid to that special fund if needed by the division of corporations, as soon as other state funds are available therefor, or as an investment in the improvement for the benefit of the special fund and to be protected by rentals or revenues otherwise provided. Second. That the act of 1931 was ineffectual as an appropriation measure either (a) because it was an outright diversion of a special or trust fund raised for regulatory purposes to a capital expenditure or general tax purpose with no provision for its return, or for safeguarding it as an investment on behalf of the special fund; or (b) because it was by the terms of the act itself postponed and subordinated to the prior and continuing appropriation for the benefit of the division of corporations. In either or any event the amount expended under the purported authority of the 1931 act, to wit, the sum of $186,609.21, is in law still in the Corporation Commission fund.

[10] The next question pertains to the appropriate remedy to be accorded the petitioner. Section 5 of the 1933 budget enactment, under which the director of finance proceeded with an evident purpose to assist in saving the division of corporations as an effective part of the state government, does not seem to fit the situation, for the reason that the petitioner has not exceeded and does not intend to exceed the allotment to his department by the 1933 budget enactment. Nor has he exceeded, nor does he intend to exceed, the amount which is in law now in the Corporation Commission fund under the continuing appropriation, and hence no violation of section 677a of the Political Code is contemplated. The petitioner is therefore entitled to an approval of his claim against his own department fund as supplemented to the extent to which it was depleted by the ineffectual appropriation act of 1931.

It is therefore ordered that the respondent retransfer from the general funds of the state to the Corporation Commission fund the sum of $186,609.21, and to audit and approve

the demands of the petitioner for expenditures from that fund as supplemented by the amount so retransferred, or in the event that the general funds of the state be not available for such retransfer at this time then to credit the Corporation Commission fund with the amount hereby ordered retransferred and to draw his warrants upon the general fund in the state treasury sufficient to pay such claims of the Corporation Commissioner presented for the conduct of his department as are in excess of the amount otherwise in the Corporation Commission fund.

Let a peremptory writ issue accordingly.

We concur: WASTE, C. J.; PRESTON, J.; THOMPSON, J.; CURTIS, J.

NEW YORK CENT. R. CO. v. FRANK H. BUCK CO. (two cases). *

S. F. 14432.

Supreme Court of California.

July 30, 1934.

Rehearing Granted Aug. 29, 1934.

1. Commerce ⇐8(12)
Courts ⇐97(5)

Rights and liabilities of parties to actions involving interstate shipments are governed by federal statutes as interpreted by federal tribunals.

2. Carriers ⇐194

Interstate carrier and shipper may contract for prepayment of freight charges or payment when goods reach destination, payment by shipper in any event or if consignee does not pay or for payment by consignee only or by both shipper and consignee (Interstate Commerce Act [49 USCA § 1 et seq.]).

3. Carriers ⇐194

Mere delivery of goods to carrier for transportation does not necessarily import absolute promise by shipper to pay freight charges.

4. Carriers ⇐194

To ascertain contract between shipper and carrier as to payment of freight charges, bill of lading, which is both receipt and contract, must be looked to primarily.

5. Carriers ⇐194

Ordinarily, person from whom carrier receives goods for shipment is primarily obligated to pay freight charges; shipper being presumably consignor and transportation ordered presumably on his own behalf.

6. Carriers ⇐194

Inference of shipper's promise to pay freight charges may be rebutted by showing that shipper did not act for himself in ordering transportation, that carrier knew such fact, and that parties intended, not only that consignee should pay, but that shipper should assume no liability or only secondary liability.

7. Carriers ⇐195

Railroad company's extension of time for payment of freight charges by company to which cars were delivered on shipper's instruction *held* not violation of clause in bill of lading, prohibiting delivery until all charges were paid, in view of authority granted carrier by Interstate Commerce Commission to extend time (Interstate Commerce Act [49 USCA § 1 et seq.]).

8. Carriers ⇐83

Shipper's direction after arrival of cars at destination to deliver contents to certain company without production of bill of lading was exercise of ownership necessarily implying acceptance thereof as consignee.

9. Carriers ⇐194

Receipt of shipment by consignee creates legal obligation to pay freight, whether demanded at time of delivery or later.

10. Carriers ⇐194

Mere direction by consignor or consignee, liable for freight, that shipment be carried or diverted "freight collect" or delivered on payment of freight charges, does not relieve him of liability.

11. Carriers ⇐32(2)

Parties to contract for interstate shipment by rail cannot waive its terms, nor can carrier, by contract, give shipper right to ignore them and hold carrier to different responsibility than that fixed by agreement made under published tariffs and regulations.

12. Carriers ⇐194

Unqualified promises of company, shipping freight as owner's agent, to pay freight charges as consignor, consignee, or both, made it legally liable for freight.

13. Carriers ⇐194

No act or omission of carrier, except allowing statute of limitations to run, estops or precludes it from enforcing shipper's obligation as consignor, consignee, or both to pay freight.

14. Carriers ⇐194

Liability of person, to whom shipment is delivered on consignee's order, to pay freight,

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 41 P.2d 547.

does not relieve consignor or original consignee from liability therefor.

15. Carriers ⇐194

Carrier's receipt of consignee's note for freight charges or filing of claim against his bankrupt estate does not relieve others liable therefor.

16. Carriers ⇐194

Carrier's failure to notify consignor or consignee, liable for freight, of nonpayment thereof by one to whom shipment was delivered on consignee's order, does not release consignor or original consignee from liability therefor.

17. Customs and usages ⇐17

Usage or custom may limit shipper's and carrier's liability, but cannot be relied on if in conflict with terms of contract.

18. Bankruptcy ⇐363
Carriers ⇐196
Customs and usages ⇐17

Neither custom of marketing grapes through agent, shipping them under bills of lading obligating it to pay freight, either as consignor or consignee, carrier's filing of claim against bankrupt estate of company, to which it delivered freight on shipper's instructions, nor its failure to notify shipper of nonpayment, constituted defense to its action against shipper for freight charges.

19. Carriers ⇐194

Shipper signing straight bill of lading, naming it as both consignor and consignee, and expressly obligating consignee to pay freight charges, became obligated therefor on default of company to which cars were delivered on shipper's instructions.

In Bank.

Appeals from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Actions, consolidated for trial, by the New York Central Railroad Company against the Frank H. Buck Company. Judgment for defendant, and plaintiff appeals.

Reversed.

Prior opinion, 21 P.(2d) 667.

Dunne, Dunne & Cook and Dunne & Dunne, all of San Francisco, for appellant.

Augustin C. Keane, of San Francisco, for respondent.

Athearn, Chandler & Farmer and Frank R. Devlin, Jas. H. Hayes, and Walter Hoffman, all of San Francisco, amici curiæ.

PER CURIAM.

On application for a hearing of the above-entitled cause in the Supreme Court after decision by the District Court of Appeal, this court was impressed by the persuasive force of respondent's petition. On a more extended examination and consideration of the authorities cited than we were able to give in the limited time allowed for considering the petition for hearing here, we are of the view that the District Court of Appeal has properly determined the issues and correctly decided the points involved. The opinion handed down by the District Court of Appeal of the First Appellate District, Division 1, is therefore adopted as the opinion of this court, as follows:

Appeals from the judgments in two separate actions which were consolidated for trial.

The actions were for the recovery of the authorized tariff or freight on ten cars of grapes shipped by defendant in 1922 from California to different eastern points. The Southern Pacific Company was the initial carrier. This company issued a straight bill of lading, signed by defendant, covering each car, and in which a representative of defendant or some person other than the fruit company hereinafter mentioned, was designated as the one to be advised upon the arrival of the car. After the cars reached plaintiff's line, it was instructed in writing by defendant to divert the same to the latter at Rochester, N. Y., and, with the exception of three of the cars, to advise the Puccia Fruit Company. As to the remaining cars, plaintiff was instructed to advise defendant's agent named in the instructions. After the cars arrived at Rochester, defendant's authorized agent instructed plaintiff, by writings referring to the several cars, to deliver the same without bill of lading to Puccia Fruit Company "upon payment of all freight and other charges. * * *" The fruit company was notified and thereafter unloaded the cars, giving plaintiff receipts for their contents. It is conceded that the fruit company had a 24-hour credit arrangement with the plaintiff. This was authorized by a rule of the Interstate Commerce Commission. The cars were delivered to the fruit company without plaintiff having received or demanded any part of the freight or charges due thereon. Subsequently the fruit company became insolvent, and a portion only of the unpaid freight was collected by plaintiff. Defendant had no no-

tice of the fact of nonpayment until December 31, 1923.

As special defenses, defendant alleged that it was the custom to direct delivery of cars, as was done here, and that, as part of such custom, the word "advise," as used in the bill of lading or diversion orders, usually meant, and was so understood by the carrier to mean, that the person "to be advised has bought or is buying the grapes shipped subject to the payment of freight and other charges thereon, and that delivery of said shipment shall be made only upon payment of freight and all other charges, or upon notice from the consignor waiving such payment"; that defendant was not the owner of the grapes but the marketing agent for the growers; that this was the customary method of marketing such products; and that the carriers had notice of the facts. Further, that plaintiff "elected to collect from and extend credit to the fruit company and accepted from the latter its agreement to pay in lieu of payment" of the freight and other charges on delivery; that the fruit company about the time of the expiration of the credit period became insolvent; and that no notice was given to the defendant of the fact of nonpayment for more than a year after such deliveries.

It is admitted that plaintiff filed claims for the freight against the bankrupt estate, and received dividends aggregating $334.18. There was no dispute as to the amount of the unpaid charges.

The court found in accordance with defendant's defenses, and plaintiff has appealed from the judgment entered thereon.

There was no evidence that the carriers knew that the defendant was not the owner of the grapes; and plaintiff contends that, in view of the other undisputed facts, those specially pleaded and found constituted no defense.

[1-6] The shipments being interstate, the rights and liabilities of the parties are governed by the acts of Congress as interpreted by the federal tribunals. Cincinnati, N. O. & T. P. R. Co. v. Rankin, 241 U. S. 319, 36 S. Ct. 555, 60 L. Ed. 1022, L. R. A. 1917A, 265. It was declared in Louisville & Nashville R. Co. v. Central Iron & Coal Co., 265 U. S. 59, 44 S. Ct. 441, 68 L. Ed. 900, that freight charges on interstate shipments are fixed by law, and no agreement by the carrier can reduce the amount legally payable, or release from liability a shipper who has assumed an obligation to pay the same; nor can any act or omission of the carrier, except the running of the statute of limitations, estop or preclude the carrier from enforcing payment of the full amount by a person liable therefor. But the Interstate Commerce Act (49 USCA § 1 et seq.) does not impose upon the shipper an absolute obligation to pay the charges. As to this the carrier and the shipper are free to contract, subject to the rule which prohibits discrimination. The carrier is at liberty to require prepayment, or payment may be deferred until the goods reach the end of the transportation. Wadley Southern Ry. Co. v. Georgia, 235 U. S. 651, 656, 35 S. Ct. 214, 59 L. Ed. 405. Where payment is deferred, the contract may provide that the shipper shall pay in any event, or merely that he shall pay if the consignee does not. Or the carrier may accept the goods for shipment solely on account of the consignee, and may contract that only the consignee shall be liable; or both the shipper and consignee may be made liable. The mere delivery of the goods to a carrier for transportation does not necessarily import an absolute promise by the shipper to pay the charges. To ascertain the contract, the bill of lading must be looked to primarily, as this serves both as a receipt and a contract. Ordinarily, the person from whom the goods are received for shipment assumes the obligation to pay the charges, and this obligation is ordinarily a primary one. The shipper is presumably the consignor, and the transportation ordered by him is presumably on his own behalf, and a promise to pay may be inferred therefrom. This inference may, however, be rebutted, and it may be shown by the bill of lading or otherwise that the shipper was not acting in his own behalf, that this fact was known to the carrier, and that the parties intended, not only that the consignee should assume an obligation to pay, but that the shipper should not assume any liability whatsoever, or that he should assume only a secondary liability.

[7] The bills of lading covering nine of the cars mentioned are set out in the record. These provided that every service to be performed should be subject to the conditions therein, whether printed or written, including the conditions on the back thereof, to which the shipper agreed and accepted for himself and assigns. These, as stated, were signed by the defendant. Three contained the following provisions: "Section 7. * * * The owner or consignee shall pay the freight and average and all other lawful charges accruing on said property; but except in those instances where it may be lawfully authorized to do so no carrier by railroad shall deliver or relinquish possession at destination

of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all lawful charges accruing on said property except that, if the consignor stipulates by signature in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges, and the carrier, contrary to such stipulation, shall make delivery without requiring such payment the consignor shall not be liable for such payment."

On the face of these documents the following was printed: "If this shipment is to be delivered to the consignee without recourse on the consignor the consignor shall sign the following statement. * * * The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. (See section 7 of Conditions.)" None was signed by the defendant.

In the first clause of section 7 following the provision "that the owner or consignee shall pay the freight and average and all other lawful charges accruing on said property, * * *" there is the stipulation that, "except in those instances where it may be lawfully authorized to do so no carrier or railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid." This stipulation clearly refers to those instances where, by statute or by rule of the Interstate Commerce Commission, the carrier is permitted to extend the time for payment of the charges. Such was the case here; and the extension given the fruit company, in view of the authority granted the carrier by the Commission, was not in violation of this clause of the bill of lading.

Six of the bills of lading contained the following provision: "Section 7. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and if required shall pay the same before delivery." No provision similar to those contained in the three bills of lading first mentioned, requiring collection of the freight upon delivery if stipulated by the consignor, appear thereon.

The bill of lading covering the remaining car, which was No. P. F. E. 10456, does not appear in the record, and the claim for the amount unpaid thereon will be hereinafter considered.

[8-11] The complaints alleged that the cars were delivered to defendant, but the court found that delivery was made to the fruit company. The physical facts were, of course, as found, but the legal effect of defendant's conduct, namely, its direction after the arrival of the cars that their contents be delivered to the fruit company without the production of the bill of lading, has been held to be such an exercise of ownership that their acceptance as consignee is necessarily implied. Mellon v. Landeck, 248 Ill. App. 353; Dare v. New York Central R. Co. (C. C. A.) 20 F.(2d) 379; New York Central R. Co. v. Stanziale, 105 N. J. Law, 593, 147 A. 457. Where a shipment is received by the consignee, a legal obligation arises to pay the freight whether the same be demanded at the time of delivery or later. Pittsburgh, etc., Ry. Co. v. Fink, 250 U. S. 577, 40 S. Ct. 27, 63 L. Ed. 1151; Louisville & Nashville R. Co. v. Central Iron & Coal Co., supra; Houston & T. C. R. Co. v. Lee County, etc., Co. (D. C.) 14 F.(2d) 145. The authorities also hold without exception, so far as we are advised, that a mere direction by a consignor or consignee liable for the freight that a shipment be carried or diverted "freight collect" or delivered "upon payment of freight charges," or the like, is insufficient to relieve him of such liability. Wabash Ry. Co. v. Horn (C. C. A.) 40 F.(2d) 905; Dare v. N. Y. Central R. Co., supra; Mellon v. Landeck, supra; New York Central R. Co. v. Stanziale, supra; New York Central R. Co. v. Federal Sugar Refining Co., 235 N. Y. 182, 139 N. E. 234, 26 A. L. R. 1312; Missouri Pacific R. Co. v. Pfeiffer Stone Co., 166 Ark. 226, 266 S. W. 82; Southern Pacific Co. v. Oregon Growers', etc., Ass'n, 127 Or. 364, 272 P. 281; Seaboard Air-Line R. Co. v. Montgomery, 28 Ga. App. 639, 112 S. E. 652; Atchison, T. & S. F. Ry. Co. v. Stannard & Co., 99 Kan. 720, 162 P. 1176, L. R. A. 1917C, 1124; Chicago Junction Ry. Co. v. Duluth Log Co., 161 Minn. 466, 202 N. W. 24, 26. Here the court said: "Under the uniform bill of lading * * * the consignor is given an opportunity to relieve himself from liability * * * by so indicating on the face of the bill." See, also, Grand Trunk Western R. Co. v. Makris, 142 Misc. 807, 255 N. Y. S. 443. In New York Central R. Co. v. Warren Ross Lumber Co., 234 N. Y. 261, 137 N. E. 324, 24 A. L. R. 1160, it was held that the language of such a direction was not contractual, its effect being merely to give the carrier an option to demand payment from the person to whom it delivered the goods; and in Western Maryland Ry. Co. v. Cross, 96 W. Va. 666, 123 S. E. 572, that the consignor was liable notwithstanding such direction, unless otherwise stipulated by sig-

nature on the bill of lading. The general rule is stated in Georgia, Florida & Alabama Ry. Co. v. Blish, etc., 241 U. S. 190, 36 S. Ct. 541, 60 L. Ed. 948, where it was held that parties to a contract of interstate shipment by rail cannot waive its terms, nor can the carrier by its contract give the shipper the right to ignore such terms and hold the carrier to a different responsibility than that fixed by the agreement made under the published tariffs and regulations.

[12-13] It was stipulated at the trial that the defendant was not the owner of the grapes but the agent for the owners, and, as stated, the court found that this was the customary way of marketing such products, and that the carrier was put upon notice of the facts. But, notwithstanding this finding, the defendant, as the consignee named in the bill of lading covering six of the cars, expressly agreed therein to pay the freight. As the consignee of three of the other cars, it made the same agreement, and the bill of lading provided that as consignor it should likewise be liable unless it stipulated by its signature on the face thereof that the carrier should not make delivery without requiring payment of the freight charges. Defendant's unqualified promises to pay, either as consignor or consignee or both, made it legally liable for the freight; and, as held in Louisville & Nashville R. Co. v. Central Iron & Coal Co., supra, no act or omission, except allowing the statute of limitations to run, will estop or preclude the carrier from enforcing this obligation. While it was held in Yazoo & M. V. R. Co. v. Zemurray (C. C. A.) 238 F. 789, that, notwithstanding the obligation of the owner or consignor to pay, the carrier might be bound by its election to collect from a consignee, yet, as pointed out in Main Island Co. v. Chesapeake & Ohio Ry. Co. (C. C. A.) 23 F.(2d) 248, this conclusion was inconsistent with later decisions in Louisville & Nashville R. Co. v. Central Iron & Coal Co., supra, that no act of the carrier could estop it from enforcing payment from any person legally liable. See, also, United States v. United States Steel Products Co. (D. C.) 27 F.(2d) 547, and New York Central R. Co. v. Federal Sugar Refining Co., supra. And, according to the following decisions, the freight can be recovered from a shipper liable therefor, notwithstanding a custom, known to the carrier, that the amount should be paid by the consignee and deducted from the price of the goods, and the consignee fails to pay: Atchison, T. & S. F. Ry. Co. v. Hunt Bros. Fruit Co. (D. C.) 34 F.(2d) 582; Moss Lumber Co. v. Michigan Central R. Co., 219 Ala. 593, 123 So. 90; Chicago, I. & L. Ry. Co. v. Peterson, 168 Wis. 193, 169 N. W. 558; Pennsylvania R. Co. v. Marcelletti, 256 Mich. 411, 240 N. W. 4, 78 A. L. R. 923. It has also been held under facts similar to those here involved that a person to whom a shipment is delivered upon the order of the consignee is the assignee of the latter, and under the statute becomes liable as though named as such consignee. New York Cent. R. Co. v. Warren Ross Lumber Co., supra; Erie Ry. Co. v. H. Rosenstein, Inc., 249 N. Y. 241, 164 N. E. 37, 61 A. L. R. 415; Pennsylvania Ry. Co. v. Titus, 216 N. Y. 17, 109 N. E. 857, L. R. A. 1916E, 1127, Ann. Cas. 1917C, 862. This, however, as shown by the decisions hereinbefore cited, does not relieve a consignor or the original consignee who is liable for the freight; nor does the fact that the carrier received the note of a consignee therefor, or files a claim against his bankrupt estate, release others who are liable; nor does the failure to notify such persons of nonpayment have that effect, as the carrier's right to recover is only barred by limitation and not by laches. Louisville & Nashville R. Co. v. Central Iron & Coal Co., supra; Cleveland, C., C. & St. Louis Ry. Co. v. Southern Coal Co., 147 Tenn. 433, 248 S. W. 297; Great Northern Ry. Co. v. Hocking Valley, etc., Co., 166 Wis. 465, 166 N. W. 41; New York Cent. R. Co. v. Lehigh Stone Co., 220 Ill. App. 563. While usage or custom may limit the liability of shippers and carriers (17 Cor. Jur. Custom and Usage, § 74, p. 507), neither can be relied upon if it be in conflict with the terms of the contract (Andrews v. Waldo, 205 Cal. 764, 272 P. 1052; Fuqua v. Thomas, 96 Cal. App. 304, 273 P. 1091; Rasmussen v. Pacific Fruit Exchange, 111 Cal. App. 346, 295 P. 538); and, in view of the foregoing, it seems clear that neither the customs found by the trial court, the fact that the carrier filed a claim against the bankrupt, nor its failure to notify defendant that payment had not been made, constituted defenses to the action.

[19] The eighth count of the complaint as amended at the trial alleged a claim for the freight on car P. F. E. 10,456. The weight of the grapes therein was 33,856 pounds, and the total freight claimed was $690.70. The correctness of these figures is not disputed. It was agreed at the trial that all the bills of lading were signed by the defendant or its authorized agent, and that a bill of lading was issued for this car. This bill of lading, as stated, was not produced at the trial, and no direct evidence of its terms appears from the record. However, counsel for plaintiff, in

opening its case, stated that all the cars were shipped on straight bills of lading in which the defendant was named both as consignor and consignee. Counsel for defendant in reply assented to this statement. It appears to have been undisputed that the missing bill of lading was in the same form as one of the two hereinbefore described. As we have seen, each form expressly provided that the consignee should pay the freight charges. Defendant, having signed the bill of lading, and being named therein as consignee, became obligated for the same reasons which apply to the other shipments, and this obligation was not discharged by what subsequently occurred.

For the foregoing reasons, the judgments are reversed.



1 Cal.(2d) 350

KNIGHTS LANDING RIDGE DRAINAGE DIST. v. RECLAMATION DIST. NO. 730 (SNOWBALL, et al., Interveners).

Sac. 4740.

Supreme Court of California.

July 24, 1934.

1. Levees and flood control ⇐23

Lands and rights of way acquired by drainage district in execution of scheme of reclamation *held* public property of state and assessable as such, under statute, by reclamation district in which drainage district was located (Pol. Code, §§ 3440 et seq., 3456c).

2. Levees and flood control ⇐25

Evidence *held* insufficient to show any benefit, received by lands and rights of way of drainage district from work done by reclamation district, upon which assessment against drainage district could be based.

In Bank.

Appeal from Superior Court, Yolo County; J. O. Moncur, Judge.

Action by the Knights Landing Ridge Drainage District against Reclamation District No. 730, in which Emma Snowball and others intervened. Judgment for plaintiff, and the interveners appeal.

Affirmed.

See, also, 30 P.(2d) 505.

Devlin & Devlin & Diepenbrock, of Sacramento, for appellants.

Arthur C. Huston, Jr., of Sacramento, Rutledge & Rutledge, of Colusa, and Stephen W. Downey, and Downey, Brand & Seymour, and Frederic R. Pierce, all of Sacramento, for respondent.

WASTE, Chief Justice.

This court granted a petition for rehearing in the above-entitled cause, one of four consolidated cases (Sac. Nos. 4737, 4738, 4739 and 4740), decided on March 1, 1934. A full discussion of the facts involved in this cause and the situation of the parties is contained in the decision in the other three causes, supra, Hawley v. Reclamation Dist. No. 730, 30 P.(2d) 505, and need not be here repeated.

[1] Two questions only need be discussed in determining this cause: First, whether or not, under the provisions of section 3456c of the Political Code, the lands and rights of way of the plaintiff, Knights Landing Ridge Drainage District, can be assessed by the defendant, Reclamation District No. 730, within the bounds of which reclamation district the lands of plaintiff are situate.

When the commissioners viewed the lands in Reclamation District No. 730, and spread assessment number 4 according to the benefits accruing from the work of repair, maintenance, and raising the height of the river levee, they laid no assessment against the property of the drainage district. Those lands consisted wholly of a strip of land 375 feet on either side of a center line, and constituted the easement and right of way for, and were occupied by, the drainage canal and its banks maintained by the drainage district. The board of supervisors, however, when it reapportioned the assessment made by the commissioners, ordered that the sum of $5,000 be levied and assessed against the land so occupied. The trial court found that no benefit would accrue to the lands by reason of the expenditure of the money for which the assessment was levied, and also found that the land was dedicated to the public use and purpose, and is so used and occupied for such use, as required by the act of the Legislature creating the drainage district. It accordingly annulled the resolution and order of the board of supervisors levying the assessment.

The relevant portion of section 3456c of the Political Code is: "Assessments levied by any reclamation district formed or operating

under the provisions of this article (article 2 of chapter 1 of title 8 [section 3440 et seq.] relating to 'property of the state') shall include all lands and all rights of way lying within such district and owned by the state of California, or by any city, city and county, county, public corporation, or any utility district formed under the laws of the state of California, except school districts. The assessments upon such lands or rights of way shall be levied in proportion to the benefits that will accrue to such land or rights of way in the same manner as assessments are levied upon other lands or rights of way within said district." The drainage district contends that it does not come within the designation of any body or entity mentioned in the section. Appellants concede that the district is not a public corporation nor a utility district, but contend that it is a public mandatory or governmental agency of the state. In other words, in effect the state itself. Therefore they contend that the land is owned by the state of California, and is assessable as such. In support of their contention, they cite the decision of the District Court of Appeal in Western Assurance Co. v. Sacramento & San Joaquin Drainage District, 72 Cal. App. 68, 74, 237 P. 59, 62. The district there being considered is identical in its organization and purposes with the Knights Landing Ridge Drainage District here involved, in that both districts were organized to carry on a part of the flood control program of the state. Each district was organized under a special statute and embraced within its territorial limits more than one reclamation district. The court there held that the drainage district in question was "a public mandatory or governmental agency of the state—indeed, with the state itself." The name "drainage district" is not used in section 3456c, supra, specifying what lands and rights of way may be included in assessments. The question, therefore, is whether or not the Legislature, by the enactment of the section, intended to refer to and include within its provisions such districts as the plaintiff district, and to provide that its rights of way and land necessary therefor can be assessed by the reclamation district within its borders.

The whole scheme of reclamation originates with the state and is carried to a conclusion by agencies of the state—the districts—in furtherance of public policy, and the property of such districts acquired thereby which is indispensable to the execution of its objects is public property of the state. Reclamation District No. 551 v. County of Sacramento, 134 Cal. 477, 479, 66 P. 668. See, also, People v. Richards, 86 Cal. App. 86, 92, 260 P. 582. We therefore see no legal reason why the state cannot permit property such as that owned by the drainage district to be assessed for benefits, if there be any, that may arise from reclamation projects such as that leading to the assessment levied by the defendant, Reclamation District No. 730, in this case.

[2] The second question to be determined is whether or not the assessment levied and assessed by order of the board of supervisors upon the lands of the Knights Landing Ridge Drainage District was spread in accordance with any benefits derived from the project involved. The strip of land owned by the drainage district on which the assessment was sought to be impressed consists of 312 acres comprising the right of way of the canal and its protecting banks or levees. Other than references in the briefs and a description of the area of the right of way for the canal, neither party has pointed to any evidence as to the nature or condition of the land. There are terms used by civil engineers who were witnesses in the cause from which we gather that the drainage district canal lies between large and substantial levees constructed in accordance with the best accepted practice, and which would not be endangered or affected by a break in the river levee being constructed by the reclamation district, and consequently would not be injured if the river levee was not raised. The commissioners who levied the assessment in the first instance testified that in their opinion no benefit would result to the lands of the drainage district from the works being constructed by the reclamation district. That conclusion appears to be borne out by the testimony of civil engineers of long experience who testified in the cause. The trial court found that "the amount of the assessment and charge made and apportioned by the board of supervisors on the lands of plaintiff [Drainage District] over and across which plaintiff has said easement and right of way for said canal and banks as aforesaid is in excess of the benefits and any benefit that has or will accrue or be derived by said plaintiff * * * and in excess of the benefit or any benefit that will accrue to said plaintiff or to said land or to the said right of way, easement or works of said plaintiff or any of the same by the carrying out of said plans of said [Reclamation] District." It therefore annulled the resolution and or-

der of the board of supervisors levying the assessment, and annulled the assessment so apportioned against the land and rights of way of plaintiff. Judgment was entered accordingly. The findings negative the idea that lands, rights of way, canal, and banks of the drainage district, on which the assessment was levied and spread by the board of supervisors, received or could receive any benefit from the reclamation work done by District No. 730, and which was the basis of the assessment. There was evidence in the record and testimony supporting the findings which, in turn, support the judgment.

The judgment is affirmed.

We concur: SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.



1 Cal.(2d) 316

PEOPLE v. COVINGTON et al.

Cr. 3760.

Supreme Court of California.

July 18, 1934.

1. Robbery ⇐17(7)

Information charging that accused committed robbery by taking from named person personalty in her possession, without her consent, by means of force and by putting named person in fear, *held* sufficient to charge robbery (Pen. Code, §§ 950, 952).

2. Constitutional law ⇐265

State may establish forms of pleading for its own courts, subject to federal constitutional provisions protecting life, liberty, and property (Const. U. S. Amend. 14).

3. Indictment and Information ⇐129(1)

Charge of robbery *held* not improperly joined with charge of murder, notwithstanding accused were acquitted of murder.

4. Criminal law ⇐829(1)

Requested instructions sufficiently covered by instructions given *held* properly refused.

5. Larceny ⇐70(3)

In robbery prosecution, evidence *held* to require requested instruction on theft.

6. Criminal law ⇐1188
Larceny ⇐65
Robbery ⇐24(1)

On appeal from conviction for robbery had, after refusal of requested instruction on theft, evidence *held* to show accused guilty of petty theft rather than robbery, and cause was remanded, with directions to enter judgment finding accused guilty of petty theft.

In Bank.

Appeals from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Revell Kenneth Covington, William Kozak, and R. B. Barnett were convicted of robbery, and they appeal.

Modified and remanded, with directions.

Prior opinion, 28 P.(2d) 687.

Gladys Towles Root and Lois B. Preston, both of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

PER CURIAM.

A petition for hearing was granted in order to consider more at length the question whether the evidence is sufficient to support the verdict finding the appellants guilty of the crime of robbery. After further consideration of the record we are satisfied that proof of essential elements of robbery is lacking, but that the appellants are, under the evidence, guilty of petty theft. We are in accord with the disposition of the appeal on this and other points of the District Court of Appeal, Second Appellate District, Division 1, and adopt, with slight modifications, the opinion of that court prepared by Mr. Presiding Justice Conrey, as the opinion of this court, as follows:

By information in three counts the defendants were accused as follows: By count I it was charged that on March 5, 1933, the defendants murdered one Marjorie Barr; by count II it was charged that on the same date the defendants committed the crime of robbery, said crime being a different offense of the same class of crimes and offenses as the charge set forth in count I, and connected in its commission. It was alleged that the defendants did willfully, etc., take from said Marjorie Barr "the goods and personal property in the possession of Marjorie Barr," without her consent, etc., and "by means of force used by said defendants upon and against the said Marjorie Barr, and by said defendants then and there putting the said Marjorie Barr in fear." By count III it was

charged that on said date the defendants committed the crime of burglary by willfully entering the house of one Stephens, with the intent then and there to commit theft. It was alleged that this crime was a different offense, but connected in its commission with the crime set forth in counts I and II.

The defendant Peterson was convicted on count I and count II and acquitted on count III. The other defendants, who are appellants here, were acquitted on counts I and III and were convicted of robbery as charged in count II. This appeal is from the judgment of conviction of appellants on count II, and from the orders of the court denying their motions for a new trial.

The events referred to in the information all took place at the residence of one Delbert Stephens, where he lived with his family. Miss Barr and another young woman known as Miss Hammond were living with the Stephens family. At 6 o'clock in the evening of March 5th, Stephens with his wife and son left the house, and, there being no one else there at home locked the front door. The windows were locked, except one which had no lock, but was screened. During the evening, and while the house was thus vacant, the defendants came to those premises and entered the house. One of them took off the screen and went in through the window, and let the others in by the door. Barnett was acquainted with Stephens and had been in this house before, and, according to his testimony, Stephens had given him permission to enter the place. "We hung around awhile and thought we would go in and wait for Mr. Stephens to come home, so we took off the screen and went inside as he told me to do many times." Stephens, on the other hand, denied that he had given Barnett permission to enter the house at any time when Stephens was absent, although he admitted that Barnett had been his guest on some occasions prior to March 5th. The defendants all were sailors in the navy, and at the time in question were on leave from their ship.

After the defendants had been for some time in the house, the two young women above mentioned came home and proceeded to entertain the defendants as guests. Without entering into details of the story, it should be enough to say that there was some eating and drinking, and after a while Miss Hammond retired to her room. The evidence shows that while she was thus absent Miss Barr was hit with a sap or blackjack in the hands of defendant Peterson. From the effects of that blow she died a short time afterwards at the hospital to which she had been taken.

According to the testimony of Miss Hammond, while she was in her room as above stated, she heard the deceased scream. Thereupon she jumped out of a window and ran to a neighbor's house. When she returned a few minutes later with a man who came at her request, the defendants had gone, and Miss Barr was in the bathroom and blood "was all over her." A diamond ring and a watch which deceased had been wearing were gone, and an electric clock and a cigarette lighter were missing.

[1, 2] In support of the appeal, the first point suggested is that the information failed to charge the offense of robbery, or any public offense. By the direct terms of the information the defendants were, in general terms, accused of the crime of robbery. But it is contended that the accusation, a substantial part of which we have quoted, is insufficient to allege a public offense "in that it does not contain words sufficient to give the accused notice of the offense of which he is accused." In other words, it is contended that the information does not comply with the requirement of Penal Code, § 950, that in charging an offense each count shall contain a "statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." But the rule governing this requirement is more particularly stated in section 952, as amended in 1927 (St. 1927, p. 1043) and further amended in 1929 (St. 1929, p. 303). Among other things, it is there provided that the statement that the accused has committed the specified public offense "may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused." We think that the information charged commission of the crime of robbery in terms which sufficiently comply with the requirements of the code. The state has the right to establish forms of pleading to be observed in its own courts, subject only to the provisions of the federal Constitution involving the protection of life, liberty, and property in all the states. People v. Robinson, 107 Cal. App. 211, 217, 290 P. 470. This fact disposes of the contentions of appellants that their conviction under this information is in violation of their constitutional rights. * * *

[3] The next point is that the charge of

robbery was improperly joined with the charge of murder, "in view of the fact that appellants were acquitted of murder." Of course, this contention is without merit, for the district attorney could not know in advance that appellants would not be convicted of the murder.

[4-6] Finally, appellants claim that the court erred in refusing to give to the jury certain requested instructions. Some of these requests were properly refused because the subjects thereof were sufficiently covered by other instructions given. Some of the requested instructions as offered by appellants were erroneous in their statement of the law. Omitting from further consideration all of those instructions, there remains one further item which seems to be of substantial merit. Appellants requested the following instruction: "You are instructed that if you do not believe that a robbery or burglary was committed but that a theft was committed by the defendants in the house of Mrs. Stephens you are instructed to find said defendants guilty of petty theft if the value of the property taken was $200.00 or less or grand theft if $200.00 or more." This instruction should have been given, except that the last three words should have been "more than $200.00."

These appellants stand convicted of robbery. * * * The jury might well have believed that appellants did not foresee that Peterson would commit the murderous attack, or the robbery of jewelry from the person of Miss Barr, and did not aid or abet the same. But appellants did share in the theft of other articles which were taken away at the same time. If the jury had been given an instruction under which appellants could have been convicted of theft, instead of being left only an alternative between a conviction of robbery or an entire acquittal, it is not unlikely that appellants would have had the benefit of the conviction of theft alone. This would have been a most substantial benefit, because in the absence of proof of the value of the property taken the conviction necessarily would have been limited to petty theft. The offense of robbery "includes larceny, and under the indictment the defendant may be found guilty of larceny" (People v. Chuey Ying Git, 100 Cal. 437, 34 P. 1080; People v. Church, 116 Cal. 300, 48 P. 125), and, upon an information charging grand larceny, petty larceny may be found (15 Cal. Jur. 960).

In accordance with the foregoing statement of the law and upon consideration of the record, and particularly the evidence showing the part taken by appellants in this unfortunate affair, we are of the opinion that the verdict and judgment of conviction should be reduced from robbery to petty theft.

The judgment of conviction of the defendants Covington, Kozak, and Barnett of the crime of robbery is modified. The cause is remanded to the trial court, with directions to enter judgment against each of the defendants finding him guilty of petty theft, and thereupon to pronounce judgment upon him as prescribed by law.



1 Cal.(2d) 354

CAMINETTI v. BOARD OF TRUSTEES OF JACKSON UNION HIGH SCHOOL DIST. et al.

Sac. 4870.

Supreme Court of California.
July 27, 1934.

Rehearing Denied Aug. 23, 1934.

1. Judgment ⇐725(2)

Judgment of October, 1931, granting mandamus establishing petitioner's right to teach during school year 1931–1932 *held* res judicata of defense, raised in subsequent proceeding for mandamus compelling payment of sum allegedly due as salary for 1931–1932, that automatic re-employment for 1931–1932 claimed by petitioner was barred by petitioner's voluntary withdrawal of her certificate of qualifications from county superintendent's office in May, 1931.

2. Judgment ⇐713(2)

Judgment concludes not only issues raised, but also those which could have been raised.

3. Judgment ⇐728

Judgment granting mandamus establishing petitioner's right to perform services of teacher determined petitioner's right to salary fixed for position.

4. Pleading ⇐343

Where questions involved in proceeding were all determined by prior judgment and no issue of fact remained to be tried, judgment on pleadings was proper.

5. Mandamus ⇐107

Mandamus against school board is proper remedy to collect salary due teacher.

In Bank.

Appeal from Superior Court, Amador County; J. T. B. Warne, Judge.

Mandamus by Evelyn M. Caminetti against the Board of Trustees of Jackson Union High School District and others. Judgment for petitioner, and respondents appeal.

Affirmed.

For prior opinion, see 27 P.(2d) 929.

Ralph McGee, of San Francisco, and T. G. Negrich, of Jackson, for appellants.

Snyder & Snyder, of Jackson, for respondent.

PER CURIAM.

This is an appeal by defendants from a judgment directing that a writ of mandate issue to compel payment of plaintiff's salary as a teacher. The appeal is on the judgment roll.

In June, 1930, plaintiff was employed by defendant school district as a probationary teacher, and taught for the school year 1930–1931. Under the provisions of the School Code the teacher is deemed re-employed for the next year unless notice to the contrary is sent by registered mail, or is personally served, on or before June 10. No valid notice in compliance with the statute was sent, but the district employed another teacher in place of plaintiff, and refused her services when she appeared in September, 1931. In October, 1931, plaintiff commenced a proceeding in the superior court, seeking a writ of mandate to establish her right to teach. The court gave judgment in her favor on October 13, 1931. It decreed that she "is now and has been ever since the commencement of this proceeding, entitled to perform the duties and services of a probationary teacher," and ordered that a peremptory writ of mandate issue commanding the board of trustees to assign her to a class. The defendants appealed, but the appeal was subsequently dismissed and the judgment became final. Defendants, however, ignored the writ and refused to reinstate plaintiff in her position.

On November 25, 1932, the present proceeding was commenced. Plaintiff alleged the above facts and her readiness, willingness, and ability to teach during the school year 1931–1932, and sought a writ of mandate to compel payment of the sum of $1,800 alleged to be due as salary during said year. Defendant filed a demurrer, which was overruled, and an answer denying certain allegations and setting up a special defense. The trial court gave judgment on the pleadings in favor of plaintiff, and ordered the defendants to pay the sum demanded and costs.

The defense relied upon by the district was that in May, 1931, plaintiff voluntarily withdrew her certificate of qualifications from the office of the county superintendent of schools, the same not being replaced until January, 1932. It is contended that under the law, this certificate must be on file as a basis for the implied contract of employment.

[1, 2] It is apparent that this defense, and the various denials found in the answer, are disposed of by the application of the doctrine of res judicata. By its judgment in the first mandamus proceeding, the court in October, 1931, determined that plaintiff was entitled to teach, and was ready, able, and willing to do so, during that school year. The defense that she had disqualified herself by removal of her credentials in May was available at that time, and hence, whether or not it was actually made, it was determined adversely to defendants by the judgment. It is elementary that the judgment is conclusive not only as to issues raised but also as to those which could have been raised. Price v. Sixth District, 201 Cal. 502, 258 P. 387.

[3] The objection that the first judgment only determined her fitness up to October 13, 1931, has no merit. Her status being once established, it is presumed to continue, and under the law as it then stood, she could not be dismissed after her re-employment, except for cause. Blalock v. Ridgway, 92 Cal. App. 132, 267 P. 713. The establishment of her right to teach determined her right to the salary fixed for the position. Goldsmith v. Board of Education, 63 Cal. App. 141, 218 P. 296; Hancock v. Board of Education, 140 Cal. 554, 74 P. 44.

[4] It follows that the questions involved in this proceeding were all determined by the prior judgment, and that no issue of fact remained to be tried. Under these circumstances it was not error for the lower court to render judgment on the pleadings.

[5] The propriety of the remedy of mandate against a school board to collect salary due a teacher is established by several cases. See Ross v. Board of Education, 18 Cal. App. 222, 122 P. 967.

The judgment is affirmed.

1 Cal.(2d) 357

ARCHER v. CIVIL SERVICE COMMISSION OF CITY AND COUNTY OF SAN FRANCISCO et al.

S. F. 15068.

Supreme Court of California.
July 27, 1934.

1. Municipal corporations ⇐217(3)

Engineer, who for more than a year prior to effective date of new charter held position on public works project located outside city, *held* entitled to such position without examination, notwithstanding he was not resident of city, under new charter providing that incumbents who held positions for one year continuously preceding time of adoption of new charter should be continued in positions as if appointed thereto.

2. Municipal corporations ⇐217(6)

That work of engineer was centered mainly on municipal airport did not change character of his employment so as to constitute him municipal airport employee holding office at pleasure of manager of utilities as provided by new charter, where engineer was employee of bureau of engineering of department of public works subject to transfer from airport to any other public works project.

In Bank.

Appeal from Superior Court, San Francisco County; Edmund P. Mogan, Judge.

Petition by Lawrence J. Archer for a writ of mandate against the Civil Service Commission of the City and County of San Francisco, and the individual members thereof. From a judgment ordering the issuance of a peremptory writ of mandate, defendants appeal.

Affirmed.

For prior opinion, see 26 P.(2d) 41.

John J. O'Toole, City Atty., and Thos. P. Slevin, Deputy City Atty., both of San Francisco, for appellants.

Leo A. Cunningham and John J. Dailey, both of San Francisco, for respondent.

PER CURIAM.

This is an appeal from a judgment of the superior court, on petition for writ of mandate, ordering defendant Civil Service Commission to restore petitioner to his employment and to approve his claim for salary.

[1] Petitioner, in February, 1927, was employed by the city and county of San Francisco in the bureau of engineering of the board of public works, in the capacity of engineering draftsman. His work consisted chiefly of preparing plans, specifications, estimates, and other engineering data for use in connection with the construction and maintenance of the San Francisco airport. He worked under the direction of the city engineer, but the bulk of his time was spent at the airport, which is located in San Mateo county, outside the boundaries of the city and county of San Francisco. On January 8, 1932, the new charter of the city and county went into effect, and the airport work was, under its terms, transferred to the public utilities commission. On May 25, 1932, petitioner's name was stricken from the civil service eligible lists on the ground that he had not been a resident of the city and county for more than a year prior to the taking of his examinations. Petitioner now concedes that he does not fulfill such residence requirement, and grounds his claim upon certain special provisions of the old and new charters. Article XIII, section 11, subdivision A of the former charter provided that city and county employees employed on public works outside the city and county were not subject to the civil service requirements. Section 142 of the new charter provides: "Where existing positions that have heretofore been exempt from civil service examinations are now made subject to examination by this charter, the incumbents of such positions who have held such positions for a period of one year continuously next preceding the time that this charter shall go into effect, shall be continued in their positions as if appointed thereto after examination and certification from a list of eligibles and shall be governed thereafter by the provisions of this charter." Petitioner, for more than a year prior to the going into effect of the new charter, held a position on a public works project located outside the city, and hence was undoubtedly "blanketed" into the position under the above charter provision, without examination. This was the finding of the court below, and it is clearly correct. The case of Cutting v. McKinley, 130 Cal. App. 136, 19 P.(2d) 507, is directly in point.

[2] It is contended by appellant Civil Service Commission that section 125 of the new charter constitutes an exception to the provisions of section 142, and deprives petitioner of his status. Section 125 provides that employees of the municipal airport shall, subject to the approval of the public utili-

ties commission, "be appointed by and hold office at the pleasure of the manager of utilities." But the evidence shows and the court found that petitioner was an employee of the bureau of engineering of the department of public works. The fact that his engineering work was centered mainly on the airport did not change the character of his employment. He remained a member of the engineering staff, subject to transfer from the airport to any other public works project.

The judgment is affirmed.



1 Cal.(2d) 359

FARRAR v. STATE BAR OF CALIFORNIA.

S. F. 15094.

Supreme Court of California.

July 28, 1934.

Attorney and client ⇐58

Attorney who accepted fees and costs in two matters and neglected to perform services *held* suspended from practice for one year though neglect was due to series of personal misfortunes, financial reverses and illness in family.

In Bank.

Petition by Mercer H. Farrar to review a recommendation of the State Bar of California that petitioner be suspended from the practice of law for two years.

Petitioner ordered suspended from practice for one year.

Mercer H. Farrar, of San Francisco, in pro. per.

Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

This is a proceeding to review the action of the Board of Governors of the State Bar of California recommending suspension of the petitioner Mercer H. Farrar from the practice of law in this state for a period of two years for professional misconduct and violation of his oath as an attorney.

Petitioner does not question the evidence before the Board of Governors, their findings thereon, nor the propriety of their recommendation. His only point, which is in the nature of a plea for clemency, is that, in view of all the facts and circumstances, the recommendation of the board of governors is unduly harsh and severe, and he asks that the period of suspension be reduced.

A partial hearing was had before local committee No. 3 of San Francisco county on June 8, 1933, and the petitioner not appearing, the matter was continued to June 29, 1933, when the respondent appeared and the matter was fully heard and submitted. The findings of the local committee were as follows:

"As to the first count, it appears that in June, 1931, John Baldanzi, the complaining witness, employed respondent, who was an attorney practicing his profession in San Francisco, with offices at 519 California Street, to establish a record of the birth of Attilio Frederico Vomero. Vomero, who was a nephew of the complaining witness, resided at the time in Pennsylvania and complaining witness acted as his agent. The employment was accepted by respondent who agreed to complete the proceedings for a fee of $50.00. Respondent was paid at the time of his employment $20.00 and a short time later an additional $10.00. Respondent was also given at the time of his employment the baptismal record of Vomero. Respondent intimated to the complaining witness that he had filed the necessary petition and that a hearing would be had December 14, 1932 (1931). Later he told complaining witness he had been obliged to continue the matter over the Christmas holidays. Complaining witness, hearing nothing further, consulted Attorney Reisner in February, 1932. Mr. Reisner upon examining the records found no petition had been filed and he so stated to the complaining witness. Mr. Reisner filed the necessary petition March 16, 1932, and completed the proceedings in three weeks.

"Respondent has not returned the payments he received nor did he perform any of the services for which he was employed by complaining witness.

"As to the second count, it appears that Rachel Cosentino, the complaining witness, employed respondent to probate her husband's estate. Vicenzo Cosentino, the husband, died January, 1917, leaving an estate consisting of $2,791.54 in a savings account in the Bank of Italy and an undivided interest in three flats at 16 Bernard Street, San Francisco. Joseph Sarubi, complaining witness' brother, introduced respondent to Rachel Cosentino at the time of her husband's

death and she employed respondent to probate the estate. The employment was accepted by respondent who was paid $25.00 on January 20, 1928, and gave his written receipt therefor. On the same day complaining witness designated her brother, Joseph Sarubi, in a written nomination, to act as administrator. Respondent filed the petition for letters of administration on January 21, 1928. The hearing was had February 7, 1928, and Sarubi was appointed administrator. On the day that Sarubi was appointed administrator complaining witness and respondent went to the Bank of Italy and transferred decedent's account to Joseph Sarubi individually and not as administrator. Upon completing the transfer Sarubi withdrew $250.00 and paid this to respondent who gave his written receipt reading: 'Received of Mrs. Cosentino by hand of Joseph Sarubi $250.00 in full of fee and costs re estate of V. Cosentino.'

"On August 25, 1930, respondent was paid an additional $20.00 by Sarubi and gave his receipt in writing as follows: 'Received of Joseph Sarubi $20.00 re settlement in estate of V. Cosentino, dec'd.'

"Notice to creditors in the Cosentino Estate was published and the affidavit of publication filed. No inventory and appraisement or other proceedings were had in the estate. Sarubi, the administrator, died April 8, 1932. Respondent prepared a petition for letters of administration in favor of Rose A. Pucheu, as successor to Sarubi, but this petition was never filed.

"Respondent has taken no further proceedings in the estate of Cosentino nor has he refunded any part of the payments he received."

The local committee drew the following conclusions from the record: "Respondent seeks to justify his acts by what he terms a plea 'in confession and avoidance.' He admits the fact of his neglect but seeks his excuse in a series of personal misfortunes, financial reverses and illness in his family. Referring to the Baldanzi matter respondent testified, 'He gave me the money and the pressure on me was such that every dollar I got into my hands I had to use in my life's condition.' These things forced respondent to close his office and later leave town in an attempt to restore his wife's health.

"The excuse is made in the Cosentino matter that Sarubi, as administrator restrained respondent's hand. 'He didn't want me (respondent) to do anything and go ahead any more.' However, it is apparent that the true reason for the neglect in this estate, extending over a period of five years, was, as respondent states, 'the condition of my own personal home.'

"The personal misfortunes of respondent though touching our feelings and sympathy cannot stand 'in avoidance' of his duties to his client. The widow of Cosentino is still awaiting her estate, and probably will face the necessity of additional costs. Respondent took his fees and costs in full in this estate, without order of Court and in advance of the statutory period. Respondent's professed willingness to act in these matters was forestalled by his yielding to the necessities of the moment. There is, however, throughout the record a keen sense of respondent's appreciation of the wrong to his clients and a depreciation of the facts to which he found himself a victim. While we cannot condone respondent's breach of duty, mitigating circumstances appear in his confession of wrong, his expressed willingness to retrieve his omissions, and, we believe, a sincere desire to re-establish himself. It would seem that the ends of justice would best be served by a limited suspension."

Whereupon, the local committee recommended thirty days' suspension. The Board of Bar Governors approved and adopted the findings of the local committee, but recommended suspension for a period of two years.

Notwithstanding the petitioner has expressed himself as satisfied with the sufficiency of the evidence and the findings of the local committee, the entire transcript of the proceedings before the local committee has been carefully examined for the purpose of appraising the respondent's omissions of duty, and it appears therefrom that the findings and conclusions above quoted are a very fair summary of the facts brought out by the investigation. While, like the local committee's, our sympathy has been aroused by respondent's story, "domestic or other private embarrassments of the attorney in such matters cannot be accepted as extenuating circumstances, at least to the extent of absolving the petitioner from discipline on the record here presented." Ring v. State Bar, 218 Cal. 747, 24 P.(2d) 821, 822.

The petitioner was charged with and found guilty of neglect of his duties as an attorney, and we do not condone his offense; but the misconduct consists of dilatoriness and negligence and he is not charged with or found guilty of any conduct involving moral turpitude. He appears willing to do whatever lies in his power to compensate for his neglect.

He acknowledges his responsibility and the justice of the disciplinary action, and asks only that the punishment be not so severe as to preclude any possibility of his regaining his place in the legal profession. Under the circumstances, we think that suspension for the period of one year is a punishment which is both ample and just.

It is therefore ordered that the petitioner be suspended from practice as an attorney at law in this state for the period of one year from and after the date of the filing of this order.



1 Cal.(2d) 370

DAVIS et al. v. JACOBY et al.

S. F. 14879.

Supreme Court of California.

July 30, 1934.

Rehearing Denied Aug. 29, 1934.

1. Contracts ⇐1

"Unilateral contract" is one in which no promisor receives promise as consideration for his promise, while "bilateral contract" is one containing mutual promises between parties.

[Ed. Note.—For other definitions of "Bilateral Contract" and "Unilateral Contract," see Words & Phrases.]

2. Contracts ⇐22(1)

No notice of acceptance of offer to enter into unilateral contract by performance is required (Civ. Code, § 1584).

3. Wills ⇐58(1)

Whether offer to enter into contract to make will is one to enter into bilateral or unilateral contract depends on offerer's intent and facts and circumstances of particular case.

4. Wills ⇐58(1)

Testator's statement, in letter to his niece and her husband, that she would inherit everything if husband could come to testator and look after his affairs *held* offer to enter into bilateral contract to make will in niece's favor.

Evidence showed that close, intimate friendship existed between testator and his niece and her husband; that testator had confidence in them only, and that he had become desperate because of ill health and financial reverses and wanted their promise of assistance; his letter requested reply as soon as possible; contract required niece and her husband to perform services until death of both testator and his wife; and testator received letter of acceptance from niece's husband and acquiesced in such means of accepting offer.

5. Wills ⇐58(1)

One offering to enter into contract to make will has right to designate offer as either unilateral or bilateral.

6. Contracts ⇐22(1)

Acceptance of offer in accordance with mode or means indicated thereby is binding on offerer.

7. Specific performance ⇐86

Specific performance of bilateral contract to make will will be granted, where promisees fully performed their part of contract after accepting offer to enter into it; damages being insufficient remedy.

8. Pleading ⇐36(2)

Complaint in equity action for specific performance of alleged contract to make will *held* not to bind plaintiffs to theory of unilateral contract, though alleging that contract became effective by performance, where defendants made no objection to testimony as to plaintiffs' acceptance of offer to make contract and case was tried on theory that sole question was existence of contract.

In Bank.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Frank M. Davis and wife against Olin D. Jacoby and another, as executor and executrix of the last will and testament of Rupert Whitehead, deceased, and others. Judgment for defendants, and plaintiffs appeal.

Reversed.

Walter H. Linforth and Wm. M. Cannon, both of San Francisco, and John L. McVey, of Oakland, for appellants.

Marshall Rutherford, Fitzgerald, Abbott & Beardsley, and Calkins, Hagar, Hall & Linforth, all of Oakland, Goudge, Robinson & Hughes, of Los Angeles, Chapman, Trefethen, Richards & Chapman, of Oakland, and Cormac & Bolles, of San Francisco, for respondents.

PER CURIAM.

Plaintiffs appeal from a judgment refusing to grant specific performance of an alleged

contract to make a will. The facts are not in dispute and are as follows:

The plaintiff Caro M. Davis was the niece of Blanche Whitehead, who was married to Rupert Whitehead. Prior to her marriage in 1913 to her coplaintiff Frank M. Davis, Caro lived for a considerable time at the home of the Whiteheads, in Piedmont, Cal. The Whiteheads were childless and extremely fond of Caro. The record is replete with uncontradicted testimony of the close and loving relationship that existed between Caro and her aunt and uncle. During the period that Caro lived with the Whiteheads, she was treated as and often referred to by the Whiteheads as their daughter. In 1913, when Caro was married to Frank Davis, the marriage was arranged at the Whitehead home and a reception held there. After the marriage Mr. and Mrs. Davis went to Mr. Davis' home in Canada, where they have resided ever since. During the period 1913 to 1931 Caro made many visits to the Whiteheads, several of them being of long duration. The Whiteheads visited Mr. and Mrs. Davis in Canada on several occasions. After the marriage and continuing down to 1931 the closest and most friendly relationship at all times existed between these two families. They corresponded frequently, the record being replete with letters showing the loving relationship.

By the year 1930 Mrs. Whitehead had become seriously ill. She had suffered several strokes and her mind was failing. Early in 1931 Mr. Whitehead had her removed to a private hospital. The doctors in attendance had informed him that she might die at any time or she might linger for many months. Mr. Whitehead had suffered severe financial reverses. He had had several sieges of sickness and was in poor health. The record shows that during the early part of 1931 he was desperately in need of assistance with his wife, and in his business affairs, and that he did not trust his friends in Piedmont. On March 18, 1931, he wrote to Mrs. Davis telling her of Mrs. Whitehead's condition and added that Mrs. Whitehead was very wistful. "Today I endeavored to find out what she wanted. I finally asked her if she wanted to see you. She burst out crying and we had great difficulty in getting her to stop. Evidently, that is what is on her mind. It is a very difficult matter to decide. If you come it will mean that you will have to leave again, and then things may be serious. I am going to see the doctor, and get his candid opinion and will then write you again. * * * Since writing the above, I have seen the doctor, and he thinks it will help considerably if you come." Shortly thereafter, Mr. Whitehead wrote to Caro Davis further explaining the physical condition of Mrs. Whitehead and himself. On March 24, 1931, Mr. Davis, at the request of his wife, telegraphed to Mr. Whitehead as follows: "Your letter received. Sorry to hear Blanche not so well. Hope you are feeling better yourself. If you wish Caro to go to you can arrange for her to leave in about two weeks. Please wire me if you think it advisable for her to go." On March 30, 1931, Mr. Whitehead wrote a long letter to Mr. Davis, in which he explained in detail the condition of Mrs. Whitehead's health and also referred to his own health. He pointed out that he had lost a considerable portion of his cash assets but still owned considerable realty, that he needed some one to help him with his wife and some friend he could trust to help him with his business affairs and suggested that perhaps Mr. Davis might come to California. He then pointed out that all his property was community property; that under his will all the property was to go to Mrs. Whitehead; that he believed that under Mrs. Whitehead's will practically everything was to go to Caro. Mr. Whitehead again wrote to Mr. Davis under date of April 9, 1931, pointing out how badly he needed some one he could trust to assist him, and giving it as his belief that if properly handled he could still save about $150,000. He then stated: "Having you [Mr. Davis] here to depend on and to help me regain my mind and courage would be a big thing." Three days later, on April 12, 1931, Mr. Whitehead again wrote, addressing his letter to "Dear Frank and Caro," and in this letter made the definite offer, which offer it is claimed was accepted and is the basis of this action. In this letter he first pointed out that Blanche, his wife, was in a private hospital and that "she cannot last much longer * * * my affairs are not as bad as I supposed at first. Cutting everything down I figure 150,000 can be saved from the wreck." He then enumerated the values placed upon his various properties and then continued:

"My trouble was caused by my friends taking advantage of my illness and my position to skin me

"Now if Frank could come out here and be with me, and look after my affairs, we could easily save the balance I mention, provided I dont get into another panic and do some more foolish things.

"The next attack will be my end, I am 65 and my health has been bad for years, so, the Drs. dont give me much longer to live. So if you can come, Caro will inherit everything and you will make our lives happier and see Blanche is provided for to the end

"My eyesight has gone back on me, I cant read only for a few lines at a time. I am at the house alone with Stanley [the chauffeur] who does everything for me and is a fine fellow. Now, what I want is some one who will take charge of my affairs and see I dont lose any more. Frank can do it, if he will and cut out the booze.

"Will you let me hear from you as soon as possible, I know it will be a sacrifice but times are still bad and likely to be, so by settling down you can help me and Blanche and gain in the end. If I had you here my mind would get better and my courage return, and we could work things out."

This letter was received by Mr. Davis at his office in Windsor, Canada, about 9:30 a. m. April 14, 1931. After reading the letter to Mrs. Davis over the telephone, and after getting her belief that they must go to California, Mr. Davis immediately wrote Mr. Whitehead a letter, which, after reading it to his wife, he sent by air mail. This letter was lost, but there is no doubt that it was sent by Davis and received by Whitehead; in fact, the trial court expressly so found. Mr. Davis testified in substance as to the contents of this letter. After acknowledging receipt of the letter of April 12, 1931, Mr. Davis unequivocally stated that he and Mrs. Davis accepted the proposition of Mr. Whitehead and both would leave Windsor to go to him on April 25. This letter of acceptance also contained the information that the reason they could not leave prior to April 25 was that Mr. Davis had to appear in court on April 22 as one of the executors of his mother's estate. The testimony is uncontradicted and ample to support the trial court's finding that this letter was sent by Davis and received by Whitehead. In fact, under date of April 15, 1931, Mr. Whitehead again wrote to Mr. Davis and stated:

"Your letter by air mail received this a. m. Now, I am wondering if I have put you to unnecessary trouble and expense, if you are making any money dont leave it, as things are bad here. * * * You know your business and I dont and I am half crazy in the bargain, but I dont want to hurt you or Caro

"Then on the other hand if I could get some one to trust and keep me straight I can save a good deal, about what I told you in my former letter."

This letter was received by Mr. Davis on April 17, 1931, and the same day Mr. Davis telegraphed to Mr. Whitehead: "Cheer up—we will soon be there, we will wire you from the train."

Between April 14, 1931, the date the letter of acceptance was sent by Mr. Davis, and April 22, Mr. Davis was engaged in closing out his business affairs, and Mrs. Davis in closing up their home and in making other arrangements to leave. On April 22, 1931, Mr. Whitehead committed suicide. Mr. and Mrs. Davis were immediately notified and they at once came to California. From almost the moment of her arrival Mrs. Davis devoted herself to the care and comfort of her aunt, and gave her aunt constant attention and care until Mrs. Whitehead's death on May 30, 1931. On this point the trial court found: "From the time of their arrival in Piedmont, Caro M. Davis administered in every way to the comforts of Blanche Whitehead and saw that she was cared for and provided for down to the time of the death of Blanche Whitehead on May 30, 1931; during said time Caro M. Davis nursed Blanche Whitehead, cared for her and administered to her wants as a natural daughter would have done toward and for her mother."

This finding is supported by uncontradicted evidence and in fact is conceded by respondents to be correct. In fact, the record shows that after their arrival in California Mr. and Mrs. Davis fully performed their side of the agreement.

After the death of Mrs. Whitehead, for the first time it was discovered that the information contained in Mr. Whitehead's letter of March 30, 1931, in reference to the contents of his and Mrs. Whitehead's wills was incorrect. By a duly witnessed will dated February 28, 1931, Mr. Whitehead, after making several specific bequests, had bequeathed all of the balance of his estate to his wife for life, and upon her death to respondents Geoff Doubble and Rupert Ross Whitehead, his nephews. Neither appellant was mentioned in his will. It was also discovered that Mrs. Whitehead by a will dated December 17, 1927, had devised all of her estate to her husband. The evidence is clear and uncontradicted that the relationship existing between Whitehead and his two nephews, respondents herein, was not nearly as close and confidential as that existing between Whitehead and appellants.

After the discovery of the manner in which the property had been devised was made, this

action was commenced upon the theory that Rupert Whitehead had assumed a contractual obligation to make a will whereby "Caro Davis would inherit everything"; that he had failed to do so; that plaintiffs had fully performed their part of the contract; that damages being insufficient, quasi specific performance should be granted in order to remedy the alleged wrong, upon the equitable principle that equity regards that done which ought to have been done. The requested relief is that the beneficiaries under the will of Rupert Whitehead, respondents herein, be declared to be involuntary trustees for plaintiffs of Whitehead's estate.

It should also be added that the evidence shows that as a result of Frank Davis leaving his business in Canada he forfeited not only all insurance business he might have written if he had remained, but also forfeited all renewal commissions earned on past business. According to his testimony this loss was over $8,000.

The trial court found that the relationship between Mr. and Mrs. Davis and the Whiteheads was substantially as above recounted and that the other facts above stated were true; that prior to April 12, 1931, Rupert Whitehead had suffered business reverses and was depressed in mind and ill in body; that his wife was very ill; that because of his mental condition he "was unable to properly care for or look after his property or affairs"; that on April 12, 1931, Rupert Whitehead in writing made an offer to plaintiffs that, if within a reasonable time thereafter plaintiffs would leave and abandon their said home in Windsor, and if Frank M. Davis would abandon or dispose of his said business, and if both of the plaintiffs would come to Piedmont in the said county of Alameda where Rupert Whitehead then resided and thereafter reside at said place and be with or near him, and if Frank M. Davis would thereupon and thereafter look after the business and affairs of said Rupert Whitehead until his condition improved to such an extent as to permit him so to do, and if the plaintiffs would look after and administer to the comforts of Blanche Whitehead and see that she was properly cared for until the time of her death, that, in consideration thereof, Caro M. Davis would inherit everything that Rupert Whitehead possessed at the time of his death and that by last will and testament Rupert Whitehead would devise and bequeath to Caro M. Davis all property and estate owned by him at the time of his death, other than the property constituting the community interest of Blanche Whitehead; that shortly prior to April 12, 1931, Rupert Whitehead informed plaintiffs of the supposed terms of his will and the will of Mrs. Whitehead. The court then finds that the offer of April 12 was not accepted. As already stated, the court found that plaintiffs sent a letter to Rupert Whitehead on April 14 purporting to accept the offer of April 12, and also found that this letter was received by the Whiteheads, but finds that in fact such letter was not a legal acceptance. The court also found that the offer of April 12 was "fair and just and reasonable, and the consideration therefor, namely, the performance by plaintiffs of the terms and conditions thereof, if the same had been performed, would have been an adequate consideration for said offer and for the agreement that would have resulted from such performance; said offer was not, and said agreement would not have been, either harsh or oppressive or unjust to the heirs at law, or devisees, or legatees, of Rupert Whitehead, or to each or any of them, or otherwise."

The court also found that plaintiffs did not know that the statements made by Whitehead in reference to the wills were not correct until after Mrs. Whitehead's death, that after plaintiffs arrived in Piedmont they cared for Mrs. Whitehead until her death and "Blanche Whitehead was greatly comforted by the presence, companionship and association of Caro M. Davis, and by her administering to her wants."

The theory of the trial court and of respondents on this appeal is that the letter of April 12 was an offer to contract, but that such offer could only be accepted by performance and could not be accepted by a promise to perform, and that said offer was revoked by the death of Mr. Whitehead before performance. In other words, it is contended that the offer was an offer to enter into a unilateral contract, and that the purported acceptance of April 14 was of no legal effect.

[1] The distinction between unilateral and bilateral contracts is well settled in the law. It is well stated in section 12 of the American Institute's Restatement of the Law of Contracts as follows: "A unilateral contract is one in which no promisor receives a promise as consideration for his promise. A bilateral contract is one in which there are mutual promises between two parties to the contract; each party being both a promisor and a promisee." This definition is in accord with the law of California. Chrisman v. So. Cal. Edison Co., 83 Cal. App. 249, 256 P. 618.

[2] In the case of unilateral contracts no notice of acceptance by performance is required. Section 1584 of the Civil Code provides: "Performance of the conditions of a proposal * * * is an acceptance of the proposal." See Cuthill v. Peabody, 19 Cal. App. 304, 125 P. 926; Los Angeles Traction Co. v. Wilshire, 135 Cal. 654, 67 P. 1086.

[3] Although the legal distinction between unilateral and bilateral contracts is thus well settled, the difficulty in any particular case is to determine whether the particular offer is one to enter into a bilateral or unilateral contract. Some cases are quite clear cut. Thus an offer to sell which is accepted is clearly a bilateral contract, while an offer of a reward is a clear-cut offer of a unilateral contract which cannot be accepted by a promise to perform, but only by performance. Berthiaume v. Doe, 22 Cal. App. 78, 133 P. 515. Between these two extremes is a vague field where the particular contract may be unilateral or bilateral depending upon the intent of the offer and the facts and circumstances of each case. The offer to contract involved in this case falls within this category. By the provisions of the Restatement of the Law of Contracts it is expressly provided that there is a *presumption* that the offer is to enter into a bilateral contract. Section 31 provides: "In case of doubt it is presumed that an offer invites the formation of a bilateral contract by an acceptance amounting in effect to a promise by the offeree to perform what the offer requests, rather than the formation of one or more unilateral contracts by actual performance on the part of the offeree."

Professor Williston, in his Treatise on Contracts, volume 1, § 60, also takes the position that a presumption in favor of bilateral contracts exists.

In the comment following section 31 of the Restatement the reason for such presumption is stated as follows: "It is not always easy to determine whether an offerer requests an act or a promise to do the act. As a bilateral contract immediately and fully protects both parties, the interpretation is favored that a bilateral contract is proposed."

While the California cases have never expressly held that a presumption in favor of bilateral contracts exists, the cases clearly indicate a tendency to treat offers as offers of bilateral rather than of unilateral contracts. Roth v. Moeller, 185 Cal. 415, 197 P. 62; Boehm v. Spreckels, 183 Cal. 239, 191 P. 5; see, also, Wood v. Lucy, Lady Duff-Gordon, 222 N. Y. 88, 118 N. E. 214.

[4-6] Keeping these principles in mind, we are of the opinion that the offer of April 12 was an offer to enter into a bilateral as distinguished from a unilateral contract. Respondents argue that Mr. Whitehead had the right as offerer to designate his offer as either unilateral or bilateral. That is undoubtedly the law. It is then argued that from all the facts and circumstances it must be implied that what Whitehead wanted was performance and not a mere promise to perform. We think this is a non sequitur, in fact the surrounding circumstances lead to just the opposite conclusion. These parties were not dealing at arm's length. Not only were they related, but a very close and intimate friendship existed between them. The record indisputably demonstrates that Mr. Whitehead had confidence in Mr. and Mrs. Davis, in fact that he had lost all confidence in every one else. The record amply shows that by an accumulation of occurrences Mr. Whitehead had become desperate, and that what he wanted was the promise of appellants that he could look to them for assistance. He knew from his past relationship with appellants that if they gave their promise to perform he could rely upon them. The correspondence between them indicates how desperately he desired this assurance. Under these circumstances he wrote his offer of April 12, above quoted, in which he stated, after disclosing his desperate mental and physical condition, and after setting forth the terms of his offer: "*Will you let me hear from you as soon as possible*—I know it will be a sacrifice but times are still bad and likely to be, so by settling down you can help me and Blanche and gain in the end." By thus specifically requesting an immediate reply Whitehead expressly indicated the nature of the acceptance desired by him, namely, appellants' promise that they would come to California and do the things requested by him. This promise was immediately sent by appellants upon receipt of the offer, and was received by Whitehead. It is elementary that when an offer has indicated the mode and means of acceptance, an acceptance in accordance with that mode or means is binding on the offerer.

Another factor which indicates that Whitehead must have contemplated a bilateral rather than an unilateral contract, is that the contract required Mr. and Mrs. Davis to perform services until the death of both Mr. and Mrs. Whitehead. It is obvious that if Mr. Whitehead died first some of these services were to be performed after his death, so that he would have to rely on the promise of

appellants to perform these services. It is also of some evidentiary force that Whitehead received the letter of acceptance and acquiesced in that means of acceptance.

Shaw v. King, 63 Cal. App. 18, 218 P. 50, relied on by respondents, is clearly not in point. In that case there was no written acceptance, nor was there an acceptance by partial or total performance.

[7] For the foregoing reasons we are of the opinion that the offer of April 12, 1931, was an offer to enter into a bilateral contract which was accepted by the letter of April 14, 1931. Subsequently appellants fully performed their part of the contract. Under such circumstances it is well settled that damages are insufficient and specific performance will be granted. Wolf v. Donahue, 206 Cal. 213, 273 P. 547. Since the consideration has been fully rendered by appellants the question as to mutuality of remedy becomes of no importance. 6 Cal. Jur. § 140.

[8] Respondents also contend the complaint definitely binds appellants to the theory of a unilateral contract. This contention is without merit. The complaint expressly alleges the parties entered into a contract. It is true that the complaint also alleged that the contract became effective by performance. However, this is an action in equity. Respondents were not misled. No objection was made to the testimony offered to show the acceptance of April 14. A fair reading of the record clearly indicates the case was tried by the parties on the theory that the sole question was whether there was a contract—unilateral or bilateral.

For the foregoing reasons the judgment appealed from is reversed.



140 Cal.App. 132

DUNHAM v. CANTLAY & TANZOLA, Inc., et al.

Civ. 9821.

District Court of Appeal, Second District, Division 2, California.

July 24, 1934.

Appeal and error ⊂=479(1)

Where sureties on undertaking furnished on appeal did not appear at hearing on exceptions to undertaking because of mistake and inadvertence, and continuance was not allowed and execution was about to issue, Appellate Court would grant writ of supersedeas and permit appellants to furnish sufficient undertaking.

Action by Luman S. Dunham against Cantlay & Tanzola, Inc., and another. Judgment for plaintiff, and defendants appeal. On defendants' petition for a writ of supersedeas and for permission to furnish an undertaking pending the appeal.

Judgment in accordance with opinion.

George P. Kinkle, of Los Angeles, for appellants.

Clyde C. Shoemaker, of Los Angeles, for respondent.

CRAIG, Justice.

The defendants appealed from a money judgment which had been rendered against them and furnished a timely undertaking in the usual form, to which exceptions were taken and notice of hearing thereon was served and filed. Owing to mistake and inadvertence, the sureties were prevented from appearing at the time and place set for hearing, a continuance was not allowed, and execution was about to issue on said judgment. The defendants pray for a writ of supersedeas and that they be permitted to furnish an undertaking pending the appeal.

Relief under strikingly similar circumstances has repeatedly been afforded until there is no longer room for discussion of the question. Segarini v. Bargagliotti, 193 Cal. 538, 226 P. 2; Foster v. Fernandes, 200 Cal. 274, 252 P. 726; Poncino v. Sierra Nevada Life & Casualty Co., 100 Cal. App. 85, 279 P. 1035; Ellinwood v. McCoy, 133 Cal. App. 597, 24 P.(2d) 549.

It is ordered that upon the filing by the petitioners with the clerk of this court, within twenty days, of a good and sufficient undertaking upon appeal, which shall have been first approved by the superior court at a hearing upon ten days' notice to the respondent, a writ shall issue as prayed. It is further ordered that in the meantime, during such period of twenty days, execution of the judgment be stayed.

We concur: STEPHENS, P. J.; DESMOND, J.

⊂=For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

140 Cal.App. 57

MUNICIPAL BOND CO. v. BALBOA CONST. CO. et al.

Civ. 8377.

District Court of Appeal, Second District, Division 2, California.

July 20, 1934.

Rehearing Denied Aug. 18, 1934.

Hearing Denied by Supreme Court Sept. 18, 1934.

1. Evidence ⇐460(13)

Words and conduct of parties to surety bond for repayment of sum loaned to street paving contractor by obligee may be referred to for sole purpose of determining identity of loan intended to be secured in action on bond (Code Civ. Proc. § 1860).

2. Principal and surety ⇐161

Words and conduct of parties to surety bond for repayment of sum loaned to street paving contractor by obligee *held* to show that loan made by obligee suing on bond was loan secured thereby (Code Civ. Proc. § 1860).

3. Principal and surety ⇐59

Suretyship contract must be fairly construed with view to effecting object thereof and accomplishing its purpose.

4. Principal and surety ⇐59

Extent of surety's liability on bond must be gathered from language thereof read in light of circumstances attending transaction.

5. Interest ⇐19(1)

Allowance of interest on items credited as counterclaims in action on surety bond for repayment of sum loaned to street paving contractor was properly refused, where evidence justified implied finding that amounts thereof were unliquidated until reduced to judgment.

6. Principal and surety ⇐59

Finance contract between street paving contractor and company loaning him money and surety bond for repayment of sum loaned must be construed together in determining whether lender is entitled to recover amount advanced in excess of that stated in bond.

7. Principal and surety ⇐78

Finance contract between street paving contractor and company lending him money and surety bond for repayment of sum advanced *held* to show lender's right to repay itself for all advances from money available at end of job before turning over any amount to surety, though it advanced more than amount stated in bond.

The finance contract provided for loans in installments not exceeding 70 per cent. of value of work done, but authorized lender to advance greater percentage in its discretion and required it to pay contractor and surety balance of face amount of warrants and other documents, received from city in payment for work, after deducting amount due lender, while bond referred to finance contract, indemnified lender up to amount thereof against contractor's failure to perform contract, and recited obligee's agreement to lend not exceeding aggregate sum of $—— to enable contractor to perform paving contract.

8. Principal and surety ⇐83

Surety on street paving contractor's bond for repayment of sum loaned principal by obligee, suing on bond for amount advanced with surety's knowledge and acquiescence, cannot properly claim that obligee evinced bad faith toward surety and violated duty in advancing more than percentage of value of work stated in finance contract with contractor.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by the Municipal Bond Company against the Balboa Construction Company and the Indemnity Insurance Company of North America. From a judgment for plaintiff against defendant indemnity company, the latter appeals.

Affirmed.

Joe Crider, Jr., of Los Angeles, Franklin A. Plank, of San Diego, and John M. Martin, and Frank L. Martin, Jr., both of Los Angeles (Sloss & Turner, of San Francisco, of counsel), for appellant.

Bailie, Turner & Lake, of Los Angeles, for respondent.

SCOTT, Justice pro tem.

During the years 1928 and 1929 Balboa Construction Company, one of the defendants, was engaged in paving streets in the city of San Diego. The general business arrangement under which it operated was as follows: Money for that company to do business was loaned to it by plaintiff, and statutory and other bonds which it required were executed by defendant Indemnity Insurance Company. As security for the money so loaned by plaintiff to defendant Balboa Construction Company, the latter assigned to plaintiff the warrant and other documents which the construction company was to receive from the city in payment for its work, and in addition thereto defendant indemnity company executed a finance bond agreeing to indemnify plaintiff against loss. Subject to plain-

tiff's rights under such assignment of the contract by Balboa Construction Company, the contract was assigned to defendant indemnity company to secure it against loss on its bonds so executed for the benefit of the Balboa Company.

In January of 1929 the president of Balboa Construction Company and one Homer, attorney in fact for defendant indemnity company, came to the office of plaintiff and requested a loan of $25,000, which was needed to complete some subcontracts. Homer stated that his company would give plaintiff a surety bond for that amount, and such a bond was executed in plaintiff's favor on January 30, 1929, in the following terms: "Know all men by these presents that we, Balboa Construction Co., a corporation, under the laws of the State of California, having its principal place of business at San Diego, California, as principal, and the Indemnity Insurance Company of North America, a corporation, under the laws of the State of Pennsylvania, having its principal place of business at Philadelphia, Pa., as surety, are held and firmly bound unto the Municipal Bond Co., as obligee, in the penal sum of Twenty-seven Thousand Five Hundred and no/100 ($27,500.00) Dollars, lawful money of the United States of America, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents. Whereas, the said Municipal Bond Co. is about to loan the said principal the sum of Twenty-five Thousand and no/100 ($25,000.00) Dollars for six months. Now therefore, the condition of the above obligation is such that if the aforesaid principal shall repay the said Municipal Bond Co. the said sum of Twenty-five Thousand and no/100 ($25,000.00) Dollars on or before the maturity of said loan this obligation shall be null and void; otherwise it shall remain in full force and effect and be payable upon demand for the amount of said sum ($25,000.00) or any unpaid balance thereof, together with accrued interest and all costs of collection including attorneys' fees."

Between February 4 and March 2, 1929, six drafts totaling $24,000 were executed by plaintiff payable to both defendants as copayees, were delivered to the Balboa Company, and were honored when presented for payment bearing the indorsement of both defendants. Defendant Balboa Company executed and delivered to plaintiff a promissory note payable to it on demand for the amount of each respective draft plus interest and attorneys' fees in case of suit. The amount thus loaned not being repaid, plaintiff on June 24, 1930, filed suit against defendants. Balboa Company defaulted, and the trial court gave judgment for plaintiff against defendant indemnity company on the bond. That defendant appeals.

[1, 2] Appellant contends that the $24,000 thus loaned and evidenced by the six drafts and six promissory notes was not the loan for which it was surety, by reason of the fact that the loans thus made were payable on demand, whereas the loan which appellant guaranteed was to be for six months. The trial court found that the money was loaned by plaintiff to defendant Balboa company "under and pursuant to the terms" of the bond. The evidence supports this view. Appellant was intimately in touch with the work being carried on by the Balboa Company, having joint control over its transactions and, in the case of this loan, having knowledge of the matter from the time of the negotiation of the loan until the money was spent. There is no substantial evidence to support a contention that the bond referred to any loan other than the one which was actually made. This is not a case in which plaintiff is seeking to recover from the surety at a time earlier than that specified in the bond. Whereas the bond referred to a loan for six months, this action was not instituted until eleven months after the expiration of the six months' period. The language of the paragraph which recites the consideration for the bond, "Whereas, the said Municipal Bond Co. is about to loan the said principal the sum of Twenty-five Thousand and no/100 ($25,000.00) Dollars for six months," obviously refers to a loan which was to be made after the signing of the bond, and the words and conduct of the parties may properly be referred to for the sole purpose of determining the identity of the loan which the bond in question was intended by the parties to secure. Code Civ. Proc., § 1860; Balfour v. Fresno C. & I. Co., 109 Cal. 221, 41 P. 876. Upon such reference the conclusion is inescapable that the loan actually made and upon which plaintiff has brought suit was the loan which the bond was intended to and did secure. In interpreting the terms of a contract of suretyship the same rules are to be observed as in the case of other contracts (Civ. Code, § 2837), and a contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so

far as the same is ascertainable and lawful (Civ. Code, § 1636), particular clauses of a contract being subordinate to its general intent (Civ. Code, § 1650).

[3, 4] The identity of the loan made as being the one covered by the bond in question is further shown by the conduct of one Eby, general agent of defendant indemnity company. On March 2, 1929, about thirty-one days after execution of the bond, Eby called at the office of plaintiff and stated that Balboa Construction Company wanted some money if there was not a margin left on the bond of $25,000, whereupon, after some calculation, the final draft of $1,000 was made out to Balboa Company and the indemnity company as copayees, and defendant Balboa Company executed its final note to plaintiff for that amount. "A contract of suretyship is to be fairly construed with a view to effecting the object for which it was given and to accomplish the purpose for which it was designed." El Dora Oil Co. v. Gibson, 201 Cal. 231, 256 P. 550, 551. "The extent of the surety's liability must be gathered from the language used when read in the light of the circumstances attending the transaction." Hollenbeck-Bush, etc., v. Amweg, 177 Cal. 159, 162, 170 P. 148, 149.

[5] Appellant urges that the trial court should have allowed interest on certain items which were credited as counterclaims. The existence of these items was disclosed during the trial and an amendment was allowed which set up the principal sums without any claim for interest. The evidence was such as to justify the implied finding that these amounts were unliquidated until they were reduced to judgment, and an allowance of interest was properly refused. Burnett v. Glas, 154 Cal. 249, 97 P. 423; Indemnity Ins. Co. v. Watson, 128 Cal. App. 10, 16 P.(2d) 760.

[6-8] In the "first amended answer and counterclaim of defendant Indemnity Insurance Company of North America" four counterclaims were set up by that defendant and were disallowed by the trial court. It may be stated parenthetically that some of the contracts hereinafter referred to had been executed with R. W. Brown as street paving contractor, but Balboa Company had taken over the rights and liabilities of Brown with the knowledge and consent of all parties concerned. Where the term "contractor" is used it will be understood to apply to either Brown or Balboa Company, without changing the effect of the language used.

The four counterclaims were predicated upon the terms of four "financing contracts" between contractor and Municipal Bond Company and four finance bonds executed in favor of respondent by the contractor as principal and appellant indemnity company as surety, covering four street improvement jobs. Each financing contract provided for loans by respondent to contractor to enable the latter to pay for the materials and labor necessary to pave certain streets, and for the assignment by contractor to respondent of the warrants, diagrams, assessments, and bonds received by him from the city of San Diego in payment for the work. Each of said "financing contracts" also contained the following provision concerning the funds thus loaned: "Said sums shall be loaned in installments as the work progresses to the satisfaction of second party; each installment in the discretion of second party shall in no event exceed 70 per cent. of the value of the work done or the amount expended by said contractor in payment of material furnished and labor performed under said improvement contract since the loaning of the last preceding installment made under this contract. * * * Second party shall not, however, in the making of such advances, be restricted to said 70 per cent. but in its discretion may advance a greater or lesser per cent. of said value, and in so doing said contractor's sanction thereof and consent thereto is hereby acknowledged." Respondent in each contract agreed to buy the warrant, diagram, assessment, and bonds received in each case at 94, 95, or 96 per cent. of the face value, to deduct and retain the amount due it under the said contract, and pay over the balance to the contractor and appellant. The bond in each case executed by contractor as principal and appellant as surety referred to the finance contract for that job, and agreed to indemnify respondent up to an amount fixed in the surety bond against failure of contractor to carry out the terms of his contract with reference thereto.

Each surety bond contained the following recital: "Whereas the said obligee has agreed to lend and advance from time to time certain sums of money, not exceeding in the aggregate the sum of ——— Dollars, for the purpose of enabling said contractor to perform and complete the matters and things to be performed and completed by the contractor under the said contract," etc. The amount set out in each bond was substantially less than the estimated value of the work. Appellant bases its counterclaims on the contention that this recital in the surety bond limited the amount of respondent's priority as to the security, to the amount set out in

the surety bond; that when respondent made advances beyond that amount such excess was not secured by the warrant, bond, etc., assigned to it by contractor as security, and respondent was required to turn over to appellant such part of the purchase price of the securities in excess of the amount set out in the surety bond as might be required to repay appellant for advances it had made.

Respondent advanced to the contractor on four jobs sums in excess of the amount set out in the surety bond, and which amounted to more than 70 per cent. of the value of the work. Appellant, however, being liable under certain other surety bonds in connection with these same jobs, paid additional sums on claims for labor and materials. When each job was finished and respondent had deducted from the amount realized on each contract the sum it had advanced, the balance was insufficient to reimburse appellant for the payments made by it. If appellant's interpretation of the agreement were correct, respondent would be required to turn over to it sufficient of the amount realized on each contract to reimburse appellant, retaining only the sum fixed in the surety bond, even though that were substantially less than the amount actually advanced by respondent under the terms of the finance contract. It is apparent that the recital in the surety bond above quoted was intended by the parties to limit the liability of appellant as surety to reimburse respondent as obligee, and was not intended to fix a limit beyond which respondent could not be reimbursed for advances to the contractor. The language of the finance contract and the surety bond, construed together as they must be (Storm & Butts v. Lipscomb, 117 Cal. App. 6, 3 P.(2d) 567; W. P. Fuller & Co. v. Alturas School District, 28 Cal. App. 609, 153 P. 743), makes it evident that the parties intended that respondent should not be obligated to advance more than 70 per cent. of the value of the work, but that it reserved the right to do so, and when the money was available at the end of the job it was entitled to repay itself for advances made by it before turning any amount over to appellant. Appellant may not properly claim that respondent evinced bad faith toward it and violated its duty in making these advances, since the conduct of appellant while they were being made shows that it knew of and acquiesced in them. Each amount advanced by respondent was in the form of a draft payable to contractor and appellant as copayees. Such drafts were endorsed by both payees and the proceeds thereof were spent on the work in which both were interested, under the supervision and control of appellant.

The findings of the trial court and the judgment based thereon in favor of respondent, both as to the complaint and the counterclaim, are amply supported by the evidence, and the construction which the court placed on the contracts in evidence is clearly in accord with the expressed intention of the parties.

The judgment is affirmed.

We concur: STEPHENS, P. J.; DESMOND, J.



140 Cal.App. 134

BERMAN v. BLANKENSHIP MOTORS et al.

Civ. 9751.

District Court of Appeal, Second District, Division 2, California.

July 24, 1934.

Appeal and error ⇐345(1)

Time for appeal from judgment under statute runs from actual entry in regular minutes of order denying new trial, not from date of order given in such entry nor from entry of order in clerk's rough minutes (Code Civ. Proc. § 939).

Appeal from Superior Court, Los Angeles County.

Action by Charles B. Berman against the Blankenship Motors, a corporation, and others. From the judgment, plaintiff appeals. On motion to dismiss the appeal.

Motion denied.

William P. Redmond, of Los Angeles, for appellant.

George L. Greer, of Los Angeles, for respondents.

STEPHENS, Presiding Justice.

This is a motion to dismiss an appeal upon the ground that the notice of appeal came too late.

Defendants, respondents here, presented a

motion for a new trial, but the court denied the motion. On the same day the clerk made a note thereof in his rough minutes, and the next day the court's ruling was duly entered in the regular minutes. The date of this entry, however, was of the date of the ruling.

Section 939, Code of Civil Procedure, provides: "If proceedings on motion for a new trial are pending, the time for appeal from the judgment shall not expire until thirty days after entry in the trial court of the order determining such motion. * * *"

The appeal was not within time if the entry in the rough minutes starts the time to running, but such entry does not do this, for it has been held that rough minutes of the clerk are personal memoranda and not records of the court. Brownell v. Superior Court, 157 Cal. 703, 109 P. 91. The appeal was not within time if the regular minutes are to be taken as of their face. But we think the plain provision of the statute is that the time runs from the actual entry. So calculated, the appeal was in time. For general discussion of the subject, see State v. Scott, 35 Wyo. 108, 247 P. 699, and note, 247 P. 699.

The motion is denied.

We concur: CRAIG, J.; DESMOND, J.

140 Cal.App. 102

Ex parte TAYLOR.

Cr. 2570.

District Court of Appeal, Second District, Division 2, California.

July 23, 1934.

1. Criminal law ⇐995(7)

Sentence to county jail for 90 days *held* valid, though judgment required it to be served from 7 p. m. Monday to 6 p. m. Wednesday of each week.

2. Criminal law ⇐1001

Instructions that sentence of prisoner to county jail for 90 days should be served from 7 p. m. Monday to 6 p. m. Wednesday of each week *held* void as an attempt to grant periods of suspension from sentence imposed (Pen. Code, § 1203).

Habeas corpus proceeding by Claude Taylor.

Writ discharged, and prisoner remanded.

George E. Stoddard, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and J. F. Moroney, Deputy Co. Counsel, both of Los Angeles, for respondent.

STEPHENS, Presiding Justice.

A petition on behalf of Claude Taylor for a writ of habeas corpus was allowed, and we are here considering the matter after return and submission.

[1, 2] Taylor was convicted of an offense, probation was denied, and he was sentenced to the "County jail * * * for the term of ninety days, to be served from 7:00 p. m. of Monday to 6:00 p. m. of Wednesday" (quotation from judgment). The ninety days have not run and it is claimed that Taylor is imprisoned under a void sentence. We think not. By the provisions of section 1203 of the Penal Code suspension of sentence is limited to probation and probation in this case was specifically denied. The sentence to the county jail for 90 days is valid, but the instruction to the sheriff to free the prisoner several days of each week was an attempt to grant periods of suspension from the sentence imposed and is void. See In re Howard, 72 Cal. App. 374, 237 P. 406, for discussion of principles involved and citation of cases.

The writ is discharged, and the prisoner is remanded.

We concur: CRAIG, J.; DESMOND, J.

WADE et al. v. THORSEN et al. *

Civ. 9122.

District Court of Appeal, First District, Division 2, California.

July 13, 1934.

Rehearing Granted Aug. 11, 1934.

1. Appeal and error ⇐1001(1)

Reviewing court will set aside finding or verdict based on evidence inherently improbable or physically impossible.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 43 P.2d 592.

2. Trial ⇐375

Knowledge gained by court from view of premises is independent evidence to be taken into consideration in determining issues.

3. Appeal and error ⇐907(4)

In action for diverting flood waters onto plaintiffs' land, court must presume that evidence received from trial judge's view of premises not given in record sustained finding that overflowing was caused by defendants, where finding was attacked as contrary to physical facts.

4. Waters and water courses ⇐87

In action for diverting flood waters onto plaintiffs' land, evidence *held* to justify finding that defendants diverted water to irrigate land and that flood waters would not have damaged plaintiffs' crop had not defendants diverted water.

5. Waters and water courses ⇐78

Landowner may erect levees to protect his property from flood waters, even though such acts may cause damage to his neighbors.

6. Waters and water courses ⇐78

Landowner erecting levees is under no duty to maintain them.

7. Waters and water courses ⇐78

Landowner may protect himself from flood waters escaping from natural stream as against common enemy, without commission of a wrong.

8. Waters and water courses ⇐78

Right to repel flood waters is purely one of self-defense (Civ. Code, § 3514).

9. Waters and water courses ⇐78

Landowners who opened spillway of levee during flood, thereby permitting flood waters to overflow plaintiffs' land, *held* liable for damage to plaintiffs' crop, where defendants deliberately diverted water to irrigate land and not in effort to protect their property or to deal with flood waters as common enemy (Civ. Code, § 3514).

10. Damages ⇐163(1)

Where damage results from independent cause as well as from action of defendants, plaintiff must show what portion of damage is attributable to acts of defendants.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by Ben Wade and another against William R. Thorsen and another. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Herbert C. Jones and Lloyd A. Mason, both of San Jose, for appellants.

Rea & Caldwell, of San Jose, for respondents.

SCHMIDT, Justice pro tem.

In the winter season of 1931–32 plaintiffs were growing a crop of cauliflower on property of plaintiff W. W. Henley, being a part of the low lands of Santa Clara Valley in an area between the towns of Alviso and Milpitas, and only a short distance from the southern margin of San Francisco Bay. These lands were from seven to nine feet above sea level. The crop was located on land on both sides of Zanker road and west of the Coyote river. Zanker road runs north from the road known as the Alviso-Milpitas road. Defendant Charles Boots owns a farm lying just north of and adjoining the Alviso-Milpitas road, extending from Coyote river on the east to what would be the prolongation southerly of Zanker road if same extended south of the Alviso-Milpitas road. Defendant William R. Thorsen owns an orchard adjoining and immediately north of the Alviso-Milpitas road and adjoining and immediately west of Zanker road. The other defendant, Eric Thorsen, is the son of William R. Thorsen and acts as manager of the elder Thorsen in the care of his orchard. Between the Thorsen property and that portion of plaintiffs' crop grown on the west side of Zanker road are two farms, that of B. W. Curtner, adjoining Thorsen, and that of Florence Zanker, immediately north of Curtner, and adjoining plaintiffs' crop. The portion of plaintiffs' crop east of Zanker road lay between the road and Smith slough. Between the Thorsen property and the Coyote river are three farms. The Coyote river is the largest stream flowing into Santa Clara Valley and is subject to torrential floods and drains an area of more than 200 square miles and empties into San Francisco Bay. During the rainy season floods occur and become most aggravated when a second heavy rainfall follows close after a first rainfall which has already saturated the earth where it cannot absorb and hold further precipitation. Such conditions occurred in December, 1931. Through the ages the floods which came down the Coyote river overflowed the banks of the stream depositing silt on either side. This deposit has gradually raised the bed of the river so that the river "rides" above the surrounding country, similar in this respect to the bed of the Colorado river in Imperial

valley and the Sacramento river in the Colusa, Yolo, and Sutter basins. To guard against the floods of the Coyote, the defendant Boots, and his father before him, year by year heightened and strengthened the levee along the west bank of the Coyote. The father of defendant Boots first constructed a levee about the year 1860, since which time it has gradually been strengthened year after year. As early as 1906 he put in concrete retaining walls constructing therein three concrete spillways, which spillways in going upstream are designated for the purpose of this action as overflow gate No. 1, gate culvert or tunnel, and overflow gate No. 2. Overflow gates 1 and 2 are in the form of weirs or notches cut in the top of the bank, protected on the outside by concrete foundations and concrete aprons. They are regulated by removable flashboards. The culvert located between the two overflow gates is in the form of a tunnel about six by six feet in dimensions lined with concrete and piercing the bank. It is controlled by a gate which lets down from the top.

On Sunday, December 27, the river was running nearly bank full and near the bridge on the Alviso-Milpitas road the water was flowing over the easterly bank of the river. The water as shown by a gauge on the Boots' property was then at a height where it threatened to go over the low places of the levee on Boots' property. Defendants Boots and Eric Thorsen removed certain boards from overflow gate No. 1, releasing a portion of the flood waters.

The theory of the respondents by the amended complaint is that the action of Boots and Thorsen on the evening of December 27, 1931, was the sole efficient and proximate cause of the damage to plaintiffs' crops. Among other things, the court found:

"III. That on said 27th day of December, A. D. 1931, said defendants, for the purpose of irrigating their said lands, negligently and carelessly diverted the waters of the Coyote Creek upon their lands; that they negligently piled sacks of sand along said San Jose-Alviso Road for the purpose of diverting said waters upon their said lands; that as a proximate result of the said action of said defendants the said waters from the Coyote Creek flowed out on the lands of said defendants and over and upon the lands and cauliflower crop of plaintiffs and absolutely destroyed said cauliflower crop above mentioned."

"VI. * * * that on account of dry years * * * the said Coyote Creek had not overflowed near the point in question for some years before the year 1931, and that the levees erected by Charles Boots * * * had not been broken down by floods since about the year 1906, and that since said time the lands of plaintiff W. W. Henley had not been overflowed with waters coming from the Coyote from any portion of the lands owned by Charles Boots.

"VII. * * * that the levees * * * are so well built and reinforced that the flood waters have not broken them down since about the year 1906, and since said time that no flood waters have come from the Coyote Creek through the levees on the land of Charles Boots to the lands of plaintiff W. W. Henley.

"VIII. * * * that at the point where defendants diverted the waters on the 27th day of December, 1931, the levee had been closed and boarded and reinforced for many years; that the other spillways and culverts * * * had always remained open * * * but that no flood waters from Coyote Creek had ever reached the land of plaintiff W. W. Henley since about the year 1906, and * * * that defendant Charles Boots allowed these other spillways to remain open for the purpose of lessening the pressure of the flood waters against the entire levees upon his property and thereby protecting his own property.

"IX. * * * that the flood waters allowed to flow through said spillways * * * had never overflowed or come near the lands of W. W. Henley.

"X. * * * that at the time defendants released the waters as alleged in the complaint there was a flood and that the waters were high; but finds that only an inconsiderable amount of water would have flowed over any of the spillways mentioned in the answer, and would not have flowed upon the land of plaintiff, W. W. Henley, had not defendants diverted the waters as alleged in the complaint at the particular point where said waters were diverted; and that the allowing of said spillways to remain open as hereinabove found was for the safety and protection of the land of defendant Charles Boots; and that if defendants had not diverted the waters of the Coyote Creek at the particular place at which said waters were diverted by defendants on said 27th day of December, A. D. 1931, that none of the flood waters of said Coyote Creek would have come upon the lands of plaintiff W. W. Henley."

In accordance with the findings, judgment went for the respondents against the appellants who have brought this appeal.

1. Appellants contend that the trial court erred in finding III that defendants diverted flood waters on December 27, 1931, for the purpose of irrigating their lands and that said finding is not supported by the evidence and is against the law. A like contention is made that the court erred in finding X, that only an inconsiderable amount of water would have flowed over any of the spillways on the Boots property, and that the flood waters of the Coyote would not have damaged the plaintiffs' crop had not the defendants diverted water by removing boards from floodgates on the Boots property. In so far as the attack on finding X is concerned, counsel in his brief admits that there is a conflict in the evidence, but argues that the evidence supporting the finding of the trial court is "contrary to immutable physical laws" and supports this contention because of certain maps introduced in evidence and certain testimony of a surveyor, called by appellants to testify, showing that water from portions of the Coyote other than from gate No. 1, actually overflowed and that such waters must have overflowed the land of plaintiff Henley, and this by reason of the contour of the lands and their respective elevations.

[1-3] Without doubt innumerable cases support the proposition of law that the reviewing court will set aside the finding of the trial court, or the verdict of a jury, when such finding or verdict is based either upon evidence inherently improbable or when there is physical impossibility of the evidence being true. Austin v. Newton, 46 Cal. App. 493, 189 P. 471; Neilson v. Houle, 200 Cal. 726, 254 P. 891. The record in this case shows a substantial conflict in the evidence not only on finding X, but on finding III, and this being true the reviewing court will not disturb the finding of the trial court. In this connection it must also be borne in mind that upon stipulation of counsel the trial judge viewed the premises and that while so viewing the premises appellant Boots and witness Jackson explained to the court "the construction of the different levees and spillways, the slope of the land and the flow of water." Although the record does not give the actual testimony of these two witnesses in connection with such explanations, what was said nevertheless was evidence received by the court, and we must presume that this evidence also sustained the findings of the court. It is well settled that "the knowledge gained by the court from a view of the premises is independent evidence to be taken into consideration by the court in determining the issues of the case." Hatton v. Gregg, 4 Cal. App. 537, 88 P. 592, 594; Vaughan v. County of Tulare, 56 Cal. App. 261, 205 P. 21.

[4] From all the evidence in the case we believe the trial court was justified in its findings in the particulars mentioned.

[5-9] 2. Appellants further contend they had a legal right to divert the flood waters in order to lessen the strain on the Boots' levees; that their action was reasonable, and even assuming, only for the purpose of argument, that the crops of respondents were damaged by their acts, such damage is damnum absque injuria. It is the well-settled law of this state that a landowner may erect levees or dikes to protect his property from flood waters even though such acts of the landowner may cause damage to his neighbors; that a landowner erecting such levees or dikes is under no duty or obligation to maintain them. Lamb v. Reclamation Dist. No. 108, 73 Cal. 125, 14 P. 625, 2 Am. St. Rep. 775; McDaniel v. Cummings, 83 Cal. 515, 23 P. 795, 8 L. R. A. 575; Gray v. McWilliams, 98 Cal. 157, 32 P. 976, 21 L. R. A. 593, 35 Am. St. Rep. 163; De Baker v. Railway Company, 106 Cal. 257, 39 P. 610, 46 Am. St. Rep. 237; Barnes v. Marshall, 68 Cal. 569, 10 P. 115; Sanguinetti v. Pock, 136 Cal. 466, 69 P. 98, 89 Am. St. Rep. 169; Jones v. California Development Co., 173 Cal. 565, 160 P. 823, L. R. A. 1917C, 1021; San Gabriel V. C. Club v. Los Angeles County, 182 Cal. 392, 188 P. 554, 9 A. L. R. 1200; Weinberg Co. v. Bixby, 185 Cal. 87, 196 P. 25. As was said in Gray v. McWilliams, supra, at page 163 of 98 Cal., 32 P. 976, 978:

"In the case of flood waters escaping from natural streams, we view them, it is true, as a common enemy, against which we may protect ourselves without the commission of a wrong; but after all, this declaration is used in view of the means of defense resorted to, rather than in the abstract. * * *

"In the case of surface waters having no defined channels of escape, and the owner of the land upon which they are found being impotent to rid himself of their presence, the law wisely provides that the laws of nature shall be left untrammeled in their disposition."

The real question in cases like this is: Had the party sued the right to do the thing complained of? In this case did the admitted acts of the appellants, the consequences being what they were, subject appellants to the legal liability declared by the trial judge? In each of the foregoing cases the damage claimed arose from the building of the levees.

In the case at bar the damages claimed arose from, not the building of the dikes, but the manner of their use after said dikes had been there for more than sixty years. In other words, the evidence shows that the dikes or levees had been built and maintained for sixty years, or more, to keep the flow of the Coyote from defendant Boots' land. That at the time in question, namely, December 27, 1931, defendant Boots, with others, caused the waters then held back by the levees not to proceed as they would have by the help of the levees, but deliberately opened spillway gate No. 1 so as to irrigate the land of defendant Thorsen and by so opening gate No. 1 caused sufficient water not only to irrigate the Thorsen land, as was intended, but to go beyond the Thorsen land and overflow the cauliflower crop of respondents. From all the testimony in the case it is reasonable to assume that the trial court did not find that Boots and his codefendant Thorsen loosened the waters over the spillway of gate No. 1 in an effort either to protect his property or to deal with the flood waters as a common enemy, but that the water was deliberately caused to flow over the spillway to help his codefendant Thorsen to irrigate his land, and that the attempted defense of dealing with the water as a common enemy was not in the minds of defendants Boots and Thorsen at the time of opening gate No. 1.

Appellants seemingly contend that having built the levees they could act with them as they pleased, even to the extent of destroying same. Assuming, but not deciding, that this contention of appellants is true in the abstract, could appellants with impunity at the height of a flood deliberately tear out the levees thereby permitting the excess accumulation of water to overflow the lands theretofore protected by the levees and escape any liability in damages for such a ruthless act? We think not. Neither do we believe the law gives him the right with impunity, particularly at the height of a flood, to loosen through a spillway waters that have been allowed to accumulate behind the levees. A study of the cases cited by appellants shows them to be in accord with the views expressed herein. In Jones v. California Development Co., supra, at page 574 of 173 Cal., 160 P. 823, 827, quoting from "Water and Water Rights":

" 'Therefore no arbitrary rule can be laid down which will govern all cases, but each case must be dealt with upon its facts, applying the rule which will be reasonable under the circumstances, under the general rule that the water should be allowed, as far as possible, to seek its natural outlet.' * * *

"The underlying principle governing the decision of all these cases which deal with extraordinary water conditions, whether created by the ocean or by unexpected and unprecedented floods, is that in such stress the landowner may use every reasonable precaution to avert injury from his land, and whether or not his conduct be reasonable will be determined by existing conditions and not by after consequences; so that if the acts of the landowner be, in the light of the existing circumstances, not unreasonable, he will not be held liable for consequent damage which by these reasonable acts may be inflicted upon another landowner."

In Weinberg Co. v. Bixby, supra, at page 96 of 185 Cal., 196 P. 25, 29, after quoting from Jones v. California Development Co., supra, the court says: "We recognize the limitation in all of these cases that such right of self-protection does not permit of any obstruction of or interference with the natural channel of the stream or diversion of the flow of the water in such channel." And at page 109 of 185 Cal., 196 P. 25, 35: "* * * the right to repel flood waters is purely one of self-defense. The proprietor of land so threatened can ward off the danger by suitable obstruction to the invasion of his land at any point upon his own premises, and by any means that does not go beyond the limits of a defensive act, and become an aggressive diversion of the natural flow upon other proprietors." In this connection we desire to call attention to section 3514 of the Civil Code, which provides that, "One must so use his own rights as not to infringe upon the rights of another," and the interpretation of that section as found in Green v. General Petroleum Corp., 205 Cal. 328, 270 P. 952, 60 A. L. R. 475.

[10] 3. The last point raised is when the evidence shows that damage results from an independent cause as well as from the action of appellants, respondents must show what portion of damage is attributable to the acts of appellants and that it is error under such circumstances to hold the appellants liable for all of the damage. We agree with the principle of law stated. See Learned v. Castle, 78 Cal. 454, 18 P. 872, 21 P. 11. However, in view of our decision on the other matters this point becomes immaterial.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

140 Cal.App. 7

PEOPLE v. SWIFT.

Cr. 2558.

District Court of Appeal, Second District, Division 1, California.

July 19, 1934.

1. Criminal law ⇐989

Statute providing that on arraignment for judgment defendant must be asked whether he has any legal cause to show why judgment should not be pronounced against him is mandatory, and substantial compliance therewith is essential, since statute affects important rights of defendant who, when arraigned, may show that he is insane or that he has grounds for new trial or for arrest of judgment (Pen. Code, § 1200).

2. Criminal law ⇐966

Right of defendant to show grounds for arrest of judgment on his arraignment for judgment *held* waived, where record did not disclose that defendant demurred to information (Pen. Code, §§ 996, 1012, 1185, 1200, 1201).

3. Criminal law ⇐1186(4)

Defendant must show commission of error whereby he was denied some substantial right in order that judgment be reversed (Const. art. 6, § 4½).

4. Criminal law ⇐1177

Failure of trial court, on arraignment for judgment, to ask defendant whether he had any legal cause to show why judgment should not be pronounced against him, *held* not reversible error, where defendant made motion for new trial which was denied, and waived his right to show grounds for arrest of judgment and made no claim that he was insane (Pen. Code, §§ 996, 1012, 1185, 1200, 1201; Const. art. 6, § 4½).

5. Criminal law ⇐1134(8)

Question whether court erred in adjudging defendant an habitual criminal *held* not reviewable on his appeal from order denying motion to vacate judgment of conviction (Pen. Code, § 644).

6. Indictment and Information ⇐57

Statute requiring information to allege that defendant had served term for prior convictions in any state prison in order that defendant be adjudged an habitual criminal *held* not retroactive so as to apply to judgment pronounced before enactment of statute (Pen. Code, § 644).

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Otto R. Swift was convicted of burglary, and from an order denying his motion to have the minutes of the court corrected and to set aside the judgment of conviction, he appeals.

Order affirmed.

Otto R. Swift, in pro. per.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

HOUSER, Justice.

By information filed against him, defendant was accused in each of two separate counts of an information of the commission by him of the crime of burglary. In the same information, it was charged that prior to the commission of either of such offenses defendant had suffered two separate convictions of the crime of burglary; which fact, on his arraignment for plea, defendant admitted. Following his conviction on each of the counts of burglary of which he was accused in the instant action, defendant was sentenced as a habitual criminal. After he had been incarcerated in the state prison for a period of more than five years, and while still so imprisoned, he caused to be presented to the superior court a motion by which, in part, he sought to have the minutes of such court corrected so as to show, what he asserted was the fact, to wit, that at the time of his arraignment for sentence for conviction of the two crimes of burglary of which he had been convicted in said court, he was not asked either by the court, or by the clerk, as required by the provisions of section 1200 of the Penal Code, whether he had "any legal cause to show why judgment should not be pronounced against him." As a part of the same motion, presented at the same time as was the part thereof to which reference just has been had, in substance defendant moved that an order be made by the court by which the judgment theretofore rendered against him be "annulled, vacated and set aside." The ground asserted by defendant for such motion was "that the court exceeded its jurisdiction when it pronounced a judgment without first fully complying with section 1200, Pen. Code, and further that in adjudging defendant an habitual criminal it exceeded the jurisdiction it acquired under the particular pleadings, or information, made and filed in this cause." The instant appeal is from an order made by the trial court by which said motion was denied.

[1] Waiving any and all objections which properly may or might be raised respecting

the right of defendant to be heard on appeal from the order in question, but considering the suggested error on its merits, it appears that in the case of People v. Walker, 132 Cal. 137, 64 P. 133, 134, it was held that the provision of section 1200 of the Penal Code, to which attention just has been directed, is mandatory, and that "a substantial compliance therewith is essential, for they affect important rights of the defendant, who, when thus called upon, may show either that he is insane, or that there are grounds for a new trial or for arrest of judgment."

It therefore is indicated by judicial determination that the "legal cause," if any, which defendant might have urged "why judgment should not be pronounced against him" consisted in his making a showing either that he was then insane, that proper grounds existed why he should be awarded a new trial, or for arrest of judgment.

An inspection of the record of the proceedings had at the time when defendant was arraigned for judgment shows that prior to the rendition of such judgment defendant made "a motion for a new trial on the usual statutory ground"; which motion was thereupon submitted to the court without argument thereon by either of respective counsel, and thereupon was by the court denied.

[2] By the provisions of section 1185 of the Penal Code a motion in arrest of judgment is defined, and the grounds upon which such motion may be founded are specified, "unless the objection has been waived by a failure to demur," etc. Since by the record herein it is not disclosed that defendant demurred to the information, it must be considered that he waived his right to show any reason in arrest of judgment as a legal cause why judgment should not be pronounced against him. Sections 996, 1012, Pen. Code; 8 Cal. Jur. p. 447, and authorities there cited.

[3] But in addition to the grounds stated in section 1185 of the Penal Code, by the provisions of section 1201 of the same Code, as a cause that "may be shown against judgment," on his arraignment for sentence, defendant is entitled to show "that he is insane." However, in his brief herein appellant makes no such claim. In that connection, the record herein shows that immediately preceding the time when defendant was so arraigned, in addition to the motion made by him for a new trial, on the ground that the verdict of the jury "was not substantiated by the evidence or the law," defendant made a motion "to vacate the judgment." Although it is thus disclosed that defendant made each of the motions to which reference hereinbefore has been had, in his brief herein he says: "But one motion was made. There remained motions for a new trial, and motion in arrest of judgment." But aside from such condition, it is apparent that on a proper presentation of the motion which is the subject of this appeal, had defendant relied upon the possible fact that he was insane at the time when he was arraigned for sentence, he would have been required not only to specify such ground as a foundation for his motion, but also that he furnish evidence of that fact. Since he failed in that regard and does not now urge it as a reason that he either could or would have assigned such cause in arrest of judgment, he neither was at that time, nor is now, injured because he was not afforded an opportunity in that regard. It is well established in the law of appellate procedure that before an order or a judgment of the lower court will be reversed, the appellant must show not only that error was committed, but as well that because of such error the appellant has suffered in a denial of some substantial right which the law guarantees to him.

[4] In the case of People v. Wademan, 38 Cal. App. 116, 175 P. 791, the case of People v. Walker, 132 Cal. 137, 64 P. 133, was distinguished, and it was held that even though on arraignment for sentence all the requirements of section 1200 of the Penal Code were not substantially complied with, still, in accord with the provisions of section 4½ of article 6 of the Constitution, unless a "miscarriage of justice" resulted from such condition, the defendant had no real ground for complaint. And in the instant case, assuming (without deciding) the correctness of the claim that error was committed by the trial court, since it appears that defendant availed himself of certain of his rights in the premises, waived others, and now makes no pretense that he suffered any injury by reason of the denial (in effect) of his remaining right, it follows that no sufficient reason is shown why the order from which the appeal is taken should be reversed.

[5, 6] Although not entitled to raise the question on this appeal [People v. Van Buren (Cal. App.) 25 Pac. (2d) 32], in substance appellant complains that because the information by which he was charged with "prior convictions" contained no allegation that he had "served a term therefor in any state prison" (section 644, Pen. Code), the trial court committed error in adjudging him a habitual

criminal. But in addition to the lack of right in appellant to have such question determined in the instant appeal, a sufficient answer to such contention is that at the time when judgment was pronounced against defendant the requirement that, before he could be adjudged a habitual criminal, it must be shown that he had "served a term in any state prison," was not a provision of the statute.

The order from which the appeal is taken is affirmed.

We concur: CONREY, P. J.; YORK, J.



140 Cal.App. 12

FISH v. LA FON SYSTEM OF OUTDOOR ADVERTISING et al.

Civ. 8464.

District Court of Appeal, Second District, Division 2, California.

July 19, 1934.

1. Brokers ⇐86(1)

Evidence sustained finding that purchaser of advertising business paid to seller for account and use of plaintiff's assignor certain sum as commission which plaintiff was entitled to recover from seller.

2. Appeal and error ⇐1011(1)

Trial court's determination upon conflicting evidence that seller of advertising business procured money for account and use of plaintiff's assignor *held* conclusive.

Appeal from Superior Court, Los Angeles County; Minor Moore, Judge.

Action by Stanley B. Fish against the La Fon System of Outdoor Advertising, a corporation, and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Marshall Stimson and Noel Edwards, both of Los Angeles, for appellants.

Loeb, Walker & Loeb and Herman F. Selvin, all of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

From a judgment of $3,000 in plaintiff's favor defendants have appealed. The sole question is the sufficiency of the evidence to justify the following finding made by the trial court: "On March 28, 1930, Restop Realty Company and/or Foster & Kleiser paid to defendant LaFon System, Ltd., a corporation (formerly known as La Fon System of Outdoor Advertising, a corporation), and said defendant received for the account and use of one Kent Parrot the sum of Three Thousand Dollars ($3,000.00)." Said Parrot was plaintiff's assignor.

[1, 2] The evidence is undisputed that an option was given to one Allen to sell the outdoor advertising business of defendant La Fon System, Limited; that such option was not taken up but that Allen entered into negotiations with Foster & Kleiser for the purchase of said business, and that they reached the point where the president of said defendant corporation agreed to accept the sum of $220,000 for said business, with the understanding that $3,000 additional would be added to the purchase price by the buyer, which sum, however, was to be paid over to Parrot by said defendant as his commission on the deal, instead of being paid directly to him by the purchaser. In other words, the sum of $58,000, which included such commission, was to be paid in cash, and the balance of $165,000, represented by promissory notes, to be paid as follows: $50,000 on or before October 1, 1930; $50,000 on or before January 1, 1931; and $60,000 on or before April 1, 1931, with interest at 7 per cent. Objection was made to such proposed deal by the secretary-treasurer of said defendant, Wm. L. Stevens. There is evidence supporting the conclusion, however, that the original deal was not abandoned, but that the objections of Mr. Stevens were ironed out and the original deal "afterwards concluded by Mr. W. L. Stevens, our secretary and treasurer"—as Mr. La Fon, president of the corporation, testified. Mr. Stevens himself testified that Mr. La Fon told him that the original offer included $3,000 to be paid Mr. Parrot, and the evidence shows that such arrangement was not included in the objections he made to the first deal. It is very significant, in view of such testimony, that the only change in the purchase price was the payment of the entire amount in cash, in which a deduction of 2 per cent. was made, viz., $3,300, on the deferred payment of $165,000 originally proposed, making the total paid under the contract finally executed, $219,700. The first draft of the proposed contract arranged through Mr. Allen with the consent of Mr. La Fon, as well as the final draft exe-

cuted, is silent as to said $3,000, but the evidence admitted without objection shows that the purchase price of the business agreed upon in the first instance was $220,000, and in the final agreement, by reason of the cash payment, this was reduced to $216,700. In other words, $3,000 more than the agreed consideration for the purchase was paid appellant, and in our opinion there is evidence supporting the finding made by the court that the sum of $3,000 was paid and received by said defendant for the account and use of plaintiff's assignor. There is other evidence, it is true, supporting the contrary conclusion, but the conflict was determined by the trial court, and such determination is binding upon us.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; DESMOND, J.



140 Cal.App. 70

PEOPLE v. SCIUNZI.

Cr. 2552.

District Court of Appeal, Second District, Division 1, California.

July 21, 1934.

Criminal law ⟸998

Guilty plea made on attorney's advice and on his opinion that judge would not impose penitentiary sentence *held* not obtained by fraud so as to authorize setting aside final judgment and permitting plea of not guilty.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Angela Sciunzi pleaded guilty to burglary and was sentenced. From an order denying defendant's motion to set aside the judgment and to permit her to plead not guilty, she appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

CONREY, Presiding Justice.

According to information filed, appellant, with two others was charged with several acts of burglary, and one other offense. Upon her plea of guilty under one of the burglary counts she was sentenced to imprisonment in the state prison. After the judgment had become final, appellant by motion applied to the court for an order to set aside the judgment, and to permit her to withdraw her plea of guilty and plead not guilty. The present appeal is from the court's order denying that motion.

It is contended by appellant that her plea of guilty was obtained under circumstances amounting to extrinsic fraud. The evidence on this point is in the form of affidavits. From these affidavits it appears that appellant made her plea of guilty upon the advice of her attorney, who informed her that it was his opinion that if the case were brought to trial under a plea of not guilty she probably would be convicted on several counts. The only additional fact of any significance is that said attorney in his affidavit stated that before the plea of guilty was entered he discussed the case with the deputy district attorney in charge of the case, and that said deputy, Mr. McIsaac, said that if the defendant would plead guilty to one count of burglary in the second degree, that it was his opinion that the judge would not send the defendant to the penitentiary. The attorney in his affidavit said that he informed appellant of this conversation and advised her to plead guilty to one count, with the hope of getting nothing more than a county jail sentence. But Mr. McIsaac in his affidavit denied the above-mentioned statement attributed to him. We must assume that the court found the fact to be in accord with the affidavit of the deputy district attorney.

We therefore have a case where a defendant in pleading guilty to a charge of felony acted solely upon advice of her counsel representing her in the case, and in reliance upon the stated opinion of such counsel that under a plea of guilty she would not be sent to the penitentiary. This falls far short of being a fraudulently obtained plea. It is not at all parallel to the situation disclosed in People v. Schwarz, 201 Cal. 309, 257 P. 71, relied upon by appellant here. In fact, we think that this is a frivolous appeal.

The order is affirmed.

We concur: HOUSER, J.; YORK, J.

⟸For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

PEOPLE v. ROLLER.

Cr. 1793.

District Court of Appeal, First District, Division 2, California.

July 18, 1934.

Hearing Denied by Supreme Court Aug. 16, 1934.

Robbery ⊂⇒24(1)

Evidence sustained conviction for robbery in first degree.

Appeal from Superior Court, San Francisco County; I. L. Harris, Judge.

Robert Roller was convicted of robbery in the first degree, and he appeals from the judgment and an order denying him a new trial.

Judgment and order affirmed.

See, also (Cal. App.) 32 P.(2d) 155.

Robert Roller, in pro. per.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

NOURSE, Presiding Justice.

In a trial before a jury the defendant was convicted upon an information charging robbery, and the jury fixed the offense as of the first degree. The defendant appeals from the judgment and from the order denying him a new trial.

The sole ground raised is that the evidence is insufficient to sustain the verdict and the degree of the crime.

The complaining witness testified that, as he was about to enter his automobile parked on a side street near a large hotel in the business section of San Francisco, the appellant approached the right-hand side of the car and, displaying an automatic pistol, ordered him to get into the car and drive him "out into the country." Appellant compelled the witness to drive him about town until they had reached an unfrequented street, when he compelled him to stop. Appellant then took from the witness about $9 in money. Throughout the ride the weapon was held at the back of the witness' neck.

There is no question of error in the admission of evidence, in the instructions to the jury, or in the identification of the appellant. Appellant argues that the evidence is inherently improbable, but we are satisfied that it is sufficient to sustain the verdict. He argues that the "weapon" might have been a water pistol because the complaining witness saw it only in the dark. But the witness testified that it was an automatic, and the appellant did not take the stand to support his defense. There is no error in the record.

The judgment and the order denying a new trial are both affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

140 Cal.App. 51

EAST-WEST REFINING CO. v. COWAN et al.

Civ. 8480.

District Court of Appeal, Second District, Division 2, California.

July 20, 1934.

1. Appeal and error ⊂⇒1011(1)

Trial court's finding on conflicting evidence that gasoline delivered after expiration of written contract was to be sold at best prices seller could make and not at rate fixed by contract unless buyer was notified of change *held* conclusive.

2. Sales ⊂⇒357(1)

In action for purchase price of gasoline sold at best prices seller could make, presumption exists that prices charged were best prices seller could make (Code Civ. Proc. § 1963 (19).

3. Sales ⊂⇒359(1)

In action against buyer for purchase price of gasoline sold at best prices seller could make, evidence *held* to support judgment for seller.

4. Interest ⊂⇒47(1)

Allowance of interest from date of commencement of action for purchase price of gasoline *held* not error, where payment was demanded before commencement of action (Usury Law [St. 1919, p. lxxxiii], § 1; Civ. Code, § 3302).

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Action by the East-West Refining Company against S. B. Cowan, individually, and S. B. Cowan, doing business under the fictitious firm name and style of the Triangle Orange County & Santa Ana Express, and others.

From a judgment in favor of plaintiff against named defendant, he appeals.

Affirmed.

Davis & Thorne and H. J. Bischoff, all of Los Angeles, for appellant.

Joseph Musgrove, Fred O. McGirr, and Thomas H. Cannan, all of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

From a judgment against him entered on findings of fact and conclusions of law filed by the trial judge, defendant Cowan has appealed.

The complaint was based on the common counts. Count I charged, in substance, that defendants became indebted to plaintiff in the sum of $5,477.70 for goods, wares, and merchandise sold and delivered to them at their special instance and request within two years last past, and for which defendants and each of them promised and agreed to pay; further alleging the failure to pay said sum or any part thereof. The findings support such allegation. The evidence shows without dispute that for the year ending December 31, 1928, respondent, under a written contract, sold appellant the gasoline required by him at his place of business for 6 cents per gallon "under the Standard Oil Company service station prices for 'Red Crown' gasoline in Los Angeles at time of delivery," within certain maximum and minimum price limits; that it sold and delivered gasoline to appellant after December 31, 1928, and until September 2, 1930, at which time the latter's business was taken over by a purchaser; that invoices were prepared by respondent accompanying each delivery, specifying the number of gallons delivered and the price per gallon, one copy of which was left with appellant or some one in his employ and one was signed by appellant or such employee and returned to respondent's deliveryman; that monthly statements were sent by respondent to appellant showing dates of delivery, numbers of such invoices and the amount of each charge, as well as the aggregate for the month, the balance owing from the previous month and payments credited. The amounts charged for gasoline on such invoices were paid by appellant without objection as to price or otherwise until the month of May, 1930, and the judgment entered is for the months from May 1 to September 2, 1930.

[1] Appellant urges that there is no evidence to support the findings and judgment. The serious conflict in the evidence is as to whether or not the gasoline delivered after the expiration of said written contract was to be sold, as appellant claims, at the rate fixed by such contract unless appellant was notified of a change, or at the best prices seller could make, as claimed by respondent. The trial court settled such conflict by accepting respondent's evidence in that regard, and we are bound thereby.

It is also urged that there is no evidence of reasonable value of the gasoline furnished. No attempt was made to prove the reasonable value thereof.

[2, 3] Appellant contends that there is no evidence of an agreed price or that the prices charged are the best respondent could make. With such contention we cannot agree. The allegation of the complaint and the finding made are to the effect that appellant agreed to pay said sum of $5,477.70. The evidence which the court accepted is that respondent was to furnish said gasoline at the best price seller could make. It must be presumed, giving effect to the presumption of fair dealing in private transactions (Code Civ. Proc. § 1963 (19), that the prices charged were such prices. In other words, in our opinion respondent made prima facie proof of the agreed price sufficient to support the finding and judgment. There is other evidence in addition to that, showing that no objection was made by appellant at any time to the prices charged, although he accepted and used the gasoline, and that appellant agreed to pay the balance of the bill "as he collected the money from accounts that were due him," and that "he would make me [respondent's president] wait for it"; also that "there was nothing said that the bill was not due, and it was not disputed in any way, shape or form," or that the price was to be according to the written contract. Of course, such evidence is disputed, but in our opinion there is evidence supporting the judgment, and that is as far as we can go.

[4] Error is also claimed in the allowance of interest from the date of the commencement of the action. Section 1 of the initiative measure approved at the general election November 5, 1918 (Usury Law [Stats. 1919, lxxxiii]), provides that "the rate of interest upon the loan or forbearance of any money, goods or things in action or on accounts after demand * * * shall be seven dollars upon the one hundred dollars for one year and at that rate for a greater or less sum or for a longer or a shorter time"; and section 3302 of the Civil Code provides that

"the detriment caused by the breach of an obligation to pay money only, is deemed to be the amount due by the terms of the obligation, with interest thereon." The evidence supports the conclusion that payment of the obligation here was demanded September 2, 1930, so we do not see how appellant can complain under the facts expressly and impliedly found by the court, if the court fixed the demand on the day complaint was filed, September 16, 1930, the law providing, as it does, for the payment of interest on such demands.

Judgment affirmed.

We concur: STEPHENS, P. J.; DESMOND, J.



140 Cal.App. 55

PERRY v. BROWNE et al.

Civ. 8450.

District Court of Appeal, Second District, Division 2, California.

July 20, 1934.

Dismissal and nonsuit ⇐45

Statute requiring dismissal of action not brought to trial within three years after entry of order granting defendant new trial *held* applicable retroactively to action in which defendant was granted new trial 2½ years before effective date of act (Code Civ. Proc. § 583, as amended by St. 1929, p. 683).

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Action by Will H. Perry against Samuel L. Browne, Irvin C. Taplin, and others. From an order granting defendant Taplin's motion to dismiss the action, plaintiff appeals.

Affirmed.

Arthur Wm. Green and C. H. Scharnikow, both of Los Angeles, for appellant.

Harry T. Young, of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

November 5, 1928, a judgment was entered in this case in favor of plaintiff and against defendants. December 3, 1928, defendant Taplin moved for a new trial which was granted by order dated January 21, 1929. On June 1, 1931, the case was set for trial on September 10, 1931, and on the latter date was continued to November 10, at which time it was ordered off calendar. "No continuances were had by the written consent or stipulation of said defendant, Irvin C. Taplin." February 15, 1932, Taplin filed his motion to dismiss the action on the ground that plaintiff had failed to bring it to trial within three years after the entry of the order granting a new trial, which motion was granted by order entered February 19, 1932. From such order plaintiff has appealed.

Section 583 of the Code of Civil Procedure was amended in 1929 (St. 1929, p. 683) by adding the following paragraph, on which said motion was based: "When, in any action after judgment, a motion for a new trial has been made and a new trial granted, such action shall be dismissed on motion of defendant after due notice to plaintiff, or by the court of its own motion, * * * unless such action is brought to trial within three years after the entry of the order granting a new trial, except when the parties have stipulated in writing that the time may be extended." It will be seen that a period of three years and twenty-four days elapsed between the dates on which said order granting a new trial was entered and the motion to dismiss was filed, and that the facts bring this case squarely within such amendment if the same applies. Appellant urges that the amendment is not retroactive and does not apply to orders granted before its effective date, August 14, 1929, that, if it does apply to such orders, the only effect was to require the action to be brought to trial within three years from such effective date, and that, as approximately six months still remained of such period, the action was prematurely dismissed.

The language in question is clearly and expressly retroactive. Speaking from its effective date, it says "any action" in which "a motion for a new trial has been made and a new trial granted." Undoubtedly the section would not be held applicable to a case where the period of three years had already expired at the effective date, or such part of it as to create a hardship on a litigant by practically depriving him of the opportunity to bring his case to trial within the period. No such situation is shown here. Appellant was bound to know on August 14, 1929, that he must bring his case to trial within three years from January 21, 1929, or by January 21, 1932. He had two years and six months in which to

take such action but did not. We think he should have done so. See Parker v. Kane, 4 Wis. 1, at page 28, 65 Am. Dec. 283, the language of which, although used with reference to a statute of limitations, is equally pertinent here.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIG, J.



140 Cal.App. 47

BRADFORD et al. v. BROCK et al.

Civ. 8422.

District Court of Appeal, Second District, Division 2, California.

July 20, 1934.

Hearing Denied by Supreme Court Sept. 18, 1934.

1. Trial ⇐295(6)

Instruction that owner of automobile and his employee driving automobile were liable for death of deceased in automobile accident even though they had not been guilty of negligence and even though deceased had been guilty of contributory negligence was prejudicially erroneous, effect of which was not mitigated when read in connection with entire charge (Civ. Code, § 1714; Code Civ. Proc. § 377).

2. Death ⇐104(4)

In action for death, instruction that savings which deceased might have accumulated if she had lived and which plaintiffs might have inherited upon her death were proper basis on which to award damages was prejudicially erroneous where it was probable that jury awarded damages on basis of instruction.

3. Trial ⇐333

Verdict against owner of automobile for $2,500 and against driver of automobile for $2,500 should be construed as being for total sum of $2,500 against both defendants and judgment entered to that effect (Civ. Code, § 1714¼).

4. Automobiles ⇐247

Where verdict of less than $5,000 is returned against driver of automobile for injuries to one person, and jury seeks to hold owner for damages growing out of same occurrence, verdict against owner must be in same sum as against driver (Civ. Code, § 1714¼).

Appeal from Superior Court, Los Angeles County; Henry B. Neville, Judge.

Action by Lillian M. Bradford and others against Paul M. Brock and another. From a judgment in favor of the plaintiffs, the defendants appeal.

Reversed, and remanded for retrial.

See, also, 128 Cal. App. 326, 16 P.(2d) 1035.

Jennings & Belcher, of Los Angeles, for appellants.

Sherman & Sherman, of Los Angeles, for respondents.

SCOTT, Justice pro tem.

Plaintiffs, heirs at law of Elizabeth Otley, deceased, brought this action to recover damages for her death. She was struck and killed by an automobile driven by defendant Brock, an employee of his codefendant stationery company. The automobile was owned by the employer and the driver was in the course of his employment at the time of the accident. Deceased, in company with a young boy, was crossing Wilshire boulevard at the intersection of Crescent Heights boulevard in the city of Los Angeles at about 7:30 o'clock in the evening of January 29, 1930, when the accident occurred, resulting also in the death of the boy. The jury returned a verdict for plaintiffs against both defendants, and, from judgment thereupon entered, the latter have appealed.

[1] Two instructions given by the court were so prejudicially erroneous that a reversal of the case is necessary. Plaintiffs' instruction No. 14, as it was given, reads: "The court instructs the jury that Elizabeth Otley may have been careless and negligent in receiving injuries which caused death and yet her negligence may not be contributory negligence. It may not be a direct cause, or proximate, and if the injury was inflicted by the defendants without any direct help from the negligence of Elizabeth Otley, then the defendants would still be liable. If the injury or injuries which caused death, if you find that they did cause death, could have been avoided, in spite of Elizabeth Otley's negligence, if any, by the exercise of due care on the part of the defendants, then the defendants would be liable." This instruction was contrary to the provisions of Civil Code, § 1714, and section 377 of the Code of Civil Procedure, on which this action was in part predicated. It told the jury in effect that defendants were liable even though they had

not been guilty of negligence and even though deceased had been guilty of contributory negligence, and is obviously erroneous. Respondents do not suggest that the instruction is correct, and cite no authority to support it. Even when read in connection with the court's entire charge its harmful error is not mitigated.

[2] Plaintiffs' instruction No. 8, likewise given, is also erroneous, because it gave the jury a wrong measure of damages to apply to the case. Instructions 7 and 8, which were read together, are as follows: (7) "The court instructs the jury: That if you find for the plaintiffs, merely determine from the evidence the probable amount and value of the pecuniary aid, if any, which the said Elizabeth Otley would probably have contributed after the 29th day of January, 1930, if she had not been killed, to the plaintiffs Lillian M. Bradford, Constance E. Britton, Evelyn I. Smith and Albert R. Otley, and fix the damages, if any you find, in such sum as you find from the evidence if paid in hand at this time would fairly compensate them for the pecuniary loss, if any, resulting to them by reason of the death of the said Elizabeth Otley." (8) "The court instructs the jury: In estimating such damages, if any, you award the plaintiffs you may and should consider, so far as shown by the evidence, the age and occupation of the said Elizabeth Otley at the time of the injury which caused her death; her bodily health and ability to earn money; her habits as to industry, thrift and economy, if any such have been shown; the contingencies of life such as ill-health, non-employment, increase or diminution in earning capacity as age advances, and all other facts and circumstances in the evidence tending to show the amount, if any, that the estate might have accumulated if she had lived out the term of her natural life, and award plaintiffs such a sum as you believe from the evidence, under the rules herein stated, will be a fair and reasonable compensation for the pecuniary loss sustained by the plaintiffs as a result of their mother's death."

The latter instruction told the jury in effect that the savings of deceased which she might have accumulated if she had lived and which plaintiffs might have inherited upon her death were a proper basis on which to award damages in this case. That is not the rule in this state. In Burk v. Arcata & Mad River R. R. Co., 125 Cal. 364, 57 P. 1065, 1066, 73 Am. St. Rep. 52, the court, after reviewing the history of the statute giving this right of action to the heirs of a deceased, expressly repudiated the above-suggested rule as "opposed to reason and the trend of the decisions." It is rejected also in Simoneau v. Pacific Electric Ry. Co., 159 Cal. 494, 507, 115 P. 320, 326, as "out of harmony, both with our statutes and decisions." L. R. A. 1916E, 118, note.

The testimony in support of the claim of pecuniary loss to the heirs is so unsubstantial and uncertain that it appears probable that the jury awarded damages on the basis of the erroneous theory contained in instruction No. 8, rather than on any proper basis. The deceased was 59 years old, working as a housekeeper at $65 per month, room, and board. Plaintiffs were a man and three women, all married, and at the time of trial the youngest was 27 years of age. The contributions of deceased were small gifts and small sums of money, and were prompted more by affection than necessity. The evidence in support of the damages claimed being so meager, an erroneous instruction as to the measure to be applied could not be otherwise than prejudicial.

[3, 4] The jury returned a verdict as follows: "We the jury in the above entitled action, find for the plaintiffs and assess the damages at $2500 against Paul M. Brock, and $2500 against Schwabacher-Frey Stationery Company." Judgment thereon was entered for plaintiffs for $2,500 as against Brock and $2,500 as against the stationery company, being a several judgment on which plaintiffs could legally collect a total of $5,000. The court should have construed the verdict as being for a total sum of $2,500 against both defendants and, if otherwise satisfied with its correctness, should have entered judgment to that effect. Where a verdict is returned against the operator of an automobile for a sum less than $5,000 for injuries to one person, and the jury seeks to hold the owner for damages growing out of the same occurrence, under Civ. Code § 1714¼ its verdict against such owner must be in the same sum as against the operator. Kerrison v. Unger (Cal. App.) 27 P.(2d) 927; Marriott v. Williams, 152 Cal. 705, 93 P. 875, 125 Am. St. Rep. 87. In Snodgrass v. Hand (Cal. Sup.) 31 P.(2d) 198, cited by respondents, the jury apparently intended to return a verdict against the operator of the car for $10,000, and was limited under the Code section to $5,000 as against the owner; and, judgment for those amounts being entered, it was sustained on an appeal which was taken on the judgment

roll alone. Such a determination is not in conflict with the rule here announced. The reason for the rule is obvious. If the detriment to plaintiffs caused by the operator of the car is found by the jury to be $2,500, they should not be permitted to collect that sum from him and then go to the owner or employer, whose liability arises out of his relationship to the car or its operator, and not out of any independent act, and collect a further like sum, thereby obtaining double the amount to which plaintiffs are entitled under the jury's decision.

It being evident that the case must be remanded for a retrial on all of the issues, it appears unnecessary to discuss the further points urged by appellants.

Judgment reversed.

We concur: STEPHENS, P. J.; CRAIG, J.

140 Cal.App. 4

SMITH et al. v. ROTHSCHILD.

Civ. 9427.

District Court of Appeal, First District, Division 2, California.

July 19, 1934.

Appeal and error ⇐1127

Where motion to dismiss appeal or affirm judgment, on grounds that appeal is frivolous and so unsubstantial as not to require further argument, is made for purpose of advancing hearing of appeal on merits or to avoid preparation of brief under court rules, motion should be denied.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Proceeding by Louis E. Smith and another against Cora Rothschild. From an adverse judgment, defendant appeals. On motion to dismiss or affirm.

Motion denied.

John H. Black and J. M. Wallace, both of San Francisco, and Ross & Ross, of Redwood City, for appellant.

Norman S. Menifee, of Redwood City, for respondents.

NOURSE, Presiding Justice.

The plaintiffs have moved to dismiss or affirm under the rule upon the grounds that the appeal is frivolous and presents grounds so unsubstantial as not to require further argument. The motion was accompanied by a typewritten brief fully arguing the merits of the appeal. When this motion is made for the purpose of advancing the hearing of an appeal on the merits, or to avoid preparation of a brief under the rules, it should be denied. The motion in this case is of that character.

Motion denied.

We concur: STURTEVANT, J.; SPENCE, J.

140 Cal.App. 1

SCHWERIN et ux. v. H. C. CAPWELL CO.

Civ. 9289.

District Court of Appeal, First District, Division 2, California.

July 19, 1934.

Hearing Denied by Supreme Court Sept. 15, 1934.

1. Carriers ⇐284(2)

Department store company in operating escalator need not provide against casualties, caused by strangers, which cannot reasonably be anticipated, even if charged with highest degree of care as common carrier.

2. Carriers ⇐284(2)

Department store company's negligence, rendering it liable for injuries to customer struck by children ascending downward moving escalator, depends on what reasonable person in its position would have done under circumstances.

3. Carriers ⇐320(16)

Evidence *held* insufficient to take to jury question of department store company's negligence in failing to maintain guards at entrance to escalator, which children attempted to ascend against downward movement thereof, causing injuries to customer.

4. Negligence ⇐10

Foundation of liability for negligence is knowledge or opportunity by exercising reasonable diligence to acquire knowledge of peril subsequently resulting in injury.

5. Negligence ⇐136(19)

Plaintiffs in action against department store company for injuries to customer,

struck by children ascending downward moving escalator, were not entitled to go to jury on theory of attractive nuisance, where complaint did not tender such issue nor evidence bring case within such doctrine.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Edward Schwerin and wife against the H. C. Capwell Company, a corporation. From a judgment of nonsuit, plaintiffs appeal.

Affirmed.

Vincent H. O'Donnell and Francis W. Murphy, both of San Francisco, for appellants.

Brown, Ledwich & Rosson, of Oakland, for respondent.

NOURSE, Presiding Justice.

The defendant owns and operates a large department store having six floors and a basement. To enable its customers to go from one floor to another the defendant maintains elevators, escalators, and ordinary stairways. While a customer in the store, Mrs. Schwerin chose an escalator to go from the first floor to the basement to make a purchase. When about halfway down she was struck by two small boys who were attempting to ascend against the downward movement of the escalator. In their suit for damages Mrs. Schwerin and her husband pleaded negligence specially, basing their case on the allegations that the children were permitted to play on the escalator "with the knowledge and consent" of the defendant and that the latter "failed and neglected to control the conduct of said children." At the close of plaintiffs' case the trial court granted the defendant a nonsuit.

[1] On this appeal it is conceded that the mechanical condition of the escalator was perfect and that it was operated in the usual and customary way with the usual guard rails and similar protective devices. The appellants found their appeal on the ground that the jury should have been permitted to determine whether the respondent should have maintained personal guards at the top and bottom of the escalator to prevent a stranger from causing any injury to a customer using the escalator. The question reduced to its simplest form is whether, assuming that, in the operation of the escalator, the respondent was charged with the highest degree of care as of a common carrier, was the respondent obliged to provide against unknown casualties caused by strangers which could not reasonably have been anticipated? The question is answered in the negative in Cary v. L. A. Ry. Co., 157 Cal. 599, 603, 108 P. 682, 684, 27 L. R. A. (N. S.) 764, 21 Ann. Cas. 1329, where the Supreme Court, quoting from Holt v. Southwest Mo. E. R. Co., 84 Mo. App. 443, says: "A carrier of passengers is not obliged to proceed to provide against casualties which have not been known to occur before, and which may not reasonably be anticipated. * * * That which never happened before, and which in its character is such as not naturally to occur to prudent men to guard against its happening at all, cannot, when in the course of years it does happen, furnish good ground for a charge of negligence in not foreseeing its happening and guarding against that remote contingency."

To the same effect, see Morris v. Southern Pacific Co., 168 Cal. 485, 490, 143 P. 708; O'Neil v. Lynn & B. R. Co., 180 Mass. 576, 62 N. E. 983; Fanshaw v. Norfolk & P. T. Co., 108 Va. 300, 61 S. E. 790; Graeff v. Philadelphia R. R. Co., 161 Pa. 230, 28 A. 1107, 23 L. R. A. 606, 41 Am. St. Rep. 885; 10 C. J. 902, 903. In Tall v. Packet Co., 90 Md. 248, 44 A. 1007, 47 L. R. A. 120, and Takacs v. Detroit United Ry., 234 Mich. 42, 207 N. W. 907, the rule is stated that the liability of a carrier to a passenger for the acts of strangers or fellow passengers is relative, qualified, and contingent upon whether the carrier, or its agents, has, or from known conditions should have, knowledge of conditions from which mischief is to be reasonably apprehended, and has neglected to prevent the injury.

[2-4] Here there is no evidence of knowledge, and no evidence of any fact from which the jury might have inferred knowledge, that children would enter the escalator from the bottom or that they would attempt to ascend against the downward movement of the machinery. Plaintiffs' evidence was that such a thing had not been known to have occurred before the accident. Negligence in such a case is founded on what a reasonable person in the position of the carrier would have done under the circumstances. Of this there was no evidence which would have supported a finding that the respondent was negligent. So far as it appears from the evidence the boys may have entered the escalator at the top in the customary way and, after going part way down, may have turned and run upward. Thus, when appellants argue that the respondent should have maintained guards at

the entrance to the escalator, they ask the jury to conjecture whether such omission was in fact negligence because harm ensued. But the foundation of liability for negligence "is knowledge—or what is deemed in law to be the same thing, opportunity by the exercise of reasonable diligence to acquire knowledge—of the peril which subsequently results in injury." 20 R. C. L., p. 13. Mr. Justice Holmes said, in Commonwealth v. Pierce, 138 Mass. 165, 52 Am. Rep. 264: "We admit that, if the thing is generally supposed to be universally harmless, and only a specialist would foresee that in a given case it would do damage, a person who did not foresee it, and who had no warning, would not be held liable for the harm. If men were held answerable for everything they did which was dangerous in fact, they would be held for all their acts from which harm in fact ensued. The use of the thing must be dangerous according to common experience, at least to the extent that there is a manifest and appreciable chance of harm from what is done, in view either of the actor's knowledge or of his conscious ignorance."

[5] In their reply brief the appellants suggest that they might have been entitled to go to the jury on the theory that the instrument was an attractive nuisance. Their complaint did not tender that issue and their evidence failed to bring the case within the attractive nuisance doctrine.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



140 Cal.App. 112

PEOPLE v. STUART.

Cr. 1388.

District Court of Appeal, Third District, California.

July 23, 1934.

Criminal law ⇐1182

Where transcript on appeal was filed in reviewing court June 21, no brief was filed for appellant, cause was regularly placed on calendar for oral argument on July 23, and no appearance was made for appellant when case was called for hearing, judgment of conviction was affirmed (Pen. Code, § 1253).

Appeal from Superior Court, Sutter County; Arthur Coats, Judge.

Donald Edwin Stuart was convicted of assault with a deadly weapon, and he appeals.

Affirmed.

J. E. Ebert, of Marysville, and Loyd E. Hewitt, of Yuba City, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

PER CURIAM.

The appellant was convicted in the superior court of Sutter county of a felony, to wit, assault with a deadly weapon.

The transcript on appeal was filed in this court June 21, 1934. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on July 23, 1934. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order are affirmed.



140 Cal.App. 80

GAGNEBIN et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 1150.

District Court of Appeal, Fourth District, California.

July 21, 1934.

1. Master and servant ⇐375(2)

Injuries sustained by employee traveling to and from place of employment do not "arise out of and in course of employment," except where employee is going to or from place of employment on substantial mission for his employer (St. 1917, p. 831, as amended).

[Ed. Note.—For other definitions of "Arising Out of Employment" and "Course of Employment," see Words & Phrases.]

2. Master and servant ⇐375(1)

Employee traveling from one place of employment to another in course of his employment is within Compensation Act (St. 1917, p. 831, as amended).

3. Master and servant ⊂⊃375(1)

Whether employee who deviates from direct route for private purpose while traveling from one place of employment to another is within Compensation Act depends on whether mission for employer is major factor in journey or whether employee has temporarily left scope of employment (St. 1917, p. 831, as amended).

4. Master and servant ⊂⊃375(1)

Injuries sustained by employee while traveling from one place of employment to another *held* compensable as "arising out of and in course of employment," where employee had been instructed by employer to take particular route, to carry fellow employee, and to take gasoline and start engine before finally going home, even though employee purchased tires for his automobile while on way, where such purchase was intended to enable employee to carry out special phase of his employment and was done upon direct order of employer (St. 1917, p. 831, as amended).

Proceeding under the Workmen's Compensation Act by Lois Gagnebin and another for the death of Elden J. Gagnebin, opposed by Will Gill, employer, and the American Employers' Insurance Company, insurance carrier. To review an order of the Industrial Accident Commission denying compensation, Lois Gagnebin brings certiorari.

Annulled and remanded.

Leroy McCormick and J. A. Chase, both of Visalia, for petitioners.

Everett A. Corten, of San Francisco, for respondents.

BARNARD, Presiding Justice.

This is a proceeding to review a decision of the respondent commission denying compensation on account of the death of one Elden J. Gagnebin, who was the husband of one of the petitioners and the father of the other.

The respondent Gill operated several ranches in Madera and Fresno counties and also a feed yard at Calwa, near Fresno. For some two years prior to the time here in question Elden J. Gagnebin was employed as a farm laborer by Gill and resided upon one of these ranches, which was located about sixteen miles east of the city of Madera. Upon this ranch, which consisted of about 5,600 acres, there were 550 head of cattle for which water had to be pumped by means of a gasoline engine. One A. C. Thompson was manager and foreman for all of the Gill properties in these two counties, and resided on another ranch some distance west of Madera. Under instructions from Thompson, Gagnebin went to the feed yard at Calwa on the morning of October 16, 1933, and spent the day there assisting in loading fertilizer. Leaving there at 6 p. m., he went to Madera, and, while proceeding from there to a pumping plant on the ranch where he lived, he received injuries in an automobile accident which resulted in his death.

After a hearing, the respondent commission found that Gagnebin was in the employ of the respondent Gill at the time in question; that the third respondent was Gill's insurance carrier; that both employer and employee were subject to the provisions of the Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 831, as amended); and that the said employee had suffered injuries in a traffic accident on the highway about one and one-half miles from Madera. It was further found, however, that said injury did not arise out of or in the course of his employment, and that the errand upon which the employee was engaged at the time of the accident was personal and not incidental to any service required by his employment. A rehearing was asked for on three grounds, namely: (1) That fraud on the part of the insurance carrier resulted in the petitioners being unrepresented by counsel at the hearing, in that an adjuster for the insurance company called upon the petitioner Lois Gagnebin and advised her, in effect, that she did not need a lawyer, that no one was fighting the case, that there would be no controversy, and that she would receive compensation. (2) That the evidence does not justify the findings of fact. (3) The discovery of new evidence. Attached to the petition for rehearing is an affidavit by A. C. Thompson, manager for respondent Gill, containing a number of material facts which were not brought out at the hearing. The respondent insurance company answered the petition for rehearing, and included an affidavit, the effect of which was to deny that any fraud was used in the respect claimed. A rehearing was denied, and this proceeding followed.

The essential question here presented is whether the injury suffered by the deceased arose out of or in the course of his employment. It is undisputed that the direct way from Calwa to the ranch on which the deceased lived was over a road leading straight north from Fresno, a part of which was pav-

ed and a part of which was an ordinary country road, while the highway to Madera runs northwesterly from Fresno. The difference between the two routes, in mileage, is not disclosed by the record. At the hearing before the referee, petitioners were not represented by counsel, although the insurance carrier was so represented. While the facts and circumstances in connection with the action of the deceased in going by way of Madera were the most essential matters in connection with the hearing, very few questions were asked concerning them, and it appears from the record that the facts in that regard were not thoroughly gone into. This especially appears in the light of the manager's affidavit, which is a part of the petition for rehearing.

[1-3] In London G. & A. Co. v. Industrial Accident Commission, 190 Cal. 587, 213 P. 977, it is said: "According to the provisions of that act an employee, in order to be entitled to compensation, must have been injured by an accident arising out of and in the course of his employment. As a general rule injuries sustained while an employee is traveling to and from his place of employment are held not to come within the provisions of the act (Ocean Accident & G. Co. v. Industrial Acc. Comm., 173 Cal. 313, 159 P. 1041, L. R. A. 1917B, 336; Bradbury's Workmen's Compensation [3d Ed.], p. 468), although in a broad sense they may be said to be incidental to his employment. Exceptions to the general rule are cases where an employee, either in his employer's or his own time, is going to or from his place of employment on some substantial mission for his employer growing out of his employment. In such cases it is held that the employee is within the protection of the act. But the mission must be the major factor in the journey or movement, and not merely incidental thereto; that is to say, if incidental to the main purpose of going to or from the place of employment, it would not bring such person under the protection of the act. If, on the other hand, the main purpose of going or coming was to perform some act arising out of his employment, he would be under the protection of the act although, incident to the performance of such duty, he might be going or coming from his home."

In Marks' Dependents v. Gray, 251 N. Y. 90, 167 N. E. 181, 183, the court said: "The test in brief is this: If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own. * * * If, however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been canceled upon failure of the private purpose, though the business errand was undone, the travel is then personal, and personal the risk."

The general rule that an employee is not within the provisions of the act while traveling to and from his place of employment is not applied in cases where the employee, in the course of his employment, is obliged to travel from one place of employment to another. Federal Mutual Liability Ins. Co. v. Industrial Accident Commission, 94 Cal. App. 251, 270 P. 992; Western Pacific Railroad Co. v. Industrial Accident Commission, 193 Cal. 413, 224 P. 754. In such cases where an employee deviates from the direct route for a private purpose the question of whether he is then within the provisions of the act usually depends upon whether, under the circumstances, his mission for his employer is the major factor in the journey or whether the circumstances are such that it may be said that the employee has, for the time being, left the scope of his employment.

[4] Examining the evidence before the respondent commission in the light of these rules, the following appears: The loading of fertilizer at Calwa was an annual occurrence and took about twenty days. In order to facilitate the same, the manager of the ranches took for the purpose men who were familiar with operating the loading machinery. To this end he instructed the deceased to assist in this work. October 16, 1933, was the first day on which this work was done during that season, and the deceased worked at Calwa from 6 o'clock a. m. to 6 o'clock p. m. The men thus engaged were paid an extra compensation for this period because the work required longer hours and to cover the cost of transportation or board and room at or near Calwa. While it was optional with most of the men whether or not they would go back and forth, the deceased was the only employee on the ranch where he lived, and, since it was necessary for him to be there to run the engine to pump water for the cattle, the manager instructed him to return to the ranch each night and attend to his duties there. On the morning of this day the manager had taken another employee named Buckalew, who lived at the manager's home, to Calwa to take part in this work. About noon on October 16 the deceased told the manager that two of the tires on his

automobile were in such bad shape that he could not safely drive between the ranch and Calwa, and that he was not financially able to procure new tires. He requested the manager's assistance in procuring the tires, and, because of the importance of having him at Calwa on time in the morning and also having him on the ranch in the evening to operate the engine and pump, the manager agreed to buy the tires for him and deduct their cost from his pay check. It was necessary for the manager to go to Madera that afternoon to attend to some business matters for the ranches and to purchase feed for the stock. During the afternoon, and before he left, he suggested to the deceased that while in Madera he would arrange for the purchase of the tires and instructed the deceased to bring Mr. Buckalew to Madera after the day's work at Calwa was finished. The manager states that it was necessary for him to make arrangements for Buckalew's transportation to Madera, to himself wait at Calwa until the day's work was finished, or to return from Madera to Calwa for Buckalew. He also states that it was a great convenience to him to have the opportunity of transacting business in Madera that afternoon without the necessity of making a return trip to Calwa, and that he might have arranged for the deceased to bring Mr. Buckalew to Madera even if the tires were not to have been purchased. Acting upon the manager's instruction, the deceased brought Buckalew to Madera, arriving there about 7 p. m. He met the manager there at a service station and two tires were secured. Among his other duties the deceased was required to take gasoline to the ranch for the purpose of running the engine and was furnished a five-gallon can for that purpose. While at Madera the manager noticed that he had a can of gasoline in his car, and instructed him to stop on his way home and start the engine and pump, which were located about three-fourths of a mile nearer to Madera than was the house occupied by the deceased. While on the direct route from Madera to the place where the engine and pump were located, the accident happened with which we are here concerned.

At the time in question the deceased was proceeding from one place of employment to another upon the instruction of his superior. He had been ordered to come by way of Madera and to bring a fellow employee. At Madera he was instructed to take the gasoline to the ranch and to start the engine before proceeding to his home. Not only does it appear that at all times, under definite instructions, he was performing services for his employer, but, in our opinion, the matter of purchasing the tires does not, under the circumstances, constitute a deviation from the course of his employment. As far as the deceased was concerned, the tires could have been purchased at Fresno or at Calwa. They were purchased at Madera at the suggestion of the manager and for his convenience. While the deceased requested the manager's assistance in getting the tires, they became necessary at that time because without them the employee could not safely carry out his instructions to go back and forth between the two points of employment. If the matter of transporting a fellow employee to Madera and transporting the gasoline to the ranch be left out of direct consideration, the matter of the purchase of the tires was a matter designed and intended to enable the employee to carry out a special phase of his employment, it was done in order to facilitate his work, the immediate end in view being a benefit to his employer, and each and every act in connection with the supposed deviation was done upon the direct order of his superior. It is also true that he was on a substantial mission for his employer at all times, and the purchase of tires for his own car was in fact merely incidental to the main purpose of carrying out the duties of his employment. The employee acted throughout under the instructions of his employer, and, in our opinion, it can neither be said that any deviation from the direct route between the two places of employment was for ends entirely personal to the employee nor that the major factor in the journey was not a mission for his employer.

For the reasons given, the findings and decision of the commission are annulled, and the matter is remanded for further action in accordance with the views herein expressed.

I concur: JENNINGS, J.

MARKS, J., being absent, does not participate herein.

140 Cal.App. 72

PEOPLE v. MARQUIS et al.

Cr. 2563.

District Court of Appeal, Second District, Division 2, California.

July 21, 1934.

Rehearing Denied Aug. 4, 1934.

Poisons ⇐9

Evidence that state narcotic bureau officers entered apartment from which odor of opium emanated, that they found two jars of opium and articles used by opium smokers, and that accused, who was renting apartment, had stated opium found was his, *held* to support conviction for illegal possession of opium, where accused made no denial that drug was in his possession at time of raid (St. 1907, p. 124, as amended).

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Gigi Marquis and Abe Allen were charged with criminal offenses. Abe Allen was convicted of violation of the State Narcotic and Drug Act for possession of opium, and he appeals.

Affirmed.

Richard H. Cantillon, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

SCOTT, Justice pro tem.

Appellant was convicted of violation of the State Narcotic and Drug Act (St. 1907, p. 124, as amended) for possession of opium. He contends that the evidence is not sufficient to support the verdict of the court.

Officers of the state narcotic bureau entered an apartment from which the odor of opium emanated. There they found appellant, a codefendant, Marquis, and a woman, and discovered two jars of opium and articles used by opium smokers. One of the officers asked appellant if he knew anything about the opium. Allen inquired: "Where was it found?" And on being informed that it was found in the apartment in question, replied, "I guess it is mine." When asked if he was the party who had rented the apartment under the name of "Pharman," Allen said that was the name he was using there. At the trial appellant denied that he had any conversation in which he admitted ownership of the opium or that he had handled it on the day of the arrest. He made no denial, however, that the drug was in his possession at the time.

The evidence is ample to support the verdict.

The judgment is affirmed.

We concur: CRAIG, Acting P. J.; DESMOND, J.



140 Cal.App. 64

THOR v. CITY AND COUNTY OF SAN FRANCISCO.

Civ. 9239.

District Court of Appeal, First District, Division 1, California.

July 21, 1934.

1. Appeal and error ⇐1001(1)

Determination of jury will not be disturbed where there is any evidence to support verdict.

2. Appeal and error ⇐1050(1)

In action against city for death of child where witness testified that she did not see accident and that she remembered only that something was said about child being pushed, admitting her testimony that child was injured by being pushed against exposed water pipe in street by another child *held* not prejudicial error.

3. Death ⇐104(5)

In action by mother for death of six year old boy, where there was no evidence that boy was different from other boys of his age, instruction that jury could take into consideration that child was expense to mother during minority and that its pecuniary value to mother after minority was conjectural *held* not error.

4. Municipal corporations ⇐822(3)

In action against city for death of child caused by dangerous condition of street, instruction that city was not liable unless some one having authority to remedy condition had notice thereof and failed to make repairs within reasonable time after acquiring notice and that plaintiff had burden of proving such facts *held* proper.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Ora Thor against the City and County of San Francisco, a municipal corporation. Judgment for defendant, and plaintiff appeals.

Affirmed.

James F. Brennan, of San Francisco, for appellant.

John J. O'Toole, City Atty., and Dion R. Holm, Asst. City Atty., both of San Francisco, for respondent.

JAMES, Justice pro tem.

Plaintiff sued herein for the death of a minor child of the age of six years, which she alleged resulted through the negligence of the defendant acting in its proprietary and private capacity and also in its governmental capacity. The complaint sets up three separate causes of action; and the particular cause of complaint is the maintenance of an exposed water pipe in a public highway, upon which the minor fell and received injuries resulting in his death. The three causes of action included: First, the charge that the defendant, in its private capacity, negligently maintained this pipe in a public highway; and, in the second cause of action, that the defendant, in its private capacity, maintained the pipe unlawfully in the highway and which constituted a public nuisance; and, third, that the defendant, in its governmental capacity, maintained Shakespeare street in a dangerous and defective condition, with notice thereof, and failed to remedy the same. On the trial, the jury returned a verdict in favor of the defendant.

Five reasons are assigned for a reversal in this case which we will deal with in the order they are presented.

[1] 1. It is contended that the court below erred in not instructing a verdict in favor of the plaintiff. This contention requires little discussing. Obviously, it was a matter to be submitted to the jury, and the determination of the jury will not be disturbed where there is any evidence to support the verdict. In the present case there is ample.

[2] 2. It is next contended that the court below erred in admitting certain evidence by way of impeachment. On the trial, there seemed to be some question as to how the boy came to fall. No witness was produced who saw the start of the accident. The plaintiff and her husband testified to seeing the boy in the act of striking against the pipe. On cross-examination, the mother was asked if her son had not told her after the accident that one Jackie Sheehan had pushed him, which she denied in a somewhat uncertain manner. Thereafter, the defendant introduced the witness Mary Sept, who testified, under objection, to having heard the boy state that Jackie Sheehan had shoved him, or that "there was something said about it, yes. But I don't know just the date at all * * * there was something said about Jackie Sheehan pushing him, but I did not see it, I cannot swear." The questions asked of the plaintiff were without objection. The testimony of Mrs. Sept was clearly inadmissible, but in this court's view the uncertain character of the statements of the latter witness is such that we cannot find therein a sufficient reason to reverse the case on that ground alone.

3. Objections are made to certain formula instructions of the court, which it is contended do not include all essential elements. The instructions complained of find support in the case of De Nardi v. Palanca, 120 Cal. App. 371, 8 P.(2d) 220.

[3] 4. It is next contended that the court erred in giving the following instruction: "You are instructed that if from the evidence you determine a verdict should be awarded plaintiff, you are to take into consideration that Ben Sanderson was a child of six years of age, and his pecuniary value to his mother for a number of years to come would be nil and that he would be a source of expense to his mother during his minority, and after his minority what pecuniary value he would be to his mother is purely conjectural." This instruction is challenged as trenching upon the province of the jury as an instruction on facts. Statements contained in this instruction, and complained of as being an instruction on facts, are so obvious from the record that it would seem that the jury would scarcely need such an instruction. There was no evidence that the boy was any different from the ordinary boy of his age, and no suggestion in the evidence, the pleadings, or the argument that he was an unusual child or different in any regard from the ordinary boy. While this instruction is not to be greatly commended, we can find in it nothing that would justify a reversal.

[4] 5. Finally, it is contended that this instruction, given by the court below, was erroneous because it is claimed it instructed the jury, in effect, that if the defendant was

not liable in its governmental capacity, it would, therefore, not be liable in its proprietary capacity: "You are instructed that the City and County of San Francisco is not liable for injuries to persons resulting from the dangerous or defective condition of public streets or highways unless you believe from a preponderance of the evidence herein that the governing or managing board of said City and County, or other board, officer or person having authority to remedy such condition had knowledge or notice of said alleged defective or dangerous condition of said street and failed to correct it for a reasonable time after acquiring such knowledge or notice to repair the same. The burden of proving each of these foregoing elements at all times rests upon plaintiff." This is a correct statement of the law as applicable to the third cause of action. The rules governing the responsibility of the defendant under the other causes of action charged against it in its private or proprietary capacity are correctly covered in other instructions.

We find no error in the proceedings of the lower court which would justify a reversal of the judgment appealed from, and it is, accordingly, affirmed.

We concur: TYLER, P. J.; CASHIN, J.



140 Cal.App. 167

REYES v. BOYD et al.

Civ. 5112.

District Court of Appeal, Third District, California.

July 25, 1934.

Hearing Denied by Supreme Court Sept. 19, 1934.

1. Trusts ⇐371(2)

Complaint seeking to establish resulting trust and alleging that plaintiff and her mother and stepfather pooled their earnings which were used to accumulate properties with oral "understanding" that on mother's and stepfather's death land involved would become plaintiff's property stated cause of action as against contention that complaint did not allege definite contract, nor amount invested by plaintiff; "understanding" being used synonymously with "agreement."

[Ed. Note.—For other definitions of "Agreement" and "Understanding," see Words & Phrases.]

2. Trusts ⇐373

In action to establish resulting trust, finding that plaintiff and others pooled earnings used to accumulate properties could be construed to mean that plaintiff contributed all her earnings, as against contention that complaint was insufficient because not alleging amount invested by plaintiff.

3. Witnesses ⇐268(9)

Where witness had testified regarding certain conversations, objection to cross-examiner's asking dates thereof *held* properly sustained, where cross-examiner refused to indicate particular conversation to which witness' attention was directed.

4. Witnesses ⇐79(1)

Court's refusal to anticipate that plaintiff might under certain conditions be disqualified to testify *held* not ground for objection, where disqualifying condition did not arise and plaintiff was competent as to testimony given by her.

5. Witnesses ⇐198(1)

Plaintiff's statements to defendant's witness *held* inadmissible because privileged, where attorney-client relation existed.

Appeal from Superior Court, Los Angeles County; Dailey S. Stafford, Judge.

Action by Helen Reyes against Mattie E. Boyd, née Brister, and others. From a judgment for plaintiff, defendant named, individually and as administratrix of the estate of Edward Robert Boyd, deceased, appeals.

Affirmed.

Afue McDowell, of Los Angeles, for appellant.

Minor Blythe, of Los Angeles, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Respondent is the daughter of Amelia Boyd, now deceased. When respondent was about 6 years of age, her mother married Edward Robert Boyd, and the three thereafter lived together until respondent married Manuel Reyes, when he, too, took up his residence with Mr. and Mrs. Boyd, and from that time onward the family group consisted of Mr. and Mrs. Boyd and Mr. and Mrs. Reyes. Amelia Boyd died in November, 1930, and a few months thereafter Edward Robert Boyd married Mattie E. Boyd, appellant herein. In May, 1931, Edward R. Boyd died.

The present litigation grows out of the

right to a piece of real property known as lot 4 of Southmore tract, the record title to which stood originally in the names of Amelia Boyd and Edward R. Boyd as joint tenants, and which upon the death of Amelia Boyd was vested in Edward R. Boyd and upon his death was by order of the probate court set aside to his surviving widow, Mattie E. Boyd, as a probate homestead. Respondent, as plaintiff, brought this action to have it decreed that appellant, Mattie E. Boyd, held title in trust for her, and to quiet title therein. The trial court found plaintiff was the owner in fee of the lot in question, and directed that possession be delivered to her. From this judgment Mattie E. Boyd appealed.

The amended complaint, after alleging the relationship of the various parties, continued: "* * * That during all of the life of the plaintiff, whether during her single life or married life, the said plaintiff and the said Amelia Boyd and the said Edward Robert Boyd lived together * * * pooling money that they earned from various sources; * * * and that the moneys that were earned by the said Edward Robert Boyd, the said Amelia Boyd and said Helen Reyes were used to accumulate the properties hereinafter mentioned; * * * with the oral understanding between said parties that on the death of the said Amelia Boyd and the death of said Edward Robert Boyd that said property hereinafter described and mentioned would become the property of said plaintiff."

Upon the trial, based upon the foregoing complaint, the court found it to be a fact "that the said Edward Robert Boyd, Amelia Boyd, Helen Reyes and Manuel Reyes entered into an oral agreement wherein and whereby the said Edward Robert Boyd, Amelia Boyd, Helen Reyes and Manuel Reyes should pool all their earnings from their labors and all income from the real property hereinafter mentioned for the purpose of paying off indebtedness, taxes, insurance, upkeep and payments on said real property, and for general household expenses, and that on the death of two of the said Amelia Boyd, Edward Robert Boyd and Helen Reyes, said real property hereinafter mentioned, and the improvements thereon should belong to the survivor in fee simple; that it is a fact that said Helen Reyes is the survivor. That it is a fact that on the death of the said Amelia Boyd and Edward Robert Boyd, under the said oral agreement between the said Amelia Boyd, Edward Robert Boyd, Helen Reyes and Manuel Reyes, all of said property hereinafter mentioned and the improvements thereon should become the property of the said Helen Reyes in fee."

Appellant urges that the judgment should be reversed because the amended complaint failed to state a cause of action, either to establish a trust or to quiet title, and that the evidence is insufficient to justify the findings and judgment.

[1, 2] As to the first ground for reversal, while not holding the amended complaint to be a model of pleading, we deem it sufficient to state a cause of action. It is apparent that the pleader was attempting to set up facts from which the court could establish a resulting trust. Appellant urges that the complaint is insufficient to establish a resulting trust in that it fails to allege the proportion or amount of money invested by plaintiff. Such an allegation is not essential in the complaint here in question, for, under the terms of the agreement, no amount or proportion was stipulated; it reciting that all of the earnings of plaintiff should be paid into the pool, and, upon the happening of the contingency, the entire title was to vest in the survivor. The court found: "It is a fact that during the life of the said plaintiff whether married or single that said plaintiff and the said Amelia Boyd, deceased, and said Edward Robert Boyd, deceased, lived together * * * and pooled their money," and, further, "the said moneys that were earned by said Edward Robert Boyd and said Amelia Boyd and Helen Reyes and Manuel Reyes were used to accumulate the real properties. * * *" Such a finding may fairly be construed to be that plaintiff contributed all of her earnings to the pool.

Appellant also argues that the complaint fails to allege a definite contract between the parties; the allegation in the complaint being that the earnings were pooled "with the oral understanding" that upon the death of Amelia Boyd and Edward Robert Boyd the property would belong to plaintiff. It is apparent, however, that the word "understanding" was there used synonymously with the word "agreement."

[3] Appellant complains of the ruling of the trial court limiting the cross-examination of a certain witness who had testified as to certain conversations. Counsel for the appellant asked for the dates of these conversations, and, upon refusal to indicate to the witness the particular conversation to which

his attention was directed, the court properly sustained an objection. Appellant, however, was not prejudiced thereby, and was accorded wide latitude in her apparently purposeless cross-examination.

[4] Appellant further objects because the court refused to anticipate that plaintiff, when called as a witness in her own behalf, might under certain conditions be disqualified to testify. The disqualifying condition did not arise, and the plaintiff was a competent witness to all the matters to which she testified. This objection is also without merit.

[5] Appellant also contends that the testimony of a certain attorney proffered by appellant was admissible, but the court correctly held that under the facts shown upon his voir dire there existed the status of attorney and client between himself and plaintiff and the statements that were made to the witness or in his presence were privileged.

There are other citations of error, but we find no cause for complaint in the attitude or rulings of the court.

The judgment is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

CAREY et al. v. DOUTHITT et al. *

Civ. 1055.

District Court of Appeal, Fourth District, California.

July 19, 1934.

Rehearing Granted Aug. 11, 1934.

1. Homestead ⇐43

Rule that statutory provisions relating to manner in which homestead right may be acquired are mandatory applies to provision that declaration of homestead must describe property claimed as homestead (Civ. Code, § 1263).

2. Homestead ⇐43

Sufficiency of declaration of homestead must be determined from statements expressly made therein, and cannot be affected by secret intentions of claimant (Civ. Code, § 1263).

3. Homestead ⇐43

Where wife's declaration of homestead failed to include description of premises, lien of judgment against husband applied to such premises, notwithstanding order made after recording of judgment purporting to permit filing of amended declaration of homestead with retroactive effect (Civ. Code, § 1263).

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Action by S. D. Carey and another, copartners doing business under the firm name and style of Carey Bros., against Wm. Douthitt, also known as Will H. Douthitt, and others. From an adverse judgment, plaintiffs appeal.

Affirmed in part, and reversed in part.

Hickcox, Trude & Robertson, of El Centro, for appellants.

C. L. Brown, of El Centro, for respondents.

BARNARD, Presiding Justice.

The respondents, as joint tenants, owned lots 7 and 10 of Crawford's subdivision No. 1, according to the map thereof recorded in Imperial county, and resided in a house situated upon lot 10 while the respondent husband conducted a junk business upon lot 7. In another action brought by these appellants against the respondent husband and another party, a writ of attachment was levied upon lot 7 of said property on May 19, 1931. On May 25, 1931, the respondent wife executed, acknowledged, and recorded a declaration of homestead upon lot 7 alone. On June 5, 1931, a judgment in the action referred to was entered in the superior court of Imperial county, and the same was duly entered in the judgment book and a transcript thereof recorded in the office of the county recorder. Thereafter, the present action was begun by these appellants for the purpose of determining what portion of the said lots 7 and 10 was subject to the lien of the judgment and for the purpose of quieting title to such portions thereof as might be found subject to the lien of said judgment. In their answer these respondents alleged that it was their intention and purpose to declare a homestead upon both lots and that the respondent wife had inadvertently omitted any reference to lot 10 in the declaration of homestead filed by her. Among other things, the court found as follows:

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 35 P.2d 632.

"That at the time of the filing of said declaration of homestead the said Edna Douthitt intended to claim said lot ten on which their dwelling house and other improvements were located, and on which she and her said family were actually living as their home, as well as lot seven, but through mistake and inadvertence she named in her said declaration only said lot seven. That she ought to be allowed to make and file an amended declaration as and of the date when her declaration was originally filed with said lot ten described therein, and added thereto."

"That at the time of the commencement of said action by plaintiff against said Will H. Douthitt and George W. Lindsay until and at the time of the issuance and levy of the attachment therein on lot seven and at all times subsequent thereto, said plaintiffs in said action, had reasons to know and did know, that said Edna Mary Douthitt and her said family actually resided wholly upon said lot ten and that at all times subsequent to the filing of said declaration of homestead the said plaintiffs had reason to know and did know, that the said Edna Mary Douthitt had inadvertently made a mistake in the omission of said lot ten from said declaration of homestead."

A judgment was entered permitting the respondent wife "to execute and file her amended declaration of homestead in her own behalf and in behalf of her said family, upon said lots 7 and 10, and as of the date of the execution and filing for record of her said declaration of homestead on said lot 7," and decreeing that the judgment which had been secured by these appellants attached to and upon an undivided one-half interest in said lot 7, and that the same did not affect any part of the said lot 10. From this judgment and decree this appeal is taken upon the judgment roll alone.

While the appeal purports to be taken from the entire judgment, the appellants state that the judgment is correct in so far as it affects said lot 7, and, no issue being presented with respect to this part of the judgment, the same should be affirmed.

With respect to that portion of the judgment affecting said lot 10, the appellants contend that the findings do not support the judgment and that the court erred in deciding that a declaration of homestead may be amended by adding other land thereto after a judgment lien has attached to the additional land.

[1, 2] It is well settled that the statutory provisions relating to the manner in which a homestead right may be acquired are mandatory. Bullis v. Staniford, 178 Cal. 40, 171 P. 1064. A declaration of homestead must contain a description of the premises in connection with which the right is claimed. Civ. Code, § 1263. The statutory requirements must be strictly complied with, and the provision that a declaration of homestead must contain a description of the property upon which a homestead is claimed is as mandatory as any of the other provisions of the section. Jones v. Gunn, 149 Cal. 687, 87 P. 577, 578. The sufficiency of a declaration of homestead must be determined from the statements expressly made therein, and cannot be affected by any secret intentions which may have been in the mind of the claimant. "The legislature has prescribed certain formalities and conditions which are essential to the 'selection' of a homestead and these formalities and conditions cannot be disregarded by courts." Reid v. Englehart-Davidson, etc., Co., 126 Cal. 527, 58 P. 1063, 1064, 77 Am. St. Rep. 206.

[3] In Jones v. Gunn, supra, the court said: " 'While it is true that homestead and exemption laws are remedial, and, generally, must be liberally construed in order to effect the purposes intended thereby, yet it is equally true that homesteads and homestead exemptions are the creatures of statute, and that the failure to comply with any statutory requirement essential to a valid declaration of homestead cannot be supplied by liberal construction.' " Much less may a homestead exemption be created by judicial decree for a particular parcel of land, in the absence of compliance with any one of the statutory requirements in so far as that parcel is concerned. At the time the appellants' judgment became a lien on the respondent husband's interest in lot 10, no homestead exemption applied thereto as a result of the declaration filed, and it follows that the situation could not be changed by an order of court purporting to permit the filing of an amended declaration with retroactive effect.

That portion of the judgment affecting lot 7 of the land in question is affirmed, and that portion of the judgment affecting lot 10 is reversed.

I concur: JENNINGS, J.

MARKS, J., being absent, does not participate herein.

140 Cal.App. 36

NORWICH UNION INDEMNITY CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 9484.

District Court of Appeal, First District, Division 2, California.

July 20, 1934.

1. Master and servant ⊂385(20)

Industrial Accident Commission may commute weekly compensation, awarded permanently disabled employee for life, at any time; statutory provision, requiring rescission or amendment of award within 245 weeks after injury, being inapplicable (St. 1917, p. 850, § 20 (d); p. 856, § 28 (a).

2. Master and servant ⊂391¼

Industrial Accident Commission may provide for payment of commuted compensation in installments by trustee, but cannot charge insurance carrier with interest on fund in advance: insurer and employer being chargeable with only such interest as fund earns, if permitted to act as trustees thereof (St. 1917, p. 856, § 28 (c).

Proceeding by the Norwich Union Indemnity Company, workmen's compensation insurance carrier, and A. P. Koetitz, employer, to review an order of the Industrial Accident Commission commuting compensation awarded to Thomas Hines, employee, for permanent disability.

Order annulled, and case remanded.

Bronson, Bronson & Slaven, of San Francisco, for petitioner.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondent Industrial Accident Commission.

NOURSE, Presiding Justice.

Following an injury to an employee of petitioner Koetitz, the respondents after hearing duly determined that he was entitled to a pension for permanent disability during the rest of his life and ordered payments at the rate of $7.77 per week. More than 245 weeks after the date of the injury, the commission, after a hearing conducted for that purpose, ordered that this pension be commuted, fixing the present value thereof at $4,311.45, assuming interest at the rate of 6 per cent. per annum, which sum the commission found to be the equivalent of an annuity payment of $75 monthly, which was to terminate in the event of death prior to full payment of the annuity for a period of 70.76 months. The insurance carrier and the employer filed this petition attacking the jurisdiction of the commission to commute after the lapse of 245 weeks from the date of the accident and attacking the portion of the order requiring payments in the form of an annuity.

[1] The petitioners rely on section 20 (d) of the Workmen's Compensation Act (St. 1917, p. 850). This provides in part: "The commission shall have continuing jurisdiction over all its orders, * * * and may at any time, * * * rescind, alter or amend any such order, * * * such power including the right to review, grant or regrant, diminish, increase or terminate, * * * any compensation awarded; * * * provided, that no award of compensation shall be rescinded, altered or amended after two hundred forty-five weeks from the date of the injury."

The commission relies on section 28 of the same act (St. 1917, p. 856), which reads in part: "At the time of making its award, or at any time thereafter, the commission * * * may, in its discretion, commute the compensation payable under this act to a lump sum, if it appears that such commutation is necessary for the protection of the person entitled thereto, * * * or that the employer has sold or otherwise disposed of the greater part of his assets, or is about to do so, or that the employer is not a resident of this state. * * *" Subdivision (a).

The petitioners argue that the proviso found in subdivision (d) of section 20 is all-inclusive. The respondents argue that the provisions of section 28 are special in their relation to commutation of compensation. It will be noted that in subdivision (d) the commission is given power "at any time" to rescind, alter or amend and that the proviso is limited to the rescission, alteration, or amendment. Section 28, subdivision (a), which comes later in point of arrangement, confers the power "at any time thereafter" to commute the compensation. No limitation is found in this section, and it would seem reasonable that if the Legislature intended to limit the power it would have repeated the proviso found in section 20. A reason for not doing so may be found in the concluding portions of section 28, subd. (a), where, among the grounds for commutation, are included a finding that the employer has sold or otherwise disposed of his assets or is about to do so, or that he was not a resident of the state. This would apply where a life pension has been granted and the financial condition of the employer or of his insurance carrier

has so changed that a commutation is necessary to protect the employee. There would seem to be no reason for confining the power to commute to any definite period.

[2] The second ground of attack upon the order presents a mixed question of fact and arithmetic which neither party has tried to make clear. The petitioners urge that the statute does not authorize the payment of the commuted award in monthly installments. The criticism is too general. Section 28 (c) of the act authorizes the commission to order the commuted sum paid directly to the insured or deposited with a savings bank or trust company that will agree to accept the same as a deposit bearing interest, or deposited with the state compensation insurance fund. "Payments from said fund, when so deposited, shall be made by the trustee only in the same amounts and at the same time as fixed by order of the commission." Though the commission may thus provide for installment payments by the trustee, it is not authorized to compel the insurer to act as trustee or to charge him in advance with interest on the fund. The interest to which the insured becomes entitled under this section of the act is the interest which the fund has accumulated after deposit. The petitioners are liable for payment of the commuted lump sum only. If they may be permitted to act as voluntary trustees of the fund, then they are chargeable with only so much interest as the fund may earn.

The order is annulled and remanded for further proceedings.

We concur: STURTEVANT, J.; SPENCE, J.



140 Cal.App. 5

HARPER v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 9507.

District Court of Appeal, First District, Division 2, California.

July 19, 1934.

1. Partition ⇐102

Defendant in action for partition of real estate is not entitled to postponement of sale merely to obtain possible increase in market price of property.

2. Mandamus ⇐51

Superior court has not mandatory duty to grant motion for judgment on pleadings in every case where answer fails to set up good defense.

3. Mandamus ⇐51

Where no abuse of discretion was shown, appellate court would not compel Superior Court by mandamus to grant plaintiff's motion for summary judgment in action to partition real estate, though affirmative defense that sale at present time would be unwise because of depressed real property values did not constitute legal defense.

Petition by Minnie Harper against the Superior Court of the State of California, in and for the City and County of San Francisco, and Honorable E. P. Mogan, Judge thereof, for a writ of mandamus to compel the defendants to grant petitioner's motion for judgment on the pleadings in an action brought by her to partition certain real estate.

Petition denied.

Joseph A. Brown and A. E. Cross, both of San Francisco, for petitioner.

NOURSE, Presiding Justice.

The petitioner filed a complaint in the Superior Court asking partition of a single piece of real property with a dwelling house thereon and setting forth that she was the owner of an undivided one-eighth thereof as a tenant in common in fee simple, and that the defendants named in the complaint owned together the other seven-eighths in common with the plaintiff. The answer of the defendants therein admitted the material allegations of the complaint and pleaded as an affirmative defense that a present sale of the real property would be unwise because of the present depressed condition of real property values. The plaintiff thereupon moved for judgment on the pleadings and, her motion having been denied, she seeks the mandate of this court to require the respondent court to grant her motion.

[1-3] In support of her petition the petitioner cites Rich v. Smith, 26 Cal. App. 775, 783, 148 P. 545, to the effect that a defendant in partition is not entitled to a postponement of the sale merely to obtain a possible increase in the market price of the property,

and argues that, for this reason, the answer of these defendants sets up no triable issue. The Rich Case states the accepted rule and, on the trial, we may assume that that rule will be followed. But we cannot for that reason say that the trial court should be compelled to grant the motion for judgment on the pleadings. The petition is framed upon the theory that it is the mandatory duty of the Superior Court to grant a motion for judgment on the pleadings in every case where the answer fails to set up a good defense. There is nothing in our statutes declaring this to be so, and no authorities are cited declaring such to be the rule. No facts are pleaded showing an abuse of discretion. To the contrary, it appears that the cause was set for trial at a date within ten days from the denial of the motion.

On the authority of Allyne v. Superior Court, 200 Cal. 661, 666, 254 P. 564, the petition herein is insufficient to warrant the issuance of the writ.

The petition is denied.

We concur: STURTEVANT, J.; SPENCE, J.



140 Cal.App. 68

BONAN v. PACIFIC ORIENT CO.

Civ. 7192.

District Court of Appeal, First District, Division 1, California.

July 21, 1934.

1. Sales ⇐177

Insurance of beans in transit in seller's name, instead of buyer's name as required by sale contract, *held* not to bar recovery of price, where they arrived safely and were tendered to buyer intact and latter repudiated contract before shipment.

2. Sales ⇐384(7)

Judgment for difference between contract and resale prices of beans refused by buyer *held* proper as against contention that resale was unreasonably delayed to buyer's detriment, where market price of beans was same during entire period of delay.

Appeal from Superior Court, San Francisco County; Charles R. Barnard, Judge.

Action by S. Z. Bonan against the Pacific Orient Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Joseph E. Bien and Werner Olds, both of San Francisco, for appellant.

Albert Picard, of San Francisco (Chester J. Keith, of San Francisco, of counsel), for respondent.

JAMES, Justice pro tem.

This appeal presents only two questions, neither of which merits any extended discussion.

The action is one for damages for the breach of a contract of sale of a quantity of Mexican beans. This contract was, without legal excuse, breached by the appellant. It refused acceptance, in advance of shipment. The beans were shipped and tendered at the port of San Francisco. Some negotiations followed, and appellant again and finally repudiated its contract. The beans were then sold. Suit was brought for the difference between the contract price and the amount realized from the sale, which resulted in a judgment for the plaintiff and respondent for the sum of $6,000, from which this appeal is prosecuted.

[1] Under the contract, the seller was required to insure the beans in transit in the name of the buyer. Such insurance was, in fact, carried—but in the name of the seller. Appellant urges here that because of the insurance being carried in the name of the seller instead of the buyer, respondent did not make a proper offer of performance. But the goods arrived in safety. There was no loss. The beans were here, tendered intact, and so refused. The purpose of the insurance was fulfilled, and that became a defunct matter.

Further than this, the appellant had repudiated the transaction before the shipment. It would have been a futile gesture for the shipper to insure the merchandise in the name of one who disclaimed any interest therein. Such insurance, if so procured, would be without value or effect.

[2] Appellant next complains that the sale was delayed unreasonably, to its detriment. The record discloses that the date of final repudiation of the contract was February 2, 1928. The sale was had in May of the same year. The trial court found, upon sufficient evidence, that the market price was the same during all that period, was $8.50 per bag net.

For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

The judgment is for the difference between that price and the contract price. This was proper.

There is no error in the record, and the judgment appealed from is affirmed.

We concur: TYLER, P. J.; CASHIN, J.



139 Cal.App. 547

PEOPLE v. BREYER.[1]
Cr. 1795.

District Court of Appeal, First District, Division 1, California.
July 5, 1934.

Hearing Denied by Supreme Court Aug. 2, 1934.

1. Criminal law ⇐878(1)

Where facts supporting second count in indictment for obtaining money by false pretenses in presenting false financial statement to bank for purpose of obtaining loan were identical with those set forth in first count charging grand theft, conviction on second count should be reversed.

2. Statutes ⇐225½

General rule is that, where general statute would include same matter as special act and conflict with it, special act will be considered as exception to general statute whether it was passed before or after such general enactment.

3. Statutes ⇐241(1)

Rules of construction applicable to civil statutes also apply to penal statutes.

4. False pretenses ⇐2

Statute under which crimes of larceny, embezzlement, and obtaining money by false pretenses are merged in one crime of grand theft superseded provisions of statute respecting false financial statements (Pen. Code, §§ 484, 532a, 952).

5. False pretenses ⇐9

Where evidence in prosecution for grand theft showed property was obtained by false representations and pretenses, fact that it was procured subsequent to time when representations were made was no defense; it being shown that defrauded person was thereby induced to part with his property.

6. Witnesses ⇐277(6)

Where defendant accused of obtaining money from bank under false pretenses offered himself as witness and related conversations between himself and bank officers, cross-examination as to truth of financial statement he delivered to bank for purpose of obtaining credit *held* not improper.

7. Criminal law ⇐448(2)

In prosecution of one alleged to have obtained money from bank under false pretenses, questions to bank officer as to whether bank could have discovered facts as to defendant's financial condition had comparisons been made between certain statements and account *held* properly excluded, where officer had testified that such comparisons were not made.

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Sam Breyer was convicted of grand theft, and of violating Penal Code, § 532, and he appeals.

Affirmed in part, and reversed in part.

George M. Naus, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

PER CURIAM.

The defendant was charged in an indictment with grand theft and a violation of section 532 of the Penal Code.

The first count alleged that he unlawfully took the property of the Bank of America, etc., a corporation, of the value of $9,500; and the second, that for the purpose of obtaining loans from said bank he knowingly, falsely and fraudulently, with the intent to deceive and defraud, presented a written financial statement to the bank, which he represented to be true and to truly show the financial condition of a firm of which he was a member, and that the same falsely represented that the firm had certain cash on hand, cash receivable and merchandise, and that he and his partner in said firm carried certain life insurance; further, that the bank, relying thereon as being true and being deceived thereby, loaned certain sums to the firm, of which the bank as a consequence was defrauded. The two counts were based on the

[1] Hearing denied by Supreme Court. 34 P.(2d) 1067.

same transaction. Defendant was convicted on both counts, and has appealed from the judgment of conviction.

It is admitted that in addition to the above amount the defendant by similar fraudulent representations had previously obtained large sums from the bank, and at the time of the transaction in question owed the bank on that account over $50,000. That gross fraud was perpetrated is not disputed, but defendant urges as grounds for reversal that the facts show but one offense, and that a judgment and conviction on both counts cannot stand; further, that the judgment on the second count, which was based on section 532 of the Penal Code, is void because of the repeal of said section (People v. Carter, 131 Cal. App. 177, 21 P.(2d) 129); and that neither count alleged more than facts constituting a misdemeanor under section 532a of the Penal Code, and that the evidence is insufficient to support a conviction under either section 484 or section 532 of that Code. It is further claimed that the trial court erred in certain of its rulings.

[1] The Attorney General is in accord with defendant's first contention, and agrees that the facts supporting that count being identical with those set forth in the first count the judgment upon the second count should be reversed.

[2-4] With respect to the first count, the defendant contends that said sections 484 and 532, which make false pretenses punishable as a felony, deal with the subject in general terms, while section 532a, making an offense thereunder a misdemeanor, deals with the subject in a more special and definite way, and that consequently cases within the latter section should be excepted from the general provisions of sections 484 and 532, and that such an offender is not punishable under either of the latter sections.

It is the general rule that where the general statute standing alone would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment. Where the special statute is later it will be regarded as an exception to or qualification of the prior general one; and where the general act is later the special statute will be considered as remaining an exception to its terms unless it is repealed in general words or by necessary implication (59 Cor. Jur., Stats. § 623, p. 1056; 23 Cal. Jur., Stats., § 136, p. 762; Ahern v. Livermore School Dist., 208 Cal. 770, 284 P. 1105); and the rules of construction applicable to civil statutes also apply to penal statutes (59 Cor. Jur., Stats., § 659, p. 1112; State v. Bailey, 115 Ore. 428, 236 P. 1053). According to People v. Carter, supra, section 484 of the Penal Code, which in its present form is a later enactment than the several sections mentioned, in effect repealed identical provisions of section 532 of the Penal Code; and it has been frequently held that under the first section the former crimes of larceny, embezzlement, and obtaining property by false pretenses are merged in the one crime of grand theft (People v. Plum, 88 Cal. App. 575, 263 P. 862, 265 P. 322; People v. Myers, 206 Cal. 480, 275 P. 219), and in charging theft it is sufficient to allege that the defendant unlawfully took the property of another (Pen. Code, § 952). What was said in People v. Carter, supra, as to the effect of section 484 upon the same provisions in section 532 applies to similar provisions in section 532a; and we are satisfied that in so far as the object and purpose of the provisions of the two statutes are the same it was the intention that those of the latter section should be superseded. In view of the purpose of the new procedure this appears to be the necessary implication. People v. Fewkes, 214 Cal. 142, 4 P.(2d) 538.

[5] The evidence was ample to support a finding that the property described in the first count of the indictment was obtained by false and fraudulent representations and pretenses; and the fact that it was procured subsequent to the time when the representations were made—it being shown that the defrauded person was thereby induced to part with its property—was no defense. People v. Hennessey, 201 Cal. 568, 258 P. 49; People v. Rabe, 202 Cal. 409, 261 P. 303.

[6] Defendant, who offered himself as a witness, was asked on direct examination to relate conversations between himself and officers of the bank before and at the time the latter's property was obtained by defendant. He complains that the prosecution was permitted on cross-examination to inquire into the truth or falsity of a certain financial statement which he had delivered to the bank for the purpose of obtaining credit. There is no merit in this contention as the record shows that under the rule stated in the following decisions the limits of proper cross-examination were not exceeded: People v. Gallagher, 100 Cal. 466, 35 P. 80; People v. Teshara, 141 Cal. 633, 75 P. 338; People v. Porter, 123 Cal. App. 618, 11 P.(2d) 894.

[7] Objections were sustained to questions asked an officer of the bank as to whether the bank could have discovered the facts as to defendant's financial condition had comparisons been made between certain statements and accounts. The officer had testified that such comparisons were not made as defendant's representations were relied upon by the bank. In People v. Daniels, 64 Cal. App. 514, 222 P. 387, it was held to be improper to sustain an objection to a question asked the complaining witness upon cross-examination for the purpose of ascertaining whether an independent investigation had been made; but in the absence of an independent investigation the question of what might have been discovered had one been made was immaterial, and the court properly so ruled.

The evidence fully sustains the verdict, and the record discloses no error which would justify a reversal of the judgment on the first count of the indictment. The judgment on that count is accordingly affirmed; and on the second count, for the reasons stated, it is reversed.

139 Cal.App. 547

The PEOPLE of the State of California, Plaintiff and Respondent, v. Sam BREYER, Defendant and Appellant.

Cr. 1795.

Supreme Court of California.

Aug. 2, 1934.

In Bank.

Prior opinion, 34 P.(2d) 1065.

George M. Naus, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Dep. Atty. Gen., for the People.

PER CURIAM.

The petition of appellant for a hearing of this cause is hereby denied. Said petition, of course, does not ask for a hearing of that portion of the decision of the District Court of Appeal which reverses his conviction under the second count of said indictment. This order denying said petition is, therefore, necessarily confined to that portion of the opinion dealing with appellant's conviction under the first count of said indictment, and is not to be construed as an expression of approval or disapproval of any other portion of said decision.

140 Cal.App. 192

COFFMAN v. CROOKSHANK.

Civ. 8539.

District Court of Appeal, Second District, Division 2, California.

July 26, 1934.

1. Brokers ⇐11

In broker's action for damages from principal's wrongful refusal to consummate exchange agreed upon, principal *held* liable to broker for commission which he knew other party to agreement had promised to pay, in addition to commission he himself had promised to pay (Civ. Code, §§ 3300, 3333).

2. Brokers ⇐11

In broker's suit for principal's wrongful refusal to consummate exchange contract calling for principal to receive 20 acres "more or less," subject to designated "right-away out," principal's withdrawal from contract *held* not justified by fact that right of way included almost 2 acres and that other party could not convey 20 acres and would not allow pro rata reduction in purchase price.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Alonzo O. Coffman against D. C. Crookshank. Judgment for plaintiff, and defendant appeals.

Affirmed.

William M. Rains, of Los Angeles, for appellant.

Kelly, Stuart & Hendrick, of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

Plaintiff secured the acceptance of an agreement whereby defendant and his wife offered to exchange property described therein belonging to them for certain property belonging to W. L. Rohrer and wife, the terms of exchange being set out in said agreement. Defendant agreed to pay plaintiff the sum of $1,500 upon "acceptance of the proposition to exchange the above described property on the above terms." Rohrer in his acceptance agreed to pay plaintiff the sum of $1,000 "for the exchange of our property * * * for the services of said agent." The property of the Rohrers was described in the agreement as "being that 20 acres, more or less," describing its location, "subject to ½ oil rights, ½ interest in pumping plant, a road easement, P. E. right-away out, and $150.00 road bonds." De-

fendant, after the exchange agreement was signed, found that the Pacific Electric right of way therein mentioned included about 1.798 acres of land, and objected to going ahead with the exchange unless Rohrer would convey to him the full 20 acres or "reduce the purchase price thereof pro rata and proportionate to the difference between the amount agreed to be conveyed, to wit, 20 acres, and the amount actually to be conveyed." This Rohrer refused to do, and the exchange was not consummated. Plaintiff brought this action against defendant to recover not only the commission which the latter agreed to pay for securing the acceptance of the exchange agreement, but also the damage caused by the loss of the commission Rohrer agreed to pay upon completion of the exchange, by reason of defendant's refusal to perform his part of the exchange agreement. From a judgment in favor of plaintiff, which included the $1,000 so lost, defendant has appealed.

[1] The only question raised on appeal is whether or not said $1,000 was properly included in the judgment. Appellant's contention is that it could not be so included in the absence of a written agreement to pay it. Such contention would be good if the claim of plaintiff had been based on an agreement to pay Rohrer's commission, but such was not the case. The complaint is based on the damage caused by defendant in refusing to make said exchange. The evidence supports the conclusion that Rohrer was ready, willing, and able to carry out his part of the agreement, but was prevented from so doing by appellant's refusal. The measure of damages in such case is the amount which will compensate "for all the detriment proximately caused thereby," whether considered as the breach of an obligation arising from contract (section 3300, Civ. Code), or a breach not so arising (section 3333, Civ. Code). It hardly needs argument to support the proposition that under the evidence here the proximate damage caused by appellant's failure to complete his agreement of exchange with Rohrer was the commission Rohrer agreed to pay upon completion; and being familiar with the commission agreements connected therewith, appellant must have known that if Rohrer was willing to complete his part of the exchange and he (appellant) was not, such damage would necessarily result from his failure so to do. The case of Traxler v. Katz, 116 Cal. App. 226, 230, 2 P.(2d) 553, is on all fours with the present case, and a hearing thereof was refused by the Supreme Court. See, also, Calkins v. F. W. Woolworth Co. (C. C. A.) 27 F.(2d) 314.

[2] Nor in our opinion did the fact that Rohrer could not convey 20 acres to appellant justify his withdrawal from the agreement to exchange. The only construction that we think can be placed on the description of Rohrer's land is that it was 20 acres more or less with "P. E. right-away out." It does not appear that he was not in a position to convey to appellant all the land he agreed to convey.

Judgment affirmed.

We concur: STEPHENS, P. J.; DESMOND, J.



140 Cal.App. 39

OVIEDO et ux. v. LONDON GUARANTY & ACCIDENT CO., Limited, et al.

Civ. 9198.

District Court of Appeal, First District, Division 2, California.

July 20, 1934.

Rehearing Denied Aug. 18, 1934.

Hearing Denied by Supreme Court Sept. 18, 1934.

1. Principal and agent ⇐145(2)

Contract of agent, who deals in his own name without disclosing that of his principal, is the contract of principal who is liable thereon.

2. Principal and agent ⇐193

Evidence that doctor, treating employee for injury to back on behalf of compensation insurer which expressly authorized doctor to give employee any treatment he deemed necessary at its expense, acted as agent of insurer when he sent employee to another doctor for kidney treatment without disclosing who would pay therefor in order to effect better cure of injury to back, thus rendering insurer liable for services of such other doctor, *held* sufficient for jury.

3. Judgment ⇐585(3)

Disallowance by Industrial Accident Commission of bill of specialist who treated employee for kidney trouble because not due to injury to back received by employee in his employment *held* not to preclude action therefor against compensation insurer whose doctor, when treating employee for injury to back, had sent employee to kidney specialist as agent of insurer in order to effect better cure of injury.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by George F. Oviedo, M. D., against the London Guaranty & Accident Company, Limited, and others. From a judgment in favor of plaintiff against named defendant, it appeals.

Affirmed.

Hearing denied by Supreme Court; PRESTON, J., dissenting.

Bronson, Bronson & Slaven and Harold R. McKinnon, all of San Francisco, for appellant.

Leslie C. Gillen and Bernard Nugent, both of San Francisco, for respondent.

SCHMIDT, Justice pro tem.

Some time in 1925, one Louis Beronio in the due course of his employment received a serious injury to his back and consulted the defendant Dr. T. J. Nolan, who testified: "I examined Louis Beronio and made a report to the London Guaranty & Accident Company concerning his condition. When Mr. Beronio first consulted me about April 15, 1925, he was complaining of pain in the back. He consulted me at that time, not at the instance or instigation of any insurance company. His case was then pending, or about to pend, before the Industrial Accident Commission. On May 11, 1925, I wrote to the Industrial Accident Commission giving them a detailed report of his condition. Following this, the patient was returned to me for treatment by the London Guaranty & Accident Company. The patient was under treatment from June 23, 1925, up to July 7, 1926. This bill was taken care of by the London Guaranty & Accident Company." In his report the doctor gave detailed findings of the condition of the vertebra of Beronio stating that: "Beronio is totally disabled for any form of heavy, laborious work." "The patient should discard his braces * * * and receive intensive physiotherapy treatment. If this does not relieve the pain over the fourth lumbar vertebra he should then be operated upon. That was the conclusion of my examination on May 11, 1925." "I made no examination of Beronio's kidneys and urine. He complained of kidney and bladder symptoms, and it was for that reason that he was referred to Dr. Oviedo. (Respondent herein.) I specialize only in bones. Dr. Oviedo specializes in kidneys. * * * It is necessary at times to treat a man, if one particularly specializes, to cure him up of some other ailment." "Q. And was that the case in this instance, doctor? A. Yes." Then witness continuing: "I have done other medical or bone work for this defendant London Guaranty & Accident Company. In one of those cases I found it necessary to send the patient to some other specialist. I don't know whether the London Guaranty & Accident Company paid the other doctor in that case. * * * When I sent Beronio to Dr. Oviedo, I did not instruct Dr. Oviedo as to where his report should be made. * * * I received a communication in writing dated June 23, 1925, from the London Guaranty & Accident Company signed by Mr. McAllister regarding Beronio which read as follows: 'This is to advise that we will be responsible for physio-therapy treatments to be rendered by you to Mr. Beronio in accordance with your report to the Industrial Accident Commission, dated May 11, 1925.'" The witness further testified: "That did not suit me because it did not specify in there that I was to receive pay for any treatment that I might render him or any cash I should apply on him, or for any of my office visits, so that I called Mr. McAllister up and told him that the order was not satisfactory, and I said, 'I have inserted in lead pencil a clause that I wish you would put in your next order.' So he just took the original and wrote on the bottom: 'Dr. Nolan: Give Mr. Beronio any treatment that you deem necessary at our expense.' And he signed it here." "The way I came to send Beronio to Dr. Oviedo was on account of his complaint of kidney and bladder symptoms. * * * When Beronio mentioned Dr. Oviedo's name I told him that he had better consult him concerning his symptoms that he was complaining of. I never told Dr. Oviedo that the London Guaranty & Accident Company would pay his bill and be responsible for his bill. I do not believe that I had any conversation regarding who would be responsible for the bill. I have a faint recollection of telling him that he should get an order. I couldn't swear to that, however. * * * I did not give Beronio any treatment myself for his kidneys. All I treated him for was his back condition and I was paid for that by the London Guaranty & Accident Company. I do not remember any conversation with Beronio concerning financial conditions or pay for Dr. Oviedo." "I stated * * * that it was necessary at times with a condition such as Beronio's, to clear up another injury or illness before I could give my treatment. I felt that Mr. Beronio had poison in his system; * * * interfering with him making a normal recovery. In addition to that, it was producing in his general system an arthritis which would interfere with any recovery, and would interfere with my treatment of him for the ailment for which I was treating him,

that is, I could have treated him, but I would not have gotten the same result."

The respondent, Dr. Oviedo, testified that he first met Beronio on May 19, 1925; that Beronio was sent to him by Dr. Nolan, that he examined Beronio and found his bladder and urine infected "so that I told him that the best thing for him to do was to go out to St. Mary's Hospital for a complete examination of his kidneys, and I notified Dr. Nolan that I was sending him out there; and then after I made this examination of the kidneys I notified Dr. Nolan verbally of the conditions which I found there. Dr. Nolan told me to go ahead and do whatever I could for Beronio to help clear up this kidney condition. He said that my efforts were necessary before he would be able to effect a complete cure in his specialty." The doctor then testified in detail as to his visits to and treatments given Beronio. "The total of all these items is $1,507. In May, 1926, I made an application to the Industrial Accident Commission for compensation for my professional services rendered to Beronio. My bill at that time was $960 * * *." The doctor explained that the additional amount over the $960 to the total of $1,507 was due to treatment given subsequent to May, 1926, and up to a second hearing before the commission; that there was a discussion before the Industrial Accident Commission as to whether Beronio's kidney condition was secondary to the accident. "It was my testimony before the commission that his kidney condition was secondary to his accident." The record further showed that at this first hearing before the commission a judgment was given in favor of Beronio, that he then was re-examined by another physician and that the commission finally found that the kidney ailment was not caused by the accident and disallowed the claim of Dr. Oviedo. The doctor testified that he had treated Beronio for approximately two years and eight months and when Beronio first came to him he had received $50 as a deposit; that at that time he did not know that there was any insurance company involved in the case; that the first time he discovered that there was an insurance company involved was when he sent Beronio to the hospital a couple of days after first seeing Beronio. "I did not then get in touch with the London Guaranty & Accident Company, because my reports at that time were not complete. I never got in touch with the London Guaranty & Accident Company until the matter came up for hearing before the Industrial Accident Commission. I never went down to see them or talk to them and I never talked to anybody connected with them." "* * * I sent Beronio every month a copy of my bill, * * * what I had been doing for him. He wanted that for his own personal record * * * whether my bills that were presented to the Industrial Accident Commission were made out to Beronio, my answer is 'No'; Mr. McAllister at that time * * * asked me for my charges, and I turned over a bill to Mr. McAllister. The bill was for services rendered to Beronio. I just turned it over to Mr. McAllister. He said he would take care of the bill if everything went along."

The foregoing is substantially all of the evidence introduced by respondent, and at the close of his evidence appellant made a motion for a nonsuit on the ground that it had not been shown that either the appellant or Dr. Nolan had become bound to respondent for his doctor's bills under any legal contract. The motion was denied. Whereupon appellant offered in evidence the receipt dated July 10, 1925, given by Dr. Oviedo to Beronio evidently on a printed billhead, the only part necessary to this case being, "July (10) on acc't 50.00 G. F. Oviedo M. D." Beronio in testifying for appellant stated that he had told Dr. Nolan that he had paid Dr. Oviedo $50 and Dr. Nolan about $30 or $40. He had other bills from the hospital that he thought ought to be paid; that he asked Dr. Nolan if it would be all right for him to go to the insurance company and present these bills so that they could be paid; that Dr. Nolan told him, "No use taking them down there. They won't pay them anyway"; that he told Dr. Oviedo about it and that Dr. Oviedo told him to save the bills; that he showed these bills to Dr. Nolan about July 10th. Dr. Oviedo stated that Beronio showed him bills and that he had told him to keep the bills in his own possession "and if the case ever came to a settlement, to present the bills, and see if they would be paid."

Upon this evidence findings and judgment went for respondent against appellant for the amount claimed, namely, $1,507. Judgment went for the defendant Nolan.

[1, 2] 1. Appellant claims that there was not any clear relationship between it and respondent whereby it became liable to respondent for the services respondent rendered to Beronio. "The rule in this state is well established that the contract of an agent, who deals in his own name without disclosing that of his principal is the contract of his principal, and the principal is liable thereon." Central Savings Bank v. Coulter, 72 Cal. App. 78, at page 87, 236 P. 956, 959. Under the

facts disclosed by the record in this case there cannot be any doubt that it was the intent of the London Guaranty Company to have Dr. Nolan act for it (the insurance company) to see to it that Beronio received "any treatment you deem necessary" and that the "any treatment" under the circumstances meant not only such treatment as Dr. Nolan personally could give but also such additional treatment as in the opinion of Dr. Nolan was advisable; that it was the opinion of Dr. Nolan that in order that a quicker and better cure could be had for the bone injury to the back, for which Dr. Nolan was treating Beronio, that Beronio should be treated for the kidney trouble; that in accordance with this opinion, Dr. Nolan sent Beronio to Dr. Oviedo for treatment; and that Dr. Nolan as well as Mr. McAllister for appellant had in mind the services to be rendered for the kidney trouble when there was added to the written authority given to Dr. Nolan the following: "any treatment you deem necessary at our expense."

Without question appellant acquiesced in the treatment that was given Beronio by Dr. Oviedo and used the services of Dr. Oviedo to obtain, if possible, a quicker and more complete recovery of Beronio's back injury in order that appellant should pay to Beronio the smallest amount of compensation possible.

[3] 2. Appellant further contends that the finding of the Industrial Accident Commission upon its second hearing that the kidney ailment of Beronio was not due to the injury received in his employment and the consequent disallowance by the commission of the bill of Dr. Oviedo precludes Dr. Oviedo from thereafter maintaining this action and cites in support thereof Pacific Employers' Insurance Company v. French, 212 Cal. 139, 298 P. 23. That decision merely determines that the Industrial Accident Commission cannot allow a doctor bill and have the same a lien against the award given the injured employee when the Industrial Accident Commission finds that the services rendered by the doctor was in connection with an ailment which the Industrial Accident Commission finds is not secondary to the injury. Inasmuch as the commission in the Beronio case found that the kidney trouble was not due to the accident, the commission could not allow the bill of Dr. Oviedo for his services rendered. Had the commission found that the kidney trouble was due to the injury then the bill for services for Dr. Oviedo would have been a proper allowance for the commission to make and in such event the allowance would have become a lien upon the award to Beronio made by the commission. In other words, the lien for services rendered is wholly incidental to the principal award and without any award for the ailment treated there can be no lien. The fact therefore that Dr. Oviedo presented to the commission his claim for services rendered to Beronio is immaterial. The finding of the commission can not be treated as a conclusion either that the services were not rendered by Oviedo or that there was not a contract between the appellant and Dr. Oviedo. Had the commission made such a finding under the circumstances it would have been beyond its jurisdiction, it would have been a nullity and void.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



140 Cal.App. 113

HENDERSON et ux. v. COCHRAN et al.

Civ. 8010.

District Court of Appeal, Second District, Division 1, California.

July 23, 1934.

1. Mines and minerals ⇐79(7)

Judgment against assignors of percentage of total production of oil well for amount due assignees *held* not supported by evidence, in absence of showing that assignors owed any duty in connection with delivery of such percentage by trustee, were responsible for dereliction therein, or received any part of production to which assignees were entitled.

2. Appeal and error ⇐882(8)

Defendants, by whose admissions and stipulations matter admitted in evidence over their objection was properly received by court, sustained no injury from, and hence cannot complain on appeal of, admission of such evidence.

3. Appeal and error ⇐760(2)

Contention that assignment of percentage of total production of oil well by owners of royalties was void cannot be considered on assignors' appeal from judgment for assignees, where appellants failed to direct court's attention to any pertinent controlling evidence presented to trial court in support of contention (St. 1917, p. 673, as amended).

Appeal from Superior Court, Los Angeles County; Henry B. Neville, Judge.

Action by D. G. Henderson and wife against J. H. Cochran, his wife, the Richfield Consolidated Oil Company, and others. From a judgment for plaintiffs, defendants Cochran and the oil company appeal.

Affirmed as to defendant oil company and reversed as to defendants Cochran.

Fred W. Morrison, of Los Angeles, for appellants.

L. D. Uhlman, of Long Beach, for respondents.

HOUSER, Justice.

From the record herein, it appears that, as derived from the lessor of certain real property, defendants Cochran were the assignees of certain royalties that accrued to them from the operation of an oil well, and of which royalties the said defendants thereafter assigned to the plaintiffs "five per cent. of the total production," etc. In the course of the distribution of such royalties by the Richfield Consolidated Oil Company, which acted as trustee with reference thereto, the plaintiffs, Henderson, claimed that, in accord with the terms of said assignment made to them, they had not been properly compensated. Following a trial of the issues presented by the respective pleadings in the action, the trial court rendered judgment in favor of the plaintiffs. It is from said judgment that the instant appeal is prosecuted.

[1] The major portion of the brief filed by appellants is devoted to a consideration of their contention that the judgment is not supported by the evidence. No one would be benefited by a recitation herein of the evidence adduced on the trial. It is sufficient to indicate that, after an examination made by this court relative to the contention of appellants in regard to the liability of the defendant Richfield Consolidated Oil Company, it manifestly appears that the point cannot be sustained. As to the purported liability of the defendants Cochran, the substance of the evidence was that they were the owners of the interest in the oil well which they assigned to the plaintiffs; but no evidence was introduced which tended to show that at any time the defendants Cochran were charged with any duty in connection with the distribution or the delivery to the plaintiffs of the 5 per cent. or any other quantity of the "production" from the well. Nor was any evidence adduced by which it was shown that, if the plaintiffs failed to receive the full amount of "production" to which they were entitled, the defendants Cochran were, or that either of them was, in any wise responsible for any dereliction in that regard, or that any part of the "production" to which the plaintiffs were entitled was received by either of said defendants, or by any one for his or their use. In such circumstances, in accordance with the specific point made by the appellants, it follows that "the judgment against the Cochrans is not supported by the evidence."

[2] Appellants also suggest that, over the objection of defendants, error was committed by the trial court in its admission of certain evidence. But since by the record herein it clearly is shown that by the admissions and the stipulations of the defendants the identical matter contained in the questioned evidence properly was received by the court for its consideration, it follows that, even conceding the existence of error in connection with the evidence to which objection was made as to its introduction, the defendants sustained no injury, and consequently are in no position to complain.

[3] Appellants further contend that under the provisions of the Corporate Securities Act (St. 1917, p. 673, as amended) the assignment made by defendants Cochran to the plaintiffs was void, and consequently that the plaintiffs were not entitled to a judgment in their favor. In that regard, although the issue was raised by the defendants' pleadings, appellants fail to direct attention to any pertinent and controlling evidence that was presented to the trial court in support thereof.

It is ordered that, as to the appellant Richfield Consolidated Oil Company, the judgment be and it is affirmed, and that, as to the appellants Cochran, the judgment be and it is reversed; appellants Cochran to recover their costs of appeal.

We concur: CONREY, P. J.; YORK, J.

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